

1870





Moghtay

THE
LAW REPORTS OF PALESTINE

OF CASES DECIDED BY
THE SUPREME COURT OF PALESTINE
THE SPECIAL TRIBUNAL
AND
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT OF PALESTINE

1 9 3 7

Volume 4

REPORTED

by

SALEEM K. AZOURI

Official Law Reporter

Published by the authority of the Chief Justice and Judges of the Supreme Court of Palestine.

Obtainable from the Government Printer, Jerusalem.

Printed by The Franciscan Press, Jerusalem.

Copyright of the Government of Palestine.



e
8
9
5
8
4
6
0
1
2
9
8
2
2
2
2
5
1
7
3
9
6
6
8
6
5
2
3
4
7
9
1
8
6
8
0
3
5
6
0
6

TABLE OF CONTENTS

THE SUPREME COURT OF PALESTINE AND THE LEGAL DEPARTMENT, 1937 III

LIST OF ABBREVIATIONS IV

TABLE of PALESTINE CASES REPORTED, arranged in alphabetical order of titles V—VII

TABLE of PALESTINE CASES REPORTED, arranged in numerical order according to the classes of cases concerned VIII—IX

TABLE of PALESTINE CASES CITED, arranged in numerical order according to the classes of cases concerned X

TABLE of ENGLISH AND OTHER CASES CITED, arranged in alphabetical order of titles XI

REPORTS of PALESTINE CASES, arranged in chronological order 1—380

INDEX 381—396

1937

THE SUPREME COURT OF PALESTINE

Harry Herbert Trusted, K.C. (1)	Chief Justice	64
Richard Joseph Manning	Senior Puisne Judge	40
Randolph Copland	British Puisne Judge	31
Maurice Cherry Greene (2)	British Puisne Judge	52
Murray Munro Jack	Chief Registrar	99

LEGAL DEPARTMENT

William James FitzGerald, K.C. (3)	Attorney General	112
Alan Edward Percival Rose	Solicitor General	2
Mussa Alami	Government Advocate	262
Michael Joseph Patrick Hogan (4)	Crown Counsel	142

(1) Appointed as such on 28.1.37
 (2) Appointed as such on 25.4.37
 (3) Appointed as such on 30.1.37
 (4) Appointed as such on 15.11.37

76
88
69
05
78
64
06
40
31
52
99
08
112
2
262
142
105
301
247
293
19
196
146
58
186
225
228
73
304
47
49
161
308
316
378
360
133
5
136
70
116

LIST OF ABBREVIATIONS

AA.	Assize Appeal
A.G.	Attorney General
CA	Civil Appeal in Court of Appeal
C.E.O.	Chief Execution Officer
CLACA	Civil Leave Application in Court of Appeal
CRA	Criminal Appeal in Court of Appeal
HC	High Court
LA	Land Appeal
MA	Misdemeanour Appeal in Court of Appeal
Misc. App.	Miscellaneous Application
PCA	Privy Council Appeal
PCLA	Privy Council Leave Application
P.L.R.	Law Reports of Palestine
R.	Rule
Reg.	Regulation
R.C.	Religious Court
S.	Section
ST	Special Tribunal

TABLE OF PALESTINE CASES REPORTED

Arranged in alphabetical order of titles

<i>Title</i>	<i>Page</i>
Aboulafia v. Felman and another	288
Absi v. Shlank	69
Abu Amsha v. Attorney General	105
Abu Dra' v. Abu Dra'	178
Abu Ghazaleh v. Agudath Shechunat Hazrifim "Maccabi" Co-operative Society Ltd.	364
Abu Ghazaleh v. Bouzo	206
Abu Habel v. Saleh	140
Abu Hajla and others v. Sayegh and others	131
Abu Hamdeh and others v. Elyashar and another	152
Abu Hussein v. Attorney General	299
Abu Sham and another v. Attorney General	208
Abyad v. Shehab	312
Agassi v. Aboutboul	2
Ahmad and others v. Attorney General	262
Aidey v. Amr	142
Amsha, Abu v. Attorney General	105
As'ad and others v. Ayesha	301
Attorney General v. Abboud	247
Attorney General v. Abu Zarad and others	293
Babayoff v. C.E.O., Jerusalem, and another	49
Baldwin v. Vester	196
Banco di Roma v. Nouriel	146
Banco di Roma v. Palestine Zinc Products and others	58
Bannour and others v. Abdullah and another	186
Binia v. C.E.O., Jerusalem, and another	225
Blumenfeld and another v. Imperial Chemical Industries	228
Calmy v. Politis	73
Cashman v. Cashman	304
Cattan v. Ama	47
Chelouche v. C.E.O., Jaffa, and another	49
Cohen v. Yammer	161
Cohen Zedek v. Belozerkovsky	308
Dahdah v. Abu Ghazaleh	316
Dahdah v. Abu Ghazaleh	378
Daoudi v. C.E.O., Jerusalem, and another	360
Danaf v. Danaf and another	133
Doukhan and another v. District Commissioner, Northern District, and another	5
Elias v. Elias	136
Elyashar v. P.D.C., Jerusalem, and others	70
Etablissements Rocca, Tassy & De Roux v. Schatzky	116

VI

<i>Title</i>	<i>Page</i>
Farouqi v. Ayoub and others	331
Farran v. Anker	195
Fischmann and others v. Bishop Methodios and another	243
Floyd and another v. Attorney General	322
Fried v. Wolansky	90
General Mortgage Bank of Palestine Ltd. v. President District Court, Tel Aviv, and another	348
General Motors Acceptance Corporation v. Dajani	91
Gerson v. C.E.O., Jerusalem, and others	246
Ghazaleh, Abu v. Agudath Shechunat Hazrifim "Maccabi" Co-operative Society Ltd.	364
Ghazaleh, Abu v. Bouzo	206
Gorfinkel and another v. Feinstein and others	118
Government of Palestine v. Katkhuda	354
Gudal v. Bernfeld	327
Habel, Abu v. Saleh	140
Haddad v. Haddad	249
Hajla, Abu and others v. Sayegh and others	131
Halbian v. Antablian	95
Hamdeh, Abu and others v. Elyashar and another	152
Hamdeh v. Hadassah Medical Organization and another	150
Hari v. C.E.O., Haifa, and another	9
Hebrew University Association and another v. Dajani	207
Hochberg v. Bergmann and others	110
Hussein, Abu v. Attorney General	299
Issa and another v. Khammar	21
Jayyoussi v. General Manager, Palestine Railways	219
Kachko v. Levin	48
Kahn and another v. Spinney's Ltd.	1
Kana'an v. Attorney General	83
Karelitz and another v. C.E.O., Tel Aviv, and another	7
Karmi v. Far'on	139
Kasem v. Ayyoubi	310
Kattan v. C.E.O., Jerusalem, and another	135
Khamra v. Bitty and another	306
Kharbutly and another v. Atrak and others	193
Khoury v. Farah	267
Khoury v. Khoury	103
Khusah and others v. Abu Sweireh and others	369
Kinsbrunner v. Kolb	353
Kramer v. Kipnis and another	10
Kramer v. Kipnis and another	51
Kronhauz v. Heiman	290
Kutsher v. Attorney General	298
Lebel v. Mattias	163
Liko v. Abou Khadra and others	187

VII

<i>Title</i>	<i>Page</i>
"Maccabi" Histadrut and another v. Registrar of Trade Marks and another	4
Maier v. Joint Liquidators of Phoenix Insurance Co.	315
Malas & Co. v. Bucowina Society	302
Mamur Awqaf, Northern District v. Attorney General	45
Mattar and others v. Khoury	191
Moyal v. Karwassarsky	319
Muhammad v. Hamad	18
Municipal Council, Jerusalem v. Weinberg	367
Municipality of Jerusalem v. Mizrahi	55
Najjar v. Amos	253
Neussihin and others v. Neussihin	373
Nouri v. Attorney General	26
Noxzema Chemical Company v. Bordcosh and another	61
O'jely v. C.E.O., Jaffa, and others	363
Olstein v. Baum	184
Palestine Land Development Co. v. Ziadeh	86
Palwoodma v. Majdalani	271
Performing Rights Society Ltd. v. Café & Restaurant Vienna	175
Qamar v. Haddad	42
Rakover v. Switzerland General Insurance Co. Ltd.	99
Rottermund v. Sarai	227
Ruslan v. Attorney General	291
Sayegh and another v. Municipal Council, Jaffa	259
Shaheen v. Abu Jaradeh and others	15
Sham, Abu and another v. Attorney General	208
Sheinzwit v. Attorney General	295
Sheinzwit v. Inspector General of Police	221
Shimon v. Department of Customs	148
Shimon v. Maxudian	172
Shlank v. Bahlul	154
Silverman v. Silverman	108
Sliman v. Bornescu	173
Sobelson and another v. Sobelson	43
Tadros v. Abu Khadra	120
Ulitski and another v. Jerusalem Local Building and Town Planning Commission	325
Wahhab and another v. Ala ed Din	88
Wawi v. Attorney General	254
Yadgaroff v. Khojainoff and others	245
Zacharia and another v. Dawid and another	67
Zetawi v. Motzman	361
Zwanger and another v. Sheinzwit	261
Zwanger and another v. Sheinzwit	286

VIII

TABLE OF PALESTINE CASES REPORTED

Arranged in numerical order according to the classes of cases concerned.

ASSIZE APPEAL

File No.	Date of Judgment	Page	File No.	Date of Judgment	Page
6-36	23.1	26			

CIVIL APPEAL

File No.	Date of Judgment	Page	File No.	Date of Judgment	Page
2-34	23.4	108	42-37	3.6	191
75-34	11.5	139	43-37	14.4	99
60-35	23.4	110	52-37	8.6	193
128-35	21.1	18	62-37	29.7	249
149-35	5.1	2	65-37	11.6	195
151-35	16.1	15	70-37	14.6	206
164-35	25.6	211	74-37	14.6	207
180-35	28.1	42	87-37	19.7	228
181-35	28.1	43	97-37	29.6	219
194-35	24.2	55	117-37	15.7	227
196-35	4.2	47	118-37	20.7	243
2-36	8.3	67	121-37	22.7	245
4-36	9.3	69	122-37	16.9	267
7-36	25.3	95	127-37	30.7	253
12-36	13.5	142	132-37	21.10	308
18-36	22.3	86	138-37	16.9	271
26-36	24.3	88	139-37	22.9	288
30-36	24.3	90	141-37	25.10	310
33-36	15.1	10	142-37	3.11	319
33-36	17.2	51	149-37	28.9	290
42-36	4.1	1	158-37	17.12	273
44-36	24.3	91	174-37	28.10	312
60-36	6.12	361	178-37	12.10	301
67-36	23.4	116	179-37	2.11	316
69-36	14.4	103	179-37	22.12	378
80-36	20.5	154	181-37	13.10	302
81-36	27.5	175	186-37	15.10	304
87-36	11.6	196	187-37	18.10	306
101-36	21.5	161	189-37	4.12	354
102-36	11.5	140	191-37	25.11	331
104-36	21.5	163	194-37	1.11	315
107-36	26.2	58	195-37	15.12	369
108-36	13.5	146	198-37	8.12	364
115-36	18.5	148	204-37	19.11	327
129-36	25.5	172	212-37	3.12	353
130-36	31.5	187	216-37	13.12	367
4-37	24.5	165			
15-37	25.5	173			

IX

CIVIL LEAVE APPLICATION

File No.	Date of Judgment	Page	File No.	Date of Judgment	Page
5-37	12.2	48			

CRIMINAL APPEAL

File No.	Date of Judgment	Page	File No.	Date of Judgment	Page
174-36	29.5	186	96-37	9.9	261
24-37	20.3	83	96-37	8.10	295
34-37	22.6	208	101-37	30.9	291
35-37	22.4	105	104-37	30.9	293
54-37	28.5	184	114-37	9.10	299
76-37	28.7	247	115-37	8.10	298
78-37	30.7	254	122-37	17.11	322
89-37	16.9	262	128-37	17.11	325
96-37	17.9	286			

HIGH COURT

File No.	Date of Judgment	Page	File No.	Date of Judgment	Page
27-36	11.1	9	12-37	29.4	135
31-36	12.2	49	17-37	9.7	225
76-36	22.1	19	33-37	2.7	221
84-36	26.2	61	39-37	31.7	259
104-36	8.1	4	40-37	23.7	246
105-36	8.1	4	57-37	4.12	360
109-36	8.1	5	60-37	29.11	348
110-36	8.1	7	68-37	6.12	363
5-37	12.3	70			

LAND APPEAL

File No.	Date of Judgment	Page	File No.	Date of Judgment	Page
52-35	23.1	21	43-36	19.3	73
56-35	28.4	131	50-36	30.4	136
5-36	28.1	45	52-36	28.4	133
14-36	19.5	152	54-36	27.5	178
37-36	26.4	118	58-36	18.5	150

PRIVY COUNCIL APPEAL

File No.	Date of Judgment	Page
80-35	26.4	120

TABLE OF PALESTINE CASES CITED

Arranged in numerical order according to the classes of cases concerned.

AA	9-28 (1 P.L.R. 281)	approved in	CRA	78-37 (p. 254)
CA	84-22	referred to in	CA	87-37 (p. 228)
CA	177-23	distinguished in	CA	122-37 (p. 267)
CA	82-25 (1 P.L.R. 69)	referred to in	CA	87-37 (p. 228)
CA	140-26 (1 P.L.R. 99)	distinguished in	CA	181-37 (p. 302)
CA	214-26 (1 P.L.R. 123)	referred to in	CA	191-37 (p. 331)
CA	16-27 (1 P.L.R. 126)	followed in	HC	60-37 (p. 348)
CA	67-28 (1 P.L.R. 346)	followed in	HC	60-37 (p. 348)
CA	15-29 (1 P.L.R. 453)	approved in	HC	84-36 (p. 61)
CA	100-29 (1 P.L.R. 528)	referred to in	CA	12-36 (p. 142)
CA	115-29 (1 P.L.R. 606)	referred to in	CA	198-37 (p. 364)
CA	112-31 (1 P.L.R. 674)	approved in	CA	204-37 (p. 327)
CA	144-31 (1 P.L.R. 704)	followed in	CA	33-36 (p. 10)
CA	75-32	referred to in	CA	80-36 (p. 154)
CA	77-32 (1 P.L.R. 739)	referred to in	CA	87-37 (p. 228)
CA	106-32	referred to in	CA	87-37 (p. 228)
CA	18-33 (2 P.L.R. 45)	followed in	CA	2-36 (p. 67)
CA	43-33	distinguished in	CA	138-37 (p. 271)
CA	106-33 (2 P.L.R. 94)	referred to in	CA	87-37 (p. 228)
CA	1-34 (2 P.L.R. 127)	followed in	CA	33-36 (p. 10)
CA	126-34	followed in	CA	2-36 (p. 67)
CA	97-35 (3 P.L.R. 101)	referred to in	CA	191-37 (p. 331)
CA	149-35 (4 P.L.R. 2)	referred to in	CA	87-37 (p. 228)
CA	33-36 (4 P.L.R. 10)	followed in	CA	2-36 (p. 67)
CA	67-36 (4 P.L.R. 116)	referred to in	CA	142-37 (p. 319)
CA	80-36 (4 P.L.R. 154)	referred to in	CA	87-37 (p. 228)
CA	77-37	distinguished in	CA	138-37 (p. 271)
CA	80-37	explained in	CA	195-37 (p. 369)
CA	83-37	referred to in	CA	191-37 (p. 331)
CRA	30-27 (1 P.L.R. 150)	held to be wrongly decided in	CRA	78-37 (p. 254)
CRA	162-28 (1 P.L.R. 348)	not followed in	HC	33-37 (p. 221)
CRA	7-33	not followed in	HC	33-37 (p. 221)
CRA	43-33	referred to in	CRA	96-37 (p. 295)
HC	50-32 (1 P.L.R. 764)	followed in	HC	5-37 (p. 70)
HC	67-36 (3 P.L.R. 146)	disapproved in	AA	6-36 (p. 26)
LA	137-23 (1 P.L.R. 13)	disapproved in	LA	56-35 (p. 131)
LA	56-24 (1 P.L.R. 41)	approved in	LA	54-36 (p. 178)
LA	76-25 (1 P.L.R. 87)	referred to in	CA	195-37 (p. 369)
LA	25-32 (1 P.L.R. 766)	referred to in	CA	195-37 (p. 369)
LA	55-32 (2 P.L.R. 11)	disapproved in	LA	52-35 (p. 21)
LA	13-34 (2 P.L.R. 352)	referred to in	CA	195-37 (p. 369)
LA	56-35 (4 P.L.R. 131)	referred to in	CA	195-37 (p. 369)
LA	58-36 (4 P.L.R. 150)	followed in	CA	74-37 (p. 207)
LA	59-36	followed in	CA	74-37 (p. 207)
MA	18-28 (1 P.L.R. 283)	overruled in	CRA	122-37 (p. 322)
MA	9-32 (1 P.L.R. 740)	held to be wrongly decided in	CRA	88-37 (p. 262)
PCA	98-25 (1 P.L.R. 71)	followed in	CA	4-37 (p. 165)
PCLA	4-35 (2 P.L.R. 423)	referred to in	CA	44-36 (p. 91)

TABLE OF ENGLISH AND OTHER CASES CITED.

Arranged in alphabetical order of titles.

Abbott v. Hendricks (1840) 133 E.R. 551	followed in	CA	87-37 (p. 228)
A.G. v. Sillem, 10 H.L. Ca. 704	approved in	CA	130-36 (p. 187)
Brien, In re, and Brien (1910) 2 Ir. R. 84	followed in	CA	69-36 (p. 103)
Brooker v. Borthwick and Sons (1933, W.N. 208)	followed in	CA	33-36 (p. 51)
Dennis v. A.J. White and Co. (1917) A.C. 479	referred to in	CA	33-36 (p. 51)
Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Co. Ltd., (1915) A.C. 79	referred to in	CA	191-37 (p. 331)
Fitch and Jones (1855) 5 E. and B. 238	approved in	CA	87-37 (p. 228)
Griffin and others v. Weatherby and Henshaw, 18 L.T.R. 881	approved in	CA	2-34 (p. 108)
Hooley Hill Rubber and Chemical Company v. Royal Insurance (1920) 1 K.B. 257	approved in	CA	43-37 (p. 99)
Imperial Ottoman Bank v. Limbouri and another, 4 Cyprus Law Reports at p. 48	distinguished in	CA	122-37 (p. 267)
Jarvis v. Hemmings, (1912) 1 Chancery 462	approved in	CA	81-36 (p. 175)
Kirby v. North British and Mercantile Insurance Company (1896) 2 Q.B.D. 99	approved in	CA	130-36 (p. 187)
Mahadeo v. The King (1936) 2 All E.R. 813	approved in	HC	33-37 (p. 221)
Marjoribanks, In re Askew v. Askew, (1930) 2 Ch. 259	referred to in	CA	87-36 (p. 196)
Matthey v. Curling (1922) 2 A.C. 180	approved in	CA	138-37 (p. 271)
Pearl Mill Company Ltd. v. Ivy Tannery Company Ltd, 120 L.T.R. 28	approved in	CA	67-36 (p. 116)
Pianotist Co. Ltd's Application, 23 R.P.C. 774	approved in	HC	84-36 (p. 61)
Poyser v. Minors, 7 Q.B.D. 329 at p. 333	approved in	CA	130-36 (p. 187)
R. v. Christie (1914) A.C. 595	approved in	CRA	78-37 (p. 254)
R. v. Minister of Health (ex parte Yaffe) (1930) 2 K.B. 98; (1931) A.C. 494	referred to in	AA	6-36 (p. 26)
Riel v. The Queen, 12 App. Cases 675	approved in	CRA	88-37 (p. 262)
Ross, In re Ross, v. Waterfield, (1930) 1 Ch. D. 377	referred to in	CA	87-36 (p. 196)
Roussos v. Theophanides, 4 Cyprus Law Reports 12	distinguished in	CA	122-37 (p. 267)
Shaw v. Attorney General, 23 L.T.R. 322	approved in	CA	62-37 (p. 249)
Waddell v. Toleman (1878) 9 Ch. D. 212	approved in	HC	60-37 (p. 348)
Walter v. Rumbal (1 Ld. Raym 53)	approved in	CA	81-36 (p. 175)
Watson v. Winch (1916) 1 K.B. 688	followed in	AA	6-36 (p. 26)
Whitehall Court Ltd. v. Ettlinger, (1920) 1 K.B. 680	approved in	HC	60-37 (p. 348)



THE LAW REPORTS OF PALESTINE

OF CASES DECIDED BY
THE SUPREME COURT OF PALESTINE
THE SPECIAL TRIBUNAL
AND
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE SUPREME COURT OF PALESTINE

Volume 4
1937

REPORTED
by
SALEEM K. AZOURI

Official Law Reporter

Published by the authority of the Chief Justice and Judges of the
Supreme Court of Palestine.

Obtainable from the Government Printer, Jerusalem.

Price 250 mils.

Printed by The Franciscan Press, Jerusalem.
Copyright of the Government of Palestine

Civil Appeal No. 42 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Senior Puisne Judge and Frumkin J.

- 1. L. KAHN
- 2. TNUVA AGRICULTURE COOPERATIVE SOCIETY Appellants.

v.

SPINNEY'S LTD. Respondents.

Ownership — Goods — Market overt (open market) — Sale of goods on hire purchase — Failure to fulfil conditions of hire-purchase agreement — Sale of goods by person hiring — Whether purchaser entitled to retention of goods — Whether "market overt" exists in Palestine — Mejelle, Articles 365 and 378.

A certain refrigerating machine was given by respondents to the first appellant on hire-purchase. First appellant having failed to pay the last three instalments under the hire-purchase agreement, he sold the machine to the second appellant, without disclosing the fact that the machine was in his possession by virtue of a hire-purchase agreement. The respondents, on becoming aware of the fact of sale, commenced proceedings in the Magistrate's Court, Jerusalem (Civil Case No. 3/36) against the appellants and obtained judgment for the return of the machine, which judgment was confirmed by the District Court of Jerusalem by its decision in Civil Appeal No. 42/36. Dissatisfied with the decision of the District Court, appellants appealed by leave on the point of law quoted in the judgment reported hereinafter.

In dismissing the appeal, the Court of Appeal,

HELD (1) that under Articles 365 and 378 of the Mejelle only the true owner or his agent may effectively alienate property to another, and the fact that the second appellant purchased the goods, the subject of the hire-purchase agreement between respondent and first appellant, was of no avail to the second appellant, because there was nothing in the Mejelle touching on a bona fide purchaser.

(2) that the law of "market overt" does not apply in Palestine.

M. Grossman for first appellant.

H. Luchinsky for second appellant.

J. Papo for respondents.

1937
4th January
Copland Ag. S.P.J.
and
Frumkin J.
CA 42/36
Kahn
and another
v.
Spinney's Ltd.

1937
4th January
Copland Ag. S.P.J.
and
Frumkin J.
CA 42/36
Kahn
and another
v.
Spinney's Ltd.

Judgment: This is an appeal, by way of leave granted by the President District Court, Jerusalem, on the following point:

"In view of the provisions of Article 378 of the Mejelle, does a person, who purchases goods in good faith from another, acquire a valid title to the goods against the true owner thereof, although the vendor himself had no such title, but merely held the goods under a hire-purchase agreement from the owner, the terms of which he failed to fulfil in regard to payment of certain instalments?"

The facts of the case may be summarised as follows: The second Appellant bought a refrigerator from the First Appellant, who had it in his possession by virtue of a hire-purchase agreement with the Respondent.

The Appeal before us is limited to one point only, as framed above by the President District Court, Jerusalem.

This Court holds that under Articles 365 and 378 of the Mejelle, only the true owner, or his agent may effectively alienate property to another person. The second Appellant has endeavoured to show that his title is based on a *bona fide* purchase in market overt. Unfortunately, however, there is nothing in the Mejelle touching on a *bona fide* purchaser.

Articles of merchandise bought in the City of London are said to be purchased in market overt and the purchase cannot be contested by the true owner, but that is not the rule in Jerusalem and the law of market overt, as it is called, does not apply in this country.

For these reasons the appeal is dismissed with costs and LP. 3 advocate's fees.

Civil Appeal No. 149 of 1935.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Chief Justice and Frumkin J.

DAVID S. AGASSI Appellant.

v.

DAVID ABOUTBOUL Respondent.

Evidence, Oral — Cheques — Admissibility of oral evidence against a document where contents of document not contradicted.

1937
5th January
Manning Ag. C.J.
and
Frumkin J.
CA 149/35
Agassi
v.
Aboutboul

1937
5th January
Manning Ag. C.J.
and
Frumkin J.
CA 149/35
Agassi
v.
Aboutboul

The respondent, the holder of a cheque drawn by appellant, on being refused payment, commenced proceedings in the District Court of Jaffa (Civil Case No. 46/34) claiming the value of the cheque. The appellant alleged fraud, duress, and want of consideration and asked to be allowed to tender evidence on these points. The District Court refused appellant's request and gave judgment against him. He appealed.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case to it to hear the defendant and his witnesses and the plaintiff's witnesses, if any, in reply, and to give a fresh judgment, the Court of Appeal,

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

M. Doukhan for appellant.

A. Chacron for respondent.

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

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

Costs to abide by the event.

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

High Court No. 104 of 1936.
High Court No. 105 of 1936.

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

Before: The Acting Senior Puisne Judge and Khayat J.

1937
8th January
Copland Ag. S.P.J.
and
Khayat J.
HC 104/36
HC 105/36
"Maccabi"
Histadrut
and another
v.
Registrar of
Trade Marks
and another

1. "MACCABI" Histadrut Arzir le Tarbut
Hagoof b'Eretz Israel S'nif
La Histadrut Ha'olamit "Maccabi"
 2. AGUDAT MACABIAH Opponents.
- v.
1. REGISTRAR OF TRADE MARKS
 2. MAX KHALEF,
trading under the style and firm
of the Laboratories and
Cosmetics Works "Nered". Respondents.

Trade Marks — Application for registration of trade mark "Macabiah" — Opposition to application by two firms having the words "Maccabi" and "Macabiah" in their firm names.— Whether registration may be effected — Trade Marks Ordinances, 1921-35, Section 9 (1).

By virtue of an agreement entered into in July, 1934, between first opponent and the second respondent, the latter was authorised to produce cosmetic and toilet articles bearing the mark "Macabiah", under certain conditions, including payment of certain fixed amounts to the first opponent. The second respondent failed to pay the amounts due and he applied for registration of the trade mark "Macabiah". The opponents filed in the High Court notices of opposition within the period allowed them by Section 9 (1) of the Trade Marks Ordinance, the main grounds of opposition being that they never consented to the registration by the second respondent of the trade mark "Macabiah" which contained their name, and that the registration of the said trade mark would deceive the public by leading them to believe that the goods upon which or in connection with which the trade mark is used are being manufactured by the opponents or that royalties in respect thereof are being paid to the opponents.

In refusing the oppositions, the High Court,
HELD that the registration of the trade mark "Macabiah" may be proceeded with, firstly, because the word "Macabiah" is an historic term which all alike may use, and, secondly, because at any rate the name adopted is not identical with that of the opposing societies, but is merely a part thereof.

A. Levin for opponents.

No appearance by respondents.

Order: This is an opposition filed by the two Opponent Societies under Section 9 (1) of the Trade Marks Ordinances 1921 and 1935, against the registration of the trade mark "Macabiah". The petitions were filed under separate actions, but the Court decides to consolidate them, as the points raised in both are the same.

The Second Respondent, Max Khalef, has applied to the First Respondent, the Registrar of Trade Marks, for registration of the said trade mark, for cosmetic and toilet articles which he manufactures.

In July, 1934, the second Respondent entered into an agreement with one of the Opponent Societies, whereby he was authorised to produce goods bearing the mark "Macabiah" under certain conditions, including payment of fixed amounts to the Society. It appears that he has failed to pay the said amounts and hence the present application.

We are of the opinion that the opposition must fail, first because the word "Macabiah" is a historic term which all alike may use, and secondly, because at any rate the name adopted is not identical with that of the Opponent Society, but is merely a part thereof.

For these reasons the opposition is refused.

High Court No. 109 of 1936.

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

Before: The Acting Senior Puisne Judge and Khayat J.

1. MOSES J. DOUKHAN
 2. LIUBOV DOUKHAN Petitioners.
- v.
1. DISTRICT COMMISSIONER, NORTHERN DISTRICT
 2. COMMISSIONER OF LANDS AND
SURVEYS Respondents.

Rates and taxes — Urban Property Tax — Property appearing in Valuation List — No objection by owners of property to

1937
8th January
Copland Ag. S.P.J.
and
Khayat J.
HC 104/36
HC 105/36
"Maccabi"
Histadrut
and another
v.
Registrar of
Trade Marks
and another

1937
8th January
Copland Ag. S.P.J.
and
Khayat J.
HC 109/36
Doukhan
and another
v.
District Commis-
sioner, Northern
District,
and another

1937

8th January

Copland Ag. S.P.J.

and
Khayat J.

HC 109/36

Doukhan
and another

v.

District Commis-
sioner, Northern
District,
and another

inclusion of their property in Valuation List — Allegation by owners of exemption for a period of three years — Non-compliance by owners with provisions of Section 14(1) of Urban Property Tax Ordinance, 1928 — Liability of owners to payment of tax.

The petitioners, the owners of a house on which they built a new storey in 1934, for which storey they applied to the District Commissioner for exemption but which was included in the Valuation List as liable to the payment of Urban Property Tax, failed to give to the Assessment Committee notice in writing of their objection, specifying the grounds thereof. Payment of the tax was asked for from petitioners who refused to pay and having failed in an action in the District Court of Haifa, they petitioned the High Court for an order nisi to issue to the respondents calling upon them to show cause why petitioners should not be exempted from payment of Urban Property Tax for three years and why respondents should not abstain from demanding and collecting the tax in question.

In refusing the application, the High Court,

HELD that a person entitled to exemption from payment of Urban Property Tax, but whose property appears on the Valuation List, should, if he wishes to object to the property appearing on such Valuation List, do so to the Assessment Committee; the property of an exempted person should not appear on the Valuation List, but if it does appear then that is sufficient justification for him to lodge his objection with the Assessment Committee.

M. Doukhan for petitioners.

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

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

Sec. 14 (1) of the Urban Property Tax Ordinance No. 23 of 1928, provides: —

“Any person who feels himself aggrieved by the Valuation List on the ground that he is not liable to pay the tax or may give to the Assessment Committee notice in writing of his objection, specifying the grounds thereof”

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

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

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

For all these reasons the application is refused.

High Court No. 110 of 1936.

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

Before: The Acting Senior Puisne Judge and Khayat J.

1. ZEEV KARELITZ
2. SHAUL KARELITZ *Petitioners.*

v.

1. THE CHIEF EXECUTION OFFICER, TEL AVIV
2. ABRAHAM ISAAC ENGELMANN *Respondents.*

Immovable property — Application to President District Court for sale of immovable property — Contention that President District Court not empowered to order sale — Whether correct contention — Land Transfer Ordinance, 1921.

Application was made under the provisions of the Land Transfer Ordinance, 1921, to the President of the District Court of Jaffa for the sale of certain immovable property owned by

1937

8th January

Copland Ag. S.P.J.

and
Khayat J.

HC 109/36

Doukhan
and another

v.

District Commis-
sioner, Northern
District,
and another

1937

8th January

Copland Ag. S.P.J.

and
Khayat J.

HC 110/36

Karelitz
and another

v.

C.E.O. Tel Aviv
and another

1937
8th January
Copland Ag. S.P.J.
and
Khayat J.
HC 110/36
Karelitz
and another
v.
C.E.O. Tel Aviv
and another

petitioners in satisfaction of a mortgage in favour of second respondent, and an order of sale was made accordingly. The petitioners thereupon applied for an order nisi calling upon the Chief Execution Officer, Tel Aviv, to show cause why his order in Tel Aviv Execution File No. 12770/36 should not be set aside.

In refusing the application, the High Court,

HELD that the President of a District Court is the Officer authorised by the Land Transfer Ordinance, 1921, to order the sale of immovable property.

Observations with regard to the competency of a Land Court to order cancellation of mortgage-deeds on grounds of fraud, etc.

Solomon Felman for petitioners.

Order: This is an application touching the procedure established for the sale of mortgaged property since the British Occupation. The novel contention now raised is that the President of the District Court as Chief Execution Officer may not order sale himself, but may merely execute an order of sale issued by a competent Court. We do not agree with this theory, for the Land Transfer Ordinance No. 2 of 1921 clearly provides that applications for sale must be made to the President of the District Court.

The petitioner has argued before us that the said provision means that applications for postponement of sale must be made to the President. But the Ordinance referred to above speaks of 'applications for sale' and it is inconceivable that applications for sale should be submitted to a person who has not got the power to order sale. To put any other construction on the said provision would be contrary both to logic and law, and this point is therefore disallowed.

Petitioner's second point is that the mortgage was procured by fraud and must not therefore be enforced. To prove this and cancel the mortgage-deed, the Petitioner has already brought two actions, one before the District Court and the other before the Land Court.

The present application is a further attempt to raise the same question before a third Court. The District Court has dismissed the action, but the one before the Land Court is still pending.

Now whereas the Land Court is the competent Court to cancel a mortgage-deed, which is vitiated by fraud, and whereas the action is still pending before it, this Court sees no reason to interfere, and the application, therefore, is dismissed.

High Court No. 27 of 1936.

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

Before: Copland J. and Frumkin J.

RACHEL HARI Petitioner.

v.

- 1. CHIEF EXECUTION OFFICER, HAIFA
- 2. HAIM HARI Respondents.

Religious Court (Rabbinical Court) — Constitution of a Rabbinical Court must be of at least three members.

A Rabbinical Court, to be properly constituted in accordance with the requirements of the Jewish law, must be constituted of at least three members.

The facts giving rise to this application appear in the judgment of the High Court.

Jacob Levy for petitioner.

Hanna Asfour for second respondent.

Order: The parties in this case appear before this Court for the second time after a short interval in the very same matter of alimony claimed by Applicant from her husband, the second Respondent.

In the first action the present second Respondent was Applicant and he objected to the execution of an interlocutory judgment against him issued by the Rabbinical Court of Appeal ordering him to pay, as a temporary measure, pending a final judgment, certain sums as alimony to his wife. Against that judgment he produced what purported to be another judgment of the Rabbinical Court of Appeal signed by two Judges only, other than those of the three Judges who signed the judgment in favour of the wife. The Chief Execution Officer had then ordered the execution of the judgment signed by the three. The husband applied to the High Court for an order for stay of execution and his application was refused for reasons not stated in that order.

Since then the wife obtained the final judgment from the Rabbinical Court of Appeal which she put into execution. The husband again produced a fresh order from the two Judges of

1937
11th January
Copland J.
and
Frumkin J.
HC 27/36
Hari
v.
C.E.O. Haifa
and another

1937
11th January
Copland J.
and
Frumkin J.
HC 27/36
Hari
v.
C.E.O. Haifa
and another

the Rabbinical Court of Appeal referring to their previous decision that the husband is not liable to pay any alimony. The Chief Execution Officer now refused execution for reasons which he considered self-evident but are not shown in his order.

This time the wife applied to this Court, and obtained an order nisi, of which this is the return date.

The main issue in this case is whether or not there are in fact two contradictory judgments or two sets of judgments issued by the Rabbinical Court of Appeal. In order to decide this point it is only necessary to decide whether two Judges alone do form a properly constituted Rabbinical Court of Appeal. The Chief Rabbi Meir, who is one of the Presidents of the Rabbinical Council of Palestine, in a letter to the Chief Execution Officer, stated that a Court of Appeal must be constituted of at least three members, and it is a well known rule of Jewish Law that any Rabbinical Court, even sitting in first instance, must always be composed of three Judges.

Moreover, the two Judges when signing what is said to be a judgment in favour of the Second Respondent, apparently being aware of the fact that a judgment signed by two Judges only is not binding, relied on a previous decision given with the authority of the late Chief Rabbi. But this does not alter the fact that as against a judgment issued by a properly constituted Court, the second Respondent relies upon a document which is clearly no judgment at all.

The order nisi is therefore made absolute with costs to include LP. 5. - advocates fees.

Civil Appeal No. 33 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Chief Justice and Copland J.

LEA KRAMER Appellant.

v.

- 1. ITZCHAK KIPNIS
- 2. JACOB GUTTERMAN Respondents.

Appeal, Leave to — Not necessary to serve other party with application for leave to appeal.

1937
15th January
Manning Ag. C.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

Appeal — Decision setting aside arbitration award in a workmen's compensation matter subject to leave to appeal — Application for leave made ten days after delivery of judgment — Grant of leave forty-five days after judgment — Filing of appeal six days after grant of leave — Article 181 of Ottoman Code of Civil Procedure inapplicable to such cases.

Supreme Court, sitting as a Court of Appeal — Provision in Workmen's Compensation Ordinance, paragraph 3 of Third Schedule, not repugnant to or inconsistent with Palestine Order in Council, Article 43 — Palestine Order in Council, Article 17.

At the hearing of this appeal, which arose out of a claim under the Workmen's Compensation Ordinance, three preliminary objections to the hearing of the appeal were raised by counsel for first respondent; the objections so raised appear in the judgment reported hereinafter.

In overruling the preliminary objections, the Court of Appeal,

HELD (1) that it was not necessary to serve the other party with notice of the application for leave to appeal to the Supreme Court which was made to the President of the District Court under Section 3 of the Third Schedule to the Workmen's Compensation Ordinance; such application may be made ex parte.

(2) that the provisions of Article 181 of the Ottoman Code of Civil Procedure were not applicable to cases in which leave to appeal was required, and as there was no provision in law to meet a case such as the present, the only question to be considered in order to determine whether the appeal was in time or out of time was whether the appellant showed due diligence in prosecuting his appeal once leave to appeal was granted.

(3) that the provision in the Workmen's Compensation Ordinance giving an aggrieved party the right to appeal a decision of a President of a District Court in workmen's compensation matters to the Supreme Court sitting as a Court of Appeal by leave of the President was not repugnant to or inconsistent with the Order in Council. It cannot be said that an ordinance extending the jurisdiction of the Supreme Court sitting as a Court of Appeal as to the tribunals from which appeals may be heard is in any way repugnant to or inconsistent with the Order in Council, and if an ordinance grants special jurisdiction to a President of a District Court and nominates an already existing Court to which an appeal may be made such ordinance is not repugnant to or inconsistent with the provisions of the Order in Council which fixed the respective Courts which should exercise jurisdiction in Palestine and the jurisdiction which they should exercise at the date the Order in Council was made.

1937
15th January
Manning Ag. C.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

1937
15th January
Manning Ag. C.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

Observations with regard to the High Commissioner's powers to promulgate Ordinances by virtue of the powers conferred by Article 17 of the Order in Council.

Followed: CA 144/31, 1 P.L.R. 704
CA 1/34, 2 P.L.R. 127

I. Barshira for appellant.

M. Seligman for first respondent — Second respondent did not appear.

Manning, Ag. C.J.: This is an appeal arising out of a claim under the Workmen's Compensation Ordinance. The arbitrator awarded compensation to the widow of one Abraham Kramer but under Section 3 of the Third Schedule to the Ordinance submitted certain questions of law for the decision of the President of the District Court of Jaffa. The effect of the Relieving President's decision was to upset the award, but he granted leave to appeal to this Court.

2. The respondent Gutterman did not appear. Mr. Seligman, who appeared on behalf of the other respondent, raised three preliminary objections to the hearing of the appeal, and as they raise questions of importance, we have deemed it necessary to decide them before proceeding to hear the appellant. The first objection was that no notice of the application for leave to appeal was served on the respondent. The record shows that after the Relieving President had given his decision the appellant's advocate asked for leave to appeal, and it was intimated to him that he should make a written application. This was done, and on the 9th March 1936, the Relieving President granted leave to appeal. Mr. Seligman's objection is that this order was made without giving him an opportunity of being heard.

3. There are conflicting decisions of this Court as to whether such an order can be made *ex parte*. They are reviewed in the case of Ibrahim Khalil v. Jad el Khoury (Civil Appeal No. 144 of 1931) and this latter decision was followed in the case of Jacob v. The Hafalil Transport Company and others (Civil Appeal No. 1 of 1934). These two cases decided that a distinction must be made between an application for leave to appeal made to a Court and an application made to a President and that in the latter instance it is not necessary to serve the respondent with notice. The decision in the latter case was exactly on the point raised in this case, as the appeal arose out of an arbitration under the Workmen's Compensation Ordinance.

1937
15th January
Manning Ag. C.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

nance. The point is one of procedure and the decision is all that litigants have to guide them. Consequently, whatever opinion might hold as to whether that case was correctly decided, I feel that I am bound to follow it and to decide that it was not necessary to serve on the respondent a notice of the application for leave to appeal.

4. The second objection was that the appeal was filed out of time. The decision of the Relieving President was delivered on January 24th, application for leave to appeal was filed on February 3rd, leave to appeal was granted on March 9th, and the grounds of appeal were filed on March 15th.

5. Article 181 of the Code of Civil Procedure requires that an appeal be filed within 30 days of the judgment. No provision is made for cases in which leave to appeal is required. In the present proceedings it is clear that the appellant could not comply with the relevant provision, as leave was not granted till forty-five days after the judgment. This was not due to any fault of the appellant, he applied for leave in open Court as soon as the judgment was delivered, and in compliance with the instructions of the Court he filed his written application ten days after the judgment. His grounds of appeal were filed six days after leave was obtained. It would be obviously unfair to apply Article 181 of the Civil Procedure Code to the circumstances of this case. That article of the Code does not, in my opinion, apply to a case in which it is necessary to obtain leave to appeal, and there being no relevant provision to meet the case, the only question to be considered is whether the appellant showed due diligence in prosecuting his appeal once leave to appeal was granted. This he has clearly done. Mr. Seligman's second objection must be overruled.

6. His third objection was that this Court has no jurisdiction to hear this appeal. He relies on the wording of Article 43 of the Palestine Order-in-Council, 1922. The first part of this article reads as follows:

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

7. Mr. Seligman says the jurisdiction of this Court is strictly confined to the matters set out. It can hear appeals from a District Court only when the judgment of that Court is a

1937
15th January
Manning Ag. C.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

first instance judgment. It can hear appeals from judgments given by a Court of Criminal Assize or by a Land Court. Mr. Seligman interprets "subject to the provisions of any Ordinance" to refer only to Ordinances which limit the right of appeal. His argument is that the judgment now appealed from is not a judgment in first instance, nor is it a judgment of any of the Courts mentioned in Article 43; it is a judgment of a President of a District Court by virtue of a special jurisdiction conferred on him by the Third Schedule to the Workmen's Compensation Ordinance. The High Commissioner, he says, cannot promulgate Ordinances inconsistent with the provisions of the Order-in-Council; the Order-in-Council has fixed the jurisdiction of this Court, and that jurisdiction cannot be enlarged or diminished except by amending the Order-in-Council.

8. This objection must also be overruled. The High Commissioner's powers to promulgate Ordinances are laid down in Article 17 of the Order-in-Council. He may promulgate such Ordinances as may be necessary for the peace, order and good government of Palestine. His powers are limited by the conditions set out in the article, and it is interesting to observe that he has no power to promulgate an Ordinance which shall be in any way repugnant to or inconsistent with the provisions of the Mandate, but the Article is silent as to whether he has the power to promulgate an Ordinance repugnant to or inconsistent with the provisions of the Order-in-Council. It is unnecessary to consider this question, as it cannot be said that an Ordinance extending the jurisdiction of this Court as to the tribunals from which appeals may be heard is in any way repugnant to or inconsistent with the Order-in-Council. The High Commissioner may make Ordinances for the good government of Palestine, and in the exercise of his powers he has promulgated an Ordinance dealing with workmen's compensation and specifying the manner in which claims shall be heard and finally adjudicated. If the Ordinance grants special jurisdiction to a President of a District Court, and nominates an already existing Court to which an appeal may be made, this is not repugnant to or inconsistent with the provisions of the Order-in-Council which fixed the respective Courts which should exercise jurisdiction in Palestine and the jurisdiction which they should exercise at the date the Order was made.

9. The preliminary objections are overruled and the appeal will proceed.

Copland J: I concur.

Civil Appeal No. 151 of 1935.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Chief Justice and Abdulhadi J.

SHEIKH MAHMOUD SHAHEEN Appellant.
v.
MAHMOUD ALI ABU JARADEH,
and two others Respondents.

1937
16th January
Manning Ag. C.J.
and
Abdulhadi J.
CA 151/35
Shaheen
v.
Abu Jaradeh
and others

Contracts — Members of a party to a contract many —
Joint promise made to them — Some of them cannot sue on
contract.

Under the terms of a contract the appellant formed the first party and the three respondents together with three other persons formed the second party. A breach of contract by the appellant was alleged and the three respondents sued the appellant in the District Court of Jaffa (Civil Case No. 181/34) in damages for breach of contract. The point was raised that the respondents could not sue without joining the other persons, who, together with the respondents, formed the second party to the contract. The District Court overruled this objection, amended the claim to one half and gave judgment for respondents for LP. 100. The appellant appealed. The same point was also raised in the Court of Appeal.

In allowing the appeal, the Court of Appeal,

HELD that the respondents and the other three persons formed a joint party to the contract, namely the second party, because the covenants made to and by the second party were made generally without any words of severance, and such being the position, the three respondents could not sue without joining the other three persons with them.

E.D. Goitein for appellant.

Sheikh Ragheb Abu Su'oud Dajani for respondents.

Manning, Ag. C.J: This appeal arises out of a contract made between the appellant, of the first part, and the three respondents and three other persons, of the second part. A breach by the appellant was alleged, and the three respondents sued for damages which had been fixed at LP. 200. When the case came before the District Court, Mr. Goitein on behalf of the appellant contended that the three respondents could not sue without joining the other parties of the second part. The Court overruled his objection on the assumption that each party of the second part

1937
16th January
Manning Ag. C.J.
and
Abdulhadi J.

CA 151/35
Shaheen

v.
Abu Jaradeh
and others

owned one-sixth of the property involved and was consequently entitled in case of breach to one-sixth of the damages. It amended the claim by reducing the damages claimed by one-half and then proceeded to hear the action on its merits.

The Court found that the appellant had committed a breach and awarded the respondents LP. 100 damages. The appellant appealed and Mr. Goitein took the same objection which he had taken in the Court below.

It is admitted that there is no provision in the Ottoman law to meet a case of this kind. The point must therefore be decided according to the law of England, and this means simply that the contract has to be scrutinised to see whether it is joint, several, or joint and several. In the first place it may be remarked that the assumption by the Court that each party of the second part owned one-sixth of the property concerned is unfounded; it was admitted by the respondents that they owned the greater part of the subject matter of the contract.

The provision of the contract relating to damages is as follows:

“Any party who commits a breach of the contract shall pay to the aggrieved party the sum of LP. 200 plus the price paid.”

In case of a breach by the appellant, “the aggrieved party” clearly means the six parties of the second part. The making of the contract arose out of a partition of property in which all the parties were interested, but from what has been said above it is clear that they were not equally interested, that is some owned a greater percentage than others, but at the same time they held it in undivided ownership. The covenants made to and by the second party are made generally without any words of severance. Their interests are clearly joint and it is to their interest that they should be construed jointly. The law therefore is as stated in Halsbury’s Laws of England, Vol. 7, p. 337:

“Where a promise is made to several persons jointly, they are entitled collectively to performance of it. Proceedings to enforce the performance of such a promise can only be taken in the names of all the joint promisees; one of them cannot sue alone, because the promise was made to all of them jointly, and not to any of them separately.”

I am therefore in agreement with Mr. Goitein that the three respondents could not sue alone for damages for a breach of this agreement.

1937
16th January
Manning Ag. C.J.
and
Abdulhadi J.

CA 151/35
Shaheen

v.
Abu Jaradeh
and others

Mr. Goitein had another ground of appeal. One of the conditions of the contract was that the second party undertook to confirm the map in the Tabu. The appellant says this was not done, and the Court below have made a finding to this effect. It is clear from the evidence that this breach by the second party prevented the appellant from fulfilling his obligations under the contract. The Court below took the view that this did not matter as the appellant had waived any objection on this score and had not mentioned this breach of the agreement in his notarial notice. I do not agree with this. There can be no question of waiver when the fact is that the appellant was prevented from fulfilling his agreement by a breach of that same agreement by the respondents. He pleaded this in his defence and he also did mention it in his notarial notice. This ground of appeal also succeeds. In my opinion the appeal should be allowed with costs, to include LP. 2 advocate’s fees.

Abdulhadi J: The first point to be decided in this appeal which arose out of an agreement made between the appellant, on the one part, and the three respondents together with three other persons, on the other part, is whether or not the respondents are entitled, without joining the other three persons forming with them the second party, to claim their shares of the stipulated damages in case of a breach.

The second point argued by the appellant’s counsel was whether the appellant or the respondents committed the breach.

As regards the first point I am of the opinion that the respondents alone, without joining the other three persons, cannot claim their shares in the damages as the appellant undertook to carry out certain things to all persons forming the second party to the agreement. Further, the notarial notice sent to the appellant was sent by the three respondents only and not by the other three persons. In the circumstances the appellant is not liable to pay damages for non-fulfilment of his undertakings made to the second party on the claim of some of that party.

As regards the second point I concur with the judgment of the learned Acting Chief Justice and hold that the respondents, not having confirmed the map in the Land Registry, prevented the appellant from fulfilling his undertakings.

The appeal should be allowed, the judgment set aside and the respondents’ claim dismissed with costs to include LP. 2 advocate’s fees.

Civil Appeal No. 128 of 1935.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Senior Puisne Judge and Frumkin J.

1937
31st January
Copland Ag. S.P.J.
and
Frumkin J.
CA 128/35
Muhammad
v.
Hamad

YUSEF KHALIL MUHAMMAD Appellant.

v.

YUSEF ALI HAMAD Respondent.

Evidence, Oral — Whether admissible against a document.

The appellant claimed from the respondent a sum of LP. 60. - by virtue of a promissory note. The defence was that no consideration was given for the note and that it was given on trust. The Magistrate's Court heard the evidence of the appellant and the respondent and the arbitrators who were dealing with the dispute between appellant and respondent. The Magistrate found in favour of the defence and dismissed appellant's action. An appeal to the District Court (Civil Appeal No. 222/34) was also dismissed. Appellant appealed by leave to the Supreme Court on the point of law stated in the judgment of the Court of Appeal reported hereinafter.

In allowing the appeal and remitting the case to the Magistrate's Court to hear it afresh and to give judgment accordingly, the Court of Appeal,

HELD that where the maker of a promissory note alleges as against the payee that, although the consideration is in the body of the note declared to have been "received in cash", in fact no consideration was received and the note was given on trust, the Court may not hear the evidence of witnesses other than the parties to prove that allegation.

Observations with regard to the admissibility of evidence of arbitrators regarding admission against a document.

Sh. Mizrahi for appellant.

Rashed Haddad for respondent.

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

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

Our reply to this is in the negative.

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

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

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

Costs to be costs in the action.

High Court No. 76 of 1936.

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

Before: The Acting Chief Justice and Frumkin J.

JOSEF BABAYOFF Petitioner.

v.

1. CHIEF EXECUTION OFFICER, JERUSALEM
2. FREIHA BABAYOFF Respondents.

Jurisdiction — Religious Court (Rabbinical Court) — At time of commencement of proceedings matter in controversy within exclusive jurisdiction of Rabbinical Court — During pendency of proceedings change in law made Rabbinical Court competent to deal with matter only by consent of parties — Objection to jurisdiction — Amendment to law not retroactive — Rabbinical Court overruled objection and assumed jurisdiction — Whether Rabbinical Court vested with jurisdiction.

Proceedings for alimony were commenced in December, 1934, by the second respondent against the petitioner before the Rabbinical Court of Jerusalem, both parties being subject to the exclusive jurisdiction of the Court. By the Palestine (Amendment) Order in Council, 1935, which came into force on the 1st of April, 1935, the petitioner, who was not up to that date a foreigner, became thereafter a foreigner within the meaning of Article 59 as amended by the said Palestine (Amendment) Order in Council, 1935. At the

1937
21st January
Copland Ag. S.P.J.
and
Frumkin J.
CA 128/35
Muhammad
v.
Hamad

1937
22nd January
Manning Ag.C.J.
and
Frumkin J.
HC 76/36
Babayoff
v.
C.E.O. Jerusalem
and another

1937
22nd January
Manning Ag. C.J.
and
Frumkin J.
HC 76/36
Babayoff
v.
C.E.O. Jerusalem
and another

hearing of the case by the Rabbinical Court which took place on the 28th April, 1935, petitioner objected to the Rabbinical Court assuming jurisdiction on the ground that he was a foreigner, and that unless he consented to the jurisdiction the Rabbinical Court could not assume jurisdiction. The Rabbinical Court overruled the objection and gave judgment awarding alimony. Execution of the judgment in question was ordered, and the petitioner having failed to pay the amounts due, an order for his imprisonment was made. Thereupon the petitioner applied for and obtained an order nisi calling upon the Chief Execution Officer to show cause why the warrant of imprisonment should not be cancelled and why he should not be ordered to refrain from proceeding to execution; his main argument being that the Rabbinical Court acted without jurisdiction, he being a foreigner (a Persian subject) within the meaning of Article 59 of the Palestine Order in Council, as amended.

In discharging the rule nisi, the High Court,

HELD that, in the absence of anything in the Palestine (Amendment) Order in Council, 1935, showing an intention to vary any right accrued or obligation incurred before it was made, the Rabbinical Court was correct in deciding the question of jurisdiction according to the law as it existed when the action was commenced and not according to the change in the law which was effected during the pendency of the action.

M. Levanon for petitioner.

N. Marein for second respondent.

Judgment: 1. In December 1934 a legal proceeding for alimony was brought before the Rabbinical Court, Jerusalem, by one Freiha Babayoff against her husband, the petitioner in these proceedings. At that time the petitioner was subject to the jurisdiction of the Rabbinical Court, but by an amendment of the Palestine Order in Council he became a foreigner on the 1st April 1935 and the Rabbinical Court has no jurisdiction over foreigners where alimony is concerned unless all the parties consent. The hearing took place on April 28th. The objection of the petitioner to the jurisdiction was overruled, and he was ordered to pay his wife LP. 4. a month.

2. He was entitled to appeal to a higher Rabbinical Court but he did not do so. He made default in the payment of the alimony ordered and an order for his imprisonment was made by the Chief Execution Officer, Jerusalem. He has applied to this Court for an order to issue to the Chief Execution Officer to show cause why the warrant of imprisonment should not be cancelled — in other words he asks that the Chief Execution Officer be ordered to refrain from proceeding to execution against him.

1937
22nd January
Manning Ag.C.J.
and
Frumkin J.
HC 76/36
Babayoff
v.
C.E.O. Jerusalem
and another

3. Mr. Levanon, who appeared on his behalf, devoted his whole argument to showing that the decision of the Rabbinical Court on the question of jurisdiction was wrong, and that therefore this Court should interfere to prevent the imprisonment of the petitioner. He urged that this Court is bound to interfere when the invalidity of the Rabbinical Court's decision is obvious. But the invalidity of their decision is anything but obvious. In the Seventh Edition of Maxwell on the Interpretation of Statutes it is stated at page 192:

“When the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights.”

4. The amendment of the Palestine Order in Council to which I have referred shows no intention to vary any right accrued or obligation incurred before it was made. On the principle of interpretation set out above a Civil Court in Palestine would decide the question of jurisdiction in the same way as the Rabbinical Court did, i.e. according to the law as it existed when the action commenced in 1934, and not according to the change in the law which was effected during the pendency of the action.

5. The order nisi will be discharged with costs for the second respondent to include LP. 2. advocate's fees.

Land Appeal No. 52 of 1935.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Chief Justice, Khaldi J. and Abdulhadi J.

- 1. RAJI EL ISSA
- 2. BAHJAT EL ISSA Appellants.
- v.
- BUTROS DEEB KHAMMAR Respondent.

Jurisdiction — Religious Court (Greek Orthodox Court) — Immovable property — Miri land — Administration — Minors — Appointment of guardian to minors by Religious Court — Authorisation of Religious Court to one of guardians to sell certain

1937
23rd January
Manning Ag. C.J.
Khaldi J.
and
Abdulhadi J.
LA 52/35
Issa
and another
v.
Khammar

1937
23rd January
Manning Ag. C.J.
Khaldi J.
and
Abdulhadi J.
LA 52/35
Issa
and another
v.
Khammar

land belonging to minors — Claim of land after minors became of age — Whether Religious Court competent to authorise sale — Whether administration of miri land within jurisdiction of Religious Court — Ottoman Land Code, Article 52 — Succession Ordinance, Sections 6 and 19.

Supreme Court — Decisions, Previous — Binding effect of previous decisions of Supreme Court.

Two persons were appointed by the Greek Orthodox Court of Acre as guardians of the children of the deceased Deeb Khammar. Some two years after, the said Religious Court gave permission to one of the guardians to sell certain land belonging to the minors to the appellants. The respondent, one of the minor children of the deceased Deeb Khammar, on becoming of age, instituted an action in the Land Court, Haifa (Land Case No. 100/34) against the appellants for the recovery of his share in the land so sold. The Land Court, in giving judgment in favour of respondent, held that the Religious Court was not competent to authorise the sale and that the appellants were not purchasers in good faith. Hence this appeal.

In allowing the appeal and setting aside the judgment of the Land Court, the Court of Appeal,

HELD (1) that by virtue of the provisions of Sections 6 and 19 of the Succession Ordinance the administration of the property of the minors, which was admitted to be miri land, was within the jurisdiction of the Religious Court and that the said Religious Court (in this case the Greek Orthodox Religious Court) had the power to authorise the sale of the property of the minor, and that the provisions of Article 52 of the Ottoman Land Code could have no application to the present case where the sale had been authorised by the Religious Court.

(2) that in principle the Supreme Court ought to follow its own decisions, but as the law of Palestine may be said to be still in its infancy, the Supreme Court is not precluded from overruling its previous decisions, unless they have remained unchallenged for a considerable length of time.

Disapproved: LA 55/32, 2 P.L.R. 11.

N. Abcarius for appellants.

Hassan Hawa for respondent.

Judgment: In 1930 the Greek Orthodox Religious Court at Acre appointed two persons as guardians of the children of one Deeb Khammar, of whom the respondent was one. In 1932

the said Court gave permission to one of the guardians to sell certain land belonging to the minors. The land was sold and the appellants became the purchasers. The respondent came of age in 1934 and instituted an action against them in the Land Court for the recovery of his share in the land. He was successful, and the appellants now seek the reversal of the decision of the Land Court.

That Court held, in the first place, that the Religious Court was not competent to authorise the sale; and in the second place that the appellants were not purchasers in good faith. In holding that the Religious Court was not competent it relied on Article 52 of the Ottoman Land Code which reads as follows:

“Natural and appointed guardians of minors of either sex cannot transfer to another or to themselves land which has devolved on their wards by inheritance, or in any way come into their possession, under pretext of payment of debts, expense of maintenance or otherwise. Should they do so the wards have the right, for ten years after attaining their majority or after having become capable of having possession, to reclaim from the possessor through the Official the restoration and possession of their property. If they die before attaining their majority the land will pass to their heirs, and in default it will become subject to the right of tapu. But when it is shown that chiftliks belonging to minors of either sex cannot be managed by their guardians except in a manner which occasions loss to the wards, and that, the appurtenances of the chiftlik being valuable, it would be injurious to the wards to leave them to be destroyed or lost, and that in these circumstances the sale of it would be sanctioned by the Sheria Law, if it is proved that retention of the land alone would, by reason of it being separated from the buildings and other appurtenances, be injurious to the interests of the minor the sale of the land and its appurtenances at the true value is allowed after getting a hudget from the Sheria Court. When a sale has been effected under these conditions minors will have no right to claim the restitution of the chiftlik or its appurtenances after attaining their majority. The same provisions apply to the land of lunatics and imbeciles.”

It also relied on Section 20 of the Succession Ordinance, 1923, and held that under that section it was only the President of the District Court who had authority to permit a sale of the immovable property of the minors in this case. Under that Section the President of a District Court may, upon the application of a guardian, authorise the sale of the property of a minor. It seems, however, that the Land Court, in holding as

1937
23rd January
Manning Ag. C.J.
Khaldi J.
and
Abdulhadi J.
LA 52/35
Issa
and another
v.
Khammar

1937

23rd January

Manning Ag. C.J.
Khaldi J.
and
Abdulhadi J.

LA 52/35

Issa
and another

v.

Khammar

above, neglected to consider the effect of the last paragraph of the section, which reads as follows:

"The powers under sub-sections (a), (b) and (c) of this section may, subject to the law of the Community, be exercised by the Court of a Community with reference to the property of any minor the administration of which is within the jurisdiction of such Court."

Sub-section (a) is the one which authorises sale. It is clear then that a Religious Court may authorise the sale of the property of a minor, but this power is subject to two conditions, (a) that there must be nothing in the law of the Community to prevent the exercise of the power; (b) that the administration of that property is within the jurisdiction of the Religious Court.

It has not been urged that there is anything in the law of the Greek Orthodox Church preventing the exercise of the power of authorising a sale. The question to determine in this case is therefore whether the administration of the property, which is admitted to be miri land, is within the jurisdiction of the Greek Orthodox Religious Court.

Sections 6 and 19 of the Succession Ordinance are follows:

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

(2) Subject to the provisions of Section 19 hereof, the estates of such persons shall be administered and distributed in accordance with the law of the Community. Provided that the Court of the Community may, upon being invited so to do by any person beneficially interested in such estate, regulate its distribution in accordance with the provisions of the Ottoman Law, subject, nevertheless, to any testamentary disposition made by the deceased, so far as such disposition is permitted."

"19. Every Court having jurisdiction in matters of succession shall, in all cases, determine the rights of succession to miri land in accordance with the provisions of the Ottoman Law set forth in the Second Schedule hereto, and the said provisions shall be applied notwithstanding any disposition made or power of attorney given by the deceased intended to take effect after death, whether by way of will or otherwise."

The Greek Orthodox Church is one of the specific religious communities under the name of the "Eastern (Orthodox) Community." The intestate in this case was a member of that

Community at the time of his death. The Religious Court of the Community had therefore, under Section 6, jurisdiction in all matters relating to the succession, and it is quite clear from the wording of sub-section (2) that these matters include the administration and distribution of the estate. The section is general in its terms, and, unless there is anything to the contrary in section 19, the jurisdiction extends to the administration of miri land. There is nothing to the contrary in Section 19, which simply lays down how the succession to miri land is to be determined and does not in any way detract from the powers of the Court to administer the estate.

It is clear therefore that the administration of the property of the minor in this case was within the jurisdiction of the Greek Orthodox Religious Court, and that that Court had the power to authorise the sale. Having that power, it is immaterial whether it authorised one guardian or two to conduct the sale. Article 52 of the Ottoman Land Code, which I have set out above, must be read together with Section 20 of the Succession Ordinance and its provisions can have no application where the appointed guardian is authorised to sell by the Religious Court.

Hassan Eff. Hawa, who appeared for the respondent, cited the case of Sara Vijansky v. Khojainoff and others, Land Appeal N. 55 of 1932, decided on 6th April, 1933. In that case this Court decided that a Religious Court had no power to appoint an administrator to administer and distribute the miri land of an intestate. The reason given was that the administration of miri land was not a matter to which the law of the Community could apply, because the rights of succession have to be determined not in accordance with the law of the Community, but in accordance with the provisions of the Ottoman Law. If I may say so with respect, this is a misreading of the effect of Sections 6 and 19 of the Succession Ordinance. Section 6(1) gives to the Courts of the Religious Communities jurisdiction in all matters relating to intestate succession. Section 19 refers to "Every Court having jurisdiction in matters of succession" and the Courts of the Religious Communities are consequently included. They are therefore given jurisdiction to determine the rights of succession to miri land, but they are enjoined to do so in accordance with the Ottoman Law and not in accordance with the Law of the Community. The clear meaning of Section 6(2) is that the Court of the Community shall administer and distribute the estates of all intestates who at the dates of their death were members of the Community no matter of what description of property the estate may consist, and the only effect of Section 19 is that in the

1937

23rd January

Manning Ag. C.J.
Khaldi J.
and
Abdulhadi J.

LA 52/35

Issa
and another

v.

Khammar

1937
23rd January
Manning Ag.C.J.
Khalidi J.
and
Abdulhadi J.
LA 52/35
Issa
and another
v.
Khammar

case of miri land different principles of succession have to be applied. The administration of miri land is therefore within the jurisdiction of the Courts of the Religious Communities.

Hassan Eff. Hawa has urged that the decision is binding on this Court. A perusal of decided cases shows that this Court has not always regarded itself as bound by its own decisions. I agree in principle that this Court ought to follow its own decisions. But the law of Palestine may be said to be still in its infancy, and I think that this Court is not precluded from overruling its previous decisions, unless they have remained unchallenged for a considerable length of time.

The Court below found that the appellants were not purchasers in good faith on the ground that they ought to have known that the sale to them was not allowed by law. As it turns out that the sale was authorised by law, all that is necessary to say is that this finding was not justified.

In the Court below the respondent had a further objection in that the sale was not carried out by public auction in accordance with the order of the Religious Court. The finding of the Court below on this point is not as clear as it might be, but I take it to mean that the respondent had failed to prove that this auction did not comply with the order of the Religious Court.

The appeal is allowed, the judgment of the Land Court is set aside with costs here and below. Costs here to include LP. 5 advocate's fees.

Assize Appeal No. 6 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Chief Justice, Evans R/P.D.C. and Khayat J.

ALI ADAM IBRAHIM NOURI Appellant.

v.

ATTORNEY GENERAL Respondent.

Repeal — Law under which accused tried repealed — Repeal does not affect liability to conviction — Interpretation Ordinance, Section 5.

1937
23rd January
Manning Ag.C.J.
Evans R/P.D.C.
and
Khayat J.
AA 6/36
Nouri
v.
Attorney General

Evidence — Depositions — Procedure to be followed where certain depositions are to be put in in evidence — Trial Upon Information Ordinance, Section 34 — Evidence wrongly admitted does not affect conviction where there is other sufficient evidence to support conviction — Evidence Ordinance, Section 9.

1937
23rd January
Manning Ag.C.J.
Evans R/P.D.C.
and
Khayat J.
AA 6/36
Nouri
v.
Attorney General

Nouri was charged before the Court of Criminal Assize sitting at Haifa (Criminal Assize Case No. 24/36) with having discharged a firearm at a member of His Majesty's Military Forces with the intention of assisting the enemy, contrary to Regulation 8A (a) of the Emergency Regulations, 1936. He was convicted of the offence charged and sentenced to death. He appealed. The arguments urged on his behalf were that the trial was improper inasmuch as appellant was tried under the Emergency Regulations, 1936, which were repealed by the coming into force of the Palestine Martial Law (Defence) Order in Council, 1936, which repealed the Palestine (Defence) Order in Council, 1931, under which the regulations were made, and that certain depositions were wrongly admitted in evidence in that Section 34 of the Criminal Procedure (Trial Upon Information) Ordinance was not complied with.

In dismissing the appeal by majority (Khayat J. dissenting), the Court of Appeal,

HELD (1) that the regulations made under the Palestine (Defence) Order in Council, 1931, under which the appellant was convicted on the 26th October, 1936, were repealed as from the 30th September, 1936, the date on which the Palestine Martial Law (Defence) Order in Council, 1936, came into force, because the latter Order in Council did not contain a saving clause preserving the regulations made under the former Order in Council. But the repeal of the regulations was of no assistance to the appellant, because Regulation 22 of the Emergency Regulations provided that the Interpretation Ordinance should apply to the regulations, the natural meaning of which regulation was that the Interpretation Ordinance was to apply to those regulations as if they were regulations made under an Ordinance instead of under an Order in Council, and by Section 5 of the Interpretation Ordinance the repeal of the Emergency Regulations, 1936, could not affect any punishment incurred in respect of any offence against the Regulations committed before that date, and any legal proceedings in respect of such punishment may be instituted as if there had been no repeal.

(2) that in order that a deposition of a witness may be read at the trial as evidence in the case, the various matters set out in Section 34 of the Trial Upon Information Ordinance must be strictly proved, and proved in the ordinary way by oral evidence; and when this has been done the deposition may be read if it is signed by

1937

23rd January

Manning Ag.C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.
Attorney General

the Magistrate. But the admitting in this present case of such wrong evidence was of no avail to the appellant in view of the provisions of Section 9 of the Evidence Ordinance, since in this case there was other sufficient evidence to support the conviction apart from the evidence wrongly admitted.

Followed: Watson v. Winch (1916) 1 K.B. 688.

Disapproved: HC 67/36, 3 P.L.R. 146.

Referred to: R. v. Minister of Health (ex parte Yaffe) (1930) 2. K.B. 98; (1931) A.C. 494.

Hassan Hawa for appellant.

Government Advocate (Mousa Alami) for respondent.

Manning, Ag. C.J.: 1. The Appellant was convicted on the 26th October last for having discharged a firearm at a member of His Majesty's Military Forces with the intention of assisting the enemy. The local provision under which he was charged and convicted was Regulation 8A (a) of the Emergency Regulations, 1936. These Regulations were made by the High Commissioner in exercise of the power vested in him by Article IV of the Palestine (Defence) Order-in-Council, 1931. This Order-in-Council came into operation in Palestine on the 19th April, 1936. Article II prescribed that it "shall continue in operation therein until the High Commissioner shall by proclamation declare that it has ceased to be in operation".

2. No such proclamation was made by the High Commissioner, but on the 30th September, 1936, another Order-in-Council was brought into operation by the High Commissioner. It was called the Palestine Martial Law (Defence) Order-in-Council, 1936. The preamble was as follows: —

"Whereas by the Palestine (Defence) Order-in-Council, 1931, (hereinafter referred to as the principal Order) provision was made for securing the public safety and defence of Palestine in time of emergency; and whereas it is expedient to amend the principal Order in the manner following".

3. In what follows I shall refer to the two Orders as the 1931 Order and the 1936 Order. Article I of the 1936 Order says it is to be construed as one with the 1931 Order. Article II begins as follows: "The following article is hereby substituted for Article IV of the principal Order". Then follows a new

Article IV vesting in the High Commissioner power to make regulations. It is therefore quite clear that from the moment the Order of 1936 was proclaimed, that is the 30th September, 1936, the old Article IV had disappeared. This is the Article, as I have said, under which the Emergency Regulations were made, and it was under one of these Regulations that the Appellant was convicted.

4. The trial of the Appellant began on the 26th October and ended the same day. Hassan Eff. Hawa, who argued the appeal on his behalf, says that Article IV of the 1931 Order having been repealed on the 30th September, no regulations existed on the 26th October, 1936, under which the Appellant could have been tried or convicted. Mousa Eff. Alami, who appeared for the Crown, was unable to point to any saving clause, but thought that the point was covered by Article V (2) of the 1936 Order. This reads as follows: —

"(2) Article VB as set out in the preceding paragraph shall apply to all regulations under the principal Order whether made before or after the date upon which this Order comes into operation".

5. The Article VB referred to was inserted in the 1931 Order by Article V (1) of the 1936 Order. It reads as follows: —

"VB. Regulations made under this Order shall have effect as if enacted in this Order and where any regulations made by the High Commissioner or by any person to whom he shall have delegated power to make regulations under this Order purport to have been made under this Order they shall be deemed to have been lawfully so made and their validity shall not be called in question in any Court of law or in any other manner whatsoever, and all regulations which purport to have been made by the High Commissioner or by a person to whom he has delegated power to make regulations under this Order shall be presumed, unless the contrary is shown, to have been made by the High Commissioner or by such person as the case may be".

6. This Article came into force on the 30th September and refers to the 1931 Order as it stood on that date. On that date the old Article IV had disappeared — a new Article IV had taken its place. The words "Regulations made under this Order" can refer only to regulations made under the new Article IV, and the effect of the Article is that all such regulations shall be deemed to form part of the Order itself; that is, there can be no question of ultra vires.

1937

23rd January

Manning Ag.C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.
Attorney General

1937

23rd January

Manning Ag. C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.

Attorney General

7. I turn next to consider the meaning of Article V (2) of the 1936 Order. Its interpretation is that Article VB shall apply to regulations made under the 1931 Order before the 30th September as well as to those made after that date, that is to regulations made under the old Article IV as well as under the new Article IV. The effect of Article VB has been already explained, its purpose is to ensure that no regulation shall be held to be ultra vires. Article V (2) of the 1936 Order therefore prescribes that no regulation made under the old Article IV can be held to be ultra vires. Article V (2) came into force only on the 30th September and it might be said that, if the regulations under the old Article IV were not meant to persist, it was otiose to enact that their validity should not be challenged. It seems to me however that the sole object of Article V (2) was to ensure that anything already done under these regulations should not be challenged in a Court of Law on the ground that any regulation was ultra vires. The regulations contained a large number of provisions with reference to taking possession of buildings, food and vehicles; to the arrest and detention of persons; to the imposition of collective fines; and to other matters interfering with the usual liberty of the subject. Before the 30th September the validity of any regulation under which any act purported to have been done might have been questioned in a Court of Law; on and after the 30th September this became impossible. To give an example, if a collective fine had been imposed on a village under the relevant regulation, the validity of the regulation could be questioned in a Court of Law at any time before the 30th September. But if the matter did not reach the Court before that date, then no such question could be raised. The object of Article V (2) of the 1936 Order was a validating one. Persons affected by certain acts may have regarded and may still regard the relevant regulation as being of doubtful validity, but after September 29th this line of attack is no longer open. This to my mind is the plain meaning of Article V (2), and it cannot be construed into meaning that the regulations made under the old Article IV are still in force.

8. I had some difficulty with the words in Article VB, "shall have effect as if enacted in this order", and have considered whether Article V (2) could possibly mean that regulations made before September 30th are to have effect now as if enacted in the Order. But these words have a recognised meaning in the drafting of legislation, they mean simply that any regulations made are to be regarded as if they formed part of the Order-in-Council itself, and that consequently their validity cannot be questioned as if they were legislation of a

subordinate character. They merely express in concise form the effect of the remaining words of the Article.

9. If it was the intention of His Majesty in Council to preserve the regulations made under the old Article IV, it could have been done by a very simple clause to the effect that until regulations were made under Article IV as substituted the previous regulations should remain in force. This was not done. On the authority of *Watson v. Winch*, 1936, 1, K.B., 688, the previous regulations were repealed as soon as the 1936 Order came into force.

10. There is another point which was not referred to in the argument before us. Regulation 22 of the Emergency Regulations enacts that the Interpretation Ordinance, 1929, shall apply to the regulations. Section 2 of the Interpretation Ordinance says that that Ordinance shall apply to all regulations, but there are no words in its provisions dealing with the interpretation of an Order-in-Council or of regulations made under an Order-in-Council. In the case of *Rushdi Shawa and others v. Assistant District Commissioner, Gaza* (High Court Case No. 67 of 1936) McDonnell, C.J., commented on this and said that Regulation 22 of the Emergency Regulations was entirely superfluous and unavailing. I must respectfully say that I do not agree with this, I think some meaning must be given to Regulation 22, and I think the natural meaning is that the Interpretation Ordinance is to apply to these regulations as if they were regulations made under an Ordinance, instead of under an Order-in-Council.

11. Section 4 (2) of the Interpretation Ordinance is as follows: —

"(2) When an Ordinance or part of an Ordinance is repealed and other provisions substituted therefor, all regulations, proclamations, orders and notices issued or made in virtue thereof shall be deemed to be repealed also, unless expressly saved by the Ordinance by which such repeal is made".

12. This clinches the matter in favour of the argument advanced by Hassan Eff. Hawa. It is not necessary to search through the 1936 Order to see if there is any implied suggestion in any of its Articles that the regulations are to remain in force, they have to be expressly saved.

13. My interpretation of Regulation 22 leads to another matter, and this renders the success of Hassan Eff. Hawa's

1937

23rd January

Manning Ag.C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.

Attorney General

1937
23rd January
Manning Ag.C.J.
Evans R/P.D.C.
and
Khayat J.
AA 6/36
Nouri
v.
Attorney General

argument of no avail to the Appellant. The effect of Section 5 of the Interpretation Ordinance is that the repeal of the Emergency Regulations by Article II of the 1936 Order on September 30th cannot affect any punishment incurred in respect of any offence against the Regulations committed before that date and that any legal proceedings in respect of such punishment may be instituted as if there had been no repeal. In the case at present under appeal the offence occurred on August 21st and consequently the fact that the Regulations were repealed on September 30th cannot assist the Appellant in any way.

14. The second ground of appeal is that evidence was wrongly admitted at the trial. The evidence objected to was that the depositions of two witnesses named Rycroft and Weignall, who had given evidence at the preliminary investigation, were allowed to be read. Section 34 of the Trial Upon Information Ordinance is as follows: —

“34. If a witness who has given evidence at the preliminary examination on oath cannot be produced at the trial because of his death, infirmity or sickness, or absence from Palestine, his deposition may with the leave of the Court be read at the trial as evidence in the case, on the production of the deposition signed by the Magistrate and on proof that the witness cannot be produced at the trial for one of the causes above-mentioned, and on proof also that the accused was present when the deposition was taken, except in the cases provided for in Section 27 hereof, and that he had an opportunity of cross-examining the witness”.

15. It will be seen that before the depositions could be read it had first to be proved that the witnesses were absent from Palestine and that the accused was present and had an opportunity of cross-examining the witnesses when the depositions were taken. There was evidence before the Court below that two persons named Rycroft and Weignall had embarked in a troopship at Part Said on 13th October. There was, however, no evidence whatever that these were the two witnesses who had given evidence at the preliminary investigation, and this cannot be assumed from the fact that their names were the same. The depositions showed that they belonged to the same regiment as the witnesses, but this is not evidence until the depositions are read, and the meaning of the Section is that certain things have to be proved before the depositions are read. Again, there was no proof that the accused had been present and had had an opportunity of cross-examining the witnesses. Mousa Eff. Alami said this was apparent from the depositions, but again these facts have to be proved before the depositions are

read. If it was intended that the Magistrate's signature should imply these matters, the section would have said so. My interpretation of the section is that the various matters set out have to be strictly proved, and proved in the ordinary way by oral evidence; and when this had been done the deposition may be read if it is signed by the Magistrate. In other words, the deposition is not admitted in evidence until the necessary proof has been given, and until it is admitted it is not evidence of anything contained therein.

16. I agree with Hassan Eff. Hawa that these depositions were wrongly admitted in evidence. But this does not assist the Appellant. Section 9 of the Law of Evidence Amendment Ordinance is as follows: —

“9. When evidence which is not admissible in proof of a criminal charge has been admitted by error or inadvertence, such evidence shall not be used in proof of the charge nor shall any judgment be based thereon. Nevertheless the fact that such evidence has been heard by the Court shall not be held to invalidate the judgment, unless in the opinion of the Court the accused would not have been convicted if such evidence had not been given, or there was no other sufficient evidence to support the conviction apart from that evidence”.

17. In this case, as will presently be seen, there was “other sufficient evidence to support the conviction apart from the evidence wrongly admitted”, and consequently the conviction cannot be interfered with on this ground.

18. The third ground of appeal is that the evidence was not sufficient to justify the conviction of the Appellant. As to this there was the evidence of the witness Price that the Appellant had discharged a rifle at him and then placed the rifle against a wall before running away. Price saw Cpl. Hughes catch the Appellant, and then he and Hughes went and took possession of the rifle. They handed the rifle to Sgt. Matthews of the Police who examined it and found it had been recently fired. It had an empty case in the breech and two rounds in the magazine.

19. I think the evidence of Price was sufficiently corroborated. Some criticism has been made of the fact that the Court has, in its written judgment, confused the names of witnesses, but I do not regard this as a ground for upsetting the conviction.

1937
23rd January
Manning Ag. C.J.
Evans R/P.D.C.
and
Khayat J.
AA 6/36
Nouri
v.
Attorney General

1937

23rd January

Manning Ag. C.J.

Evans R/P.D.C.

and

Khayat J.

AA 6/36

Nouri

v.

Attorney General

20. It is further said that there was no proof of an intention to assist the enemy. There was evidence that on the 20th August the Police and troops were fired on and that the attackers retreated to Ara village. It was on the next day when the troops were searching the village that the Appellant fired at Price. The word "enemy" includes all armed rebels and there was thus ample material for any Court to conclude that there was an intention to assist the enemy.

21. There is a further appeal against the sentence of death which was passed on the Appellant. The discretion as to sentence was essentially a matter for the Court below and in my opinion this Court should not interfere with it.

22. None of the grounds of appeal can avail to upset the conviction. The appeal should be dismissed and the conviction and sentence affirmed.

Evans, R/P.D.C.: This is an appeal from the Court of Criminal Assize sitting at Haifa. The Appellant was charged with two offences: Discharging firearm at members of His Majesty's Military Forces with the intention of assisting the enemy contrary to Regulation 8A (a) of the Emergency Regulations 1936, and Being in possession of firearms and ammunition contrary to Regulation 8A (i) of the same Regulations. One plea is recorded and apparently refers to the first count as the Appellant was found guilty of the offence charged therein, the second count was struck out, and the Appellant sentenced to death.

On appeal the counsel for Appellant disregarded the grounds of appeal filed and relied on four grounds. In the first place he argued that the Regulations under which the Appellant was convicted had been repealed. Secondly he contended that the depositions of Privates Joseph Rycroft and Robert Weignall had been wrongly admitted. His third point was that there were no facts recorded in evidence to support certain findings in the judgment at length, and his fourth that there was not sufficient evidence to support the conviction. He also argued that the sentence was excessive.

The Regulation under which the Appellant was convicted is recited in the information as enacted in the Emergency (Amendment) Regulations (No. 5) 1936. In fact it was mainly enacted in Emergency (Amendment) Regulations (No. 4) 1936, which were published in the Palestine Gazette on 12th June,

1936, and came into force on that day. There is only one Regulation 8A (a) and the offence seems sufficiently defined. Emergency (Amendment) Regulations (No. 4) and (No. 5) 1936 were made by the High Commissioner under powers conferred on him by Article IV of the Palestine (Defence) Order-in-Council, 1931, which was proclaimed and came into force on the 19th April, 1936. On the 26th September, 1936, His Majesty in Council made a further Order entitled the Palestine Martial Law (Defence) Order-in-Council. Article I (2) of this Order provides that it is to come into force on its being proclaimed. It was proclaimed on the 30th September, 1936. Article II of this Order substitutes a new Article IV for the Article IV of the principal Order-in-Council. On the 30th September, 1936, therefore, this old Article IV was repealed and as from the time of that repeal the new Article IV has stood in its place. The original Article IV was a provision conferring rule-making powers, and those powers had been exercised to make the Regulations under which the Appellant was convicted on 26th October, 1936.

The appellant cited the case of *Watson v. Winch*, 1916, 1 K.B. 688, to show that the repeal of an enactment creating powers of subordinate legislation repeals the subordinate legislation made thereunder. There appears to be no distinction in principle between a statute as in the case cited and an Order-in-Council as in this case. The two judges who gave reasons for their decision in that case, Lord Reading, C.J., and Sankey J., both relied on two grounds, which are briefly stated by Sankey J., as follows: —

"First because otherwise there might be two inconsistent codes relating to the same matter" "Secondly because the usual practice is to insert in the later statute a section expressly preserving previously made by-laws if it is intended that they shall remain in force".

Lord Reading treated the latter as the more important ground. He quoted *Surtees v. Ellison*, 9 B. & C. 750: —

"It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed. That is the general rule, and we must not destroy that, by indulging in conjectures as to the intention of the legislature".

And went on to say:

"Apart from the provisions of the Interpretation Act 1869: "It would follow that any law made under a repealed

1937

23rd January

Manning Ag. C.J.

Evans R/P.D.C.

and

Khayat J.

AA 6/36

Nouri

v.

Attorney General

1937

23rd January

Manning Ag. C.J.
Evans R/P.D.C.
and

Khayat J.

AA 6/36

Nouri

v.

Attorney General

statute ceases to have any validity unless the repealing Act contains some provision preserving the validity of the by-law notwithstanding the repeal."

Lord Reading described the second point as one "not of such general application" and treated it as in part falling under the rule as to inconsistent subsequent legislation.

What is treated by Lord Reading as the major reason clearly applies to this case, and the Crown do not suggest that there is in the later Order-in-Council any provision expressly saving the Regulations made under the repealed Article IV. The new Article IV does not differ from the old merely in detail as in the variation of the first paragraph and the addition of paragraph (h), but goes on by the alteration of the paragraph succeeding (h) and by paragraphs (2), (3) and (4) to make provision for the establishment of a completely new set of Criminal Courts without supervision and from whom there was to be no appeal. The Courts to try offences prescribed by Regulations made under the original Article IV are laid down in Regulations 3 and 8A. The danger of inconsistent codes referred to by Sankey J. is obvious. Moreover the consideration of these provisions makes it appear probable that the legislator intended a complete supercession of the old Regulations, and the title of the later Order-in-Council supports the view that a new, Martial, Law was to be established forthwith.

That it is still the common practice of English draftsman to insert saving provisions in such cases could not be better exemplified than at present. In 1936 five pieces of consolidating legislation, without major variation such as those just referred to, were passed. I refer to the Old Age Pensions Act, National Health Insurance Act, Public Health Act, Public Health (London) Act and the Housing Act in which Sections 14, 228, 346, 307 and 189 respectively will show the careful provision made to save subordinate legislation.

As I understood the Government Advocate, he relied to some extent on the wording of Article V of the Palestine Martial Law (Defence) Order-in-Council, and argued that because it says "are hereby inserted" the Order including the new Article IV must be read as having retrospective force. There is a presumption against giving retrospective force to legislation and such force will not be given in the absence of express provision to that effect. There is nothing in this contention.

This Article V inserts as from 29th September Articles VA and VB in the principal Order. There is nothing retrospective

in either of these, and this absence was apparent to and intended by the legislator who went on to make the only express retrospective provision in the Order in Sub-Clause (2) which reads: —

"Article VB as set out in the preceding paragraph shall apply to all regulations under the principal Order whether made before or after the date upon which this Order comes into operation".

The Article VB referred to reads as follows: —

"VB. Regulations made under this Order shall have effect as if enacted in this Order and where any regulations made by the High Commissioner or by any person to whom he shall have delegated power to make regulations under this Order purport to have been made under this Order, they shall be deemed to have been lawfully so made and their validity shall not be called in question in any Court of Law or in any manner whatsoever, and all regulations which purport to have been made by the High Commissioner or by any person to whom he has delegated power to make regulations under this Order shall be presumed, unless the contrary be shewn, to have been made by the High Commissioner or by such person as aforesaid as the case may be".

The Crown contends that this provision has the effect of saving the Regulations made, by preventing the Court from enquiring into this repeal. On the face of them these provisions are not saving provisions at all and say nothing as to the continued existence of the subordinate legislation. The meaning of the first provision of Article VB has been considered in *R. v. Minister of Health (Ex parte Yaffe)* 1930, 2 K.B. 98 and 1931 A.C. 494. The remainder of Article VB does not add materially to this.

In effect Article VB prohibits the Courts from considering the validity of the subordinate legislation, the circumstances of its enactment and the manner in which the powers conferred have been exercised. In other words, it is directed against the doctrine of ultra vires. A consideration of the decisions under the Emergency Regulations confirms this opinion. Article VB does not forbid the Courts to read and construe the Order-in-Council under which the Regulations are made. On the other hand it states that the Regulations are to be read as part of the Order-in-Council and the Court must read and construe all in order to enforce the Regulations. In construing the Order-in-Council they must apply the ordinary rules of interpretation, and if these rules lead to the conclusion that the Regulations have been repealed they can only find that they are no longer in force. The Court could not enquire into the validity of the

1937

23rd January

Manning Ag. C.J.
Evans R/P.D.C.

and

Khayat J.

AA 6/36

Nouri

v.

Attorney General

1937

23rd January

Manning Ag. C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.
Attorney General

Order-in-Council but they can and must enquire into whether or not it has been repealed expressly or impliedly in accordance with the known rules of interpretation. The Regulations cannot be on a higher plane than the Order itself. In my opinion the Emergency Regulations were repealed by the Order-in-Council on the 30th September, 1936.

The offence of which the Appellant was found guilty was committed on the 21st August last. At that date the Regulation under which he was convicted was still in force. He was tried and convicted on the 26th October, 1936, after the Regulations were repealed. The general rule, as quoted above, is that a repealed statute must be considered (except as to transactions passed and closed) as if it had never existed. No prosecution could be brought under it after its repeal. The Crown argued that the Order-in-Council must be interpreted in accordance with the Interpretation Act 1889, and that by Section 38 (2) the Appellant was properly convicted. The Palestine Martial Law (Defence) Order-in-Council recites that it is made under the Foreign Jurisdiction Act 1890. I can find nothing in the Interpretation Act shewing that it applies generally to Orders-in-Council, prerogative or statutory; on the other hand when its provisions are to apply to Orders-in-Council it expressly says so as in Sections 31 and 36 (2). Section 31 was not called in aid but it provides that expressions in statutory Orders-in-Council shall have the same meaning as in the Act under which they are made. The argument then seems to amount to saying that the word "Substituted" (and consequent repeal) shall have the same effect as "substituted" would have had in the Foreign Jurisdiction Act 1890 had it been used therein when construed in accordance with the Interpretation Act 1889. This is not what the Act says.

It remains to consider two points not raised by the Government Advocate. Article V (2) of the later Order-in-Council deals with Regulations under the principal Order whether made before or after the date upon which the later Order comes into operation. The expression "under the principal Order" is equivalent to under the repealed Article IV, since Regulations under the Order can only be made under this Article. Effect must be given, if possible, to every expression in an instrument. Can effect only be given to the word "before" by understanding it as an implied saving of the Emergency Regulations? This would indeed be a slender reason for implying a saving provision. As I understand the rules of interpretation by necessary implication the justification for the assumption made as to such implied meaning is

to be found in the necessity for making it, and if therefore the word "before" can be given any application without assuming an intention to save the regulations that intention must not be assumed. The principal Order consists of two main Articles, IV and V. The former confers powers of legislating, and the latter confers powers to do, administratively, acts which would otherwise be violations of private persons' rights of personal liberty or of property. The principal Regulations under Article IV are undated but were published on 19th April, 1936, and largely concern themselves with bestowing on junior officers powers differing in degree rather than in kind from those conferred by Article V of the Order-in-Council. Whether this was in accordance with the wishes of the superior legislating authority, we are debarred from considering, but we must consider the effect of those regulations, actual and theoretical. Under these regulations administrative orders can be and have been made in larger numbers. The justification for the otherwise unlawful acts performed in carrying out such orders is to be found in the Orders and Regulations under which they were done. These acts might be challenged at any time within the period of prescription. Article V (2) would then take effect to prevent the validity of the regulations being canvassed. This reading of "before" is confirmed by the proviso to the Article V (2) which, following on the provisions as to administrative orders, saves judgments and judicial orders based on the ordinary rules as to ultra vires.

The second point which falls to be considered is the effect of Regulation 22 of the principal Regulations. At first sight it would appear impossible that a provision should take effect to extend the life of the subordinate enactment in which it is found for any purpose after the total repeal of the enabling enactment. Any such saving would naturally be looked for in the repealing instrument. I understand Regulation 22 to mean that the Interpretation Ordinance 1929 shall apply as a whole to the regulations as if they were an Ordinance. As on the 30th September 1936 the regulations made were affirmed and the Courts prohibited from canvassing the propriety of any of their provisions by the Order-in-Council which also repealed them. There seems to be nothing inconsistent in saying that that repeal takes effect in accordance with the Interpretation Ordinance, the continued effect of the regulations depending on the Order and the Ordinance. Section 5 of the Ordinance is similar to Section 38 (2) of the Act, and I think that the Appellant was rightly convicted after the repeal of the regulations.

The Appellant admitted on his second point that the evidence of Captain Riggs was good evidence to prove that the

1937

23rd January

Manning Ag. G.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.
Attorney General

1937

23rd January

Manning Ag. C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.

Attorney General

witnesses Rycroft and Weignall were out of the country, but contended that it should be corroborated in accordance with Section 5 of the Law of Evidence Amendment Ordinance. The Appellant was not convicted on the evidence of Capt. Riggs nor was his evidence such as would inculcate the accused, but was on a purely collateral matter of whether depositions could be given in evidence. In my opinion no corroboration was necessary.

The third and fourth grounds of appeal in substance merge into one. Under the former he complained of certain passages in the judgment attached to the proceedings which ascribed to Private Price statements that the rifle belonged to the Appellant, and that the witness smelt the rifle and found it recently used, and to Cpl. Hughes a statement that he heard shots and saw an Arab running, and which speak in paragraphs 5 and 6 of "they saw". The appeal is considered on the Judges' notes of the evidence, and not on a transcript of the proceedings. The findings are substantially supported by the notes. The gravamen of the complaint is that Price's evidence lacks corroboration. It is true that he alone saw the accused fire, but he goes on to describe how the accused ran away and was caught by Cpl. Hughes, how in running he hid his rifle, and how Price and others went in search and found the rifle which, when smelt by the Sergeant in charge, smelt as if it had been recently fired. His evidence implicating the accused must be read as a whole, and so read seems to be amply corroborated.

In my opinion, therefore, although the Emergency Regulations have been repealed, the Appellant was rightly convicted, and the appeal should be dismissed. The sentence is not exceptional and should stand.

Khayat J: The most important objection taken by the Appellant's Advocate is that Section 8A(a) of the Emergency Regulations 1936, under which the accused was convicted and sentenced to death, was made under Article IV of the Palestine (Defence) Order-in-Council 1931, and that that Article has been substituted by Article II of the Palestine Martial Law (Defence) Order-in-Council 1936, which was published on the 30th September, 1936. He argued that inasmuch as his client was convicted and sentenced on the 26th October, 1936, i.e. after Article II of the Martial Law (Defence) Order-in-Council, 1936, came into force, the said Emergency Regulations are no more in force. He therefore applies for the conviction and sentence to be set aside and his client discharged.

1937

23rd January

Manning Ag. C.J.
Evans R/P.D.C.
and
Khayat J.

AA 6/36

Nouri

v.

Attorney General

The Government Advocate argued, in reply, that Article VB of the Palestine Martial Law (Defence) Order-in-Council, 1936, prohibits the Courts from dealing with the validity of the Regulations made under that Order and that the second paragraph of the same Article provides that these provisions shall apply to all regulations made under the principal Order of 1931.

The point to be decided is as to whether or not Article IV of the Palestine (Defence) Order-in-Council, 1931, under which the Emergency Regulations were made is still in force, although it has been substituted by Article II of the Palestine Martial Law (Defence) Order-in-Council, 1936. In other words, Are the Regulations made prior to the 30th September, 1936, applicable after that date?

The provisions of the second paragraph to Article V of the 1936 Order-in-Council, which prohibits the Courts from dealing with the validity of the regulations previously made, cannot be considered as authorising the application of these regulations without any clear provision to the contrary.

It cannot be argued that Regulation 22 of the principal Emergency Regulations, 1936, which makes the Interpretation Ordinance 1929 applicable to these Regulations, is still in force as long as Article IV of the Palestine (Defence) Order-in-Council, 1931, has been repealed and substituted by Article II of the Palestine Martial Law (Defence) Order-in-Council, 1936.

For the above reasons, I am of the opinion that Article IV of the Palestine (Defence) Order-in-Council, 1931, and the Regulations made thereunder are no more in force and that the conviction and sentence should be set aside and the Appellant acquitted.

Civil Appeal No. 180 of 1935.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J. and Khaldi J.

1937
28th January
Copland J.
and
Khaldi J.
CA 180/35
Qamar
v.
Haddad

IBRAHIM QAMAR Appellant.

v.

SALIM HADDAD Respondent.

Immovable property — Dispositions — Undertaking to re-transfer property sold — Undertaking need not be made before Land Registry.

Haddad owed Qamar a sum of LP. 300. To satisfy his debt Haddad sold Qamar in the Land Registry a piece of land. On the day of the transfer Qamar undertook in writing that he would retransfer the land to Haddad on payment by the latter within a year of the debt with interest so that Haddad may benefit from a rise in the price of the land. Haddad, within the year, tendered the debt with interest as agreed but Qamar refused to accept it or to effect transfer. Thereupon Haddad commenced proceedings in the District Court, Jerusalem (Civil Case No. 80/35) claiming the difference between the sale price and the actual value of the land at the time. He succeeded in the District Court. Qamar appealed.

In dismissing the appeal, the Court of Appeal,

HELD that the undertaking given by appellant to retransfer to respondent the land upon payment of the debt with interest within one year from the transfer was not null and void, since it was an independent collateral agreement which, far from contradicting the sale, was made in express reference to it; nor was there any provision in the law requiring such undertakings to be made before the Land Registry.

B. Joseph for appellant.

H. Cattan and Zaki El Ousta for respondent.

Judgment: The present appeal is both simple and clear.

The respondent (plaintiff) sold to the appellant (defendant) a piece of land before the Land Registry, for a sum of LP. 300 being the debt due from the former to the latter. On the day of transfer, whether before or after the transaction is immaterial, the appellant undertook in writing that he would re-transfer the land to respondent on payment by him within a year of the debt with interest, "so that he may benefit from a rise in the price of land".

Within the said period the respondent tendered the debt with the interest as agreed, but the appellant refused to accept same or to effect the transfer. Thereupon, the present respondent brought an action before the District Court, claiming from the appellant the difference between the sale price and the actual value of the land at the time. Judgment was given for plaintiff by default and upon opposition was confirmed in presence.

It is against this judgment that the present appeal has been filed.

Appellant's first ground is that having taken place outside the Land Registry and being in contradiction to the transaction of sale, the undertaking is null and void. The answer to this is that the undertaking is an independent collateral agreement, which far from contradicting the sale is made in express reference to it and we know of no provision in the law, which requires that such undertakings be made before the Land Registry.

The second point raised is that the undertaking is defective firstly because it is signed only by one party and secondly because there is no consideration to it. This ground also fails because the signature of one party suffices for an undertaking, and as to consideration the Court holds that the interest payable under the undertaking constitutes same.

For these reasons, the appeal is dismissed with costs and advocates' fees assessed at LP. 3.

Civil Appeal No. 181 of 1935.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J. and Khaldi J.

1. ESTHER SOBELSON
2. ELIEZER YEHEZKELSON
Administrators of the Estate
of the late Pinchas Sobelson Appellants.

v.

LEAH SOBELSON Respondent.

Mortgage — Not a 'registered interest in land' under the Succession Ordinance.

In Succession Case No. 2/35 of the District Court of Jerusalem, in which the appellants applied for probate of the will of the

1937
28th January
Copland J.
and
Khaldi J.
CA 180/35
Qamar
v.
Haddad

1937
28th January
Copland J.
and
Khaldi J.
CA 181/35
Sobelson
and another
v.
Sobelson

1937
28th January
—
Copland J.
and
Khalidi J.
—
CA 181/35
Sobelson
and another
v.
Sobelson

late Pinchas Sobelson, who left movable property, rights (including a mortgage on miri land) and creditors, the President of the District Court held that the mortgage was a 'registered interest in land' under the Succession Ordinance, and as the land mortgaged was of the miri category, the mortgage was subject to the Ottoman Law relating to Succession of Immovable Property, notwithstanding any disposition made by will or otherwise. The executors appealed.

In allowing the appeal, the Court of Appeal,
HELD that the phrase "registered interest in land", which occurs in the Succession Ordinance, does not apply to mortgages and was intended to cover such rights as those of pasturage, right of way, etc., that is to say, direct rights in land and not a mortgage which is merely a security for a debt.

B. Ben Aharon for appellants.
M. Rotenstreich for respondent.

Judgment: This is an appeal against a judgment of the President of the District Court of Jerusalem in a succession case, wherein it was held that a mortgage is a 'registered interest in land' under the Succession Ordinance 1923, and that the land being of the 'Miri' category in that particular case, 'the mortgage was subject to the Ottoman Law relating to Succession of Immovable Property, notwithstanding any disposition made by will or otherwise'.

Counsel for the Respondent has argued that the appeal is out of time, because the original judgment in which the above decision was enunciated was given on the 22nd of February, 1935. The Appellants, according to this argument, failed to appeal within thirty days of the said date, and instead waited until the judgment of the 6th day of September was given, which was made in pursuance of the previous judgment.

The preliminary point is over-ruled, because the Court holds that the present appeal is really against the latter judgment and was thus filed in time.

With regard to the point raised on the merits, this Court having heard the advocates for both parties, holds that the clause 'registered interest in land', which occurs in the Succession Ordinance 1923, does not apply to mortgages and was intended to cover such rights as those of pasturage, right of way, etc., i.e. direct rights in land and not a mortgage which is merely security for a debt.

For these reasons, the appeal is allowed with costs and advocate's fees assessed at LP. 2. —

Land Appeal No. 5 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Acting Senior Puisne Judge and Khayat J.

MAMUR AWQAF OF THE NORTHERN
DISTRICT, ACRE Appellant.
v.
ATTORNEY GENERAL Respondent.

*Immovable property — Land Registers — Registration in —
Whether sufficient proof of category of land.*

1937
28th January
—
Copland Ag. S.P.J.
and
Khayat J.
—
LA 5/36
Mamur Awqaf
Northern
District, Acre
v.
Attorney General

The mere registration in the Land Registers that a particular land falls within a definite category of land is not conclusive proof of the category of the land in question if the party disputing the correctness of the registration is in a position to establish that the other party relying on the correctness of the registration has admitted the incorrectness of such registration — So laid down by the Supreme Court sitting as a Court of Appeal.

A certain land was claimed by the appellant in Land Case No. 42/34 of the Land Court of Nablus as waqf. Objection was taken by the respondent's representative that the claim was barred by prescription on the ground that the land claimed was registered as miri since 1298 A.H. and as that registration had never been changed since that date, a period of more than 36 years had elapsed and the Court was prohibited under Article 1661 of the Mejelle from dealing with the action. The Land Court disagreed, one judge was of the view that prescription should run from the date of the registration, while the other judge was of the view that prescription should run from the date of taking possession by the respondent.

Mu'een El Madi for appellant.

Solicitor General (Alan Rose) for respondent.

Copland, Ag. S.P.J.: I agree with the judgment that is about to be read by my brother Khayat, and would only add a few words.

There is a tendency in District and Land Courts to decide cases rather hurriedly on preliminary points. In this case now before us, in particular, the accuracy of the preliminary point of prescription was debatable seeing that the learned Judges in the Court below disagreed on it. It would have been much better,

1937
28th January
Copland Ag. S.P.J.
and
Khayat J.
LA 5/36
Mamur Awqaf
Northern
District, Acre
v.
Attorney General

therefore, if the Court had heard the whole case and made their finding or findings of fact thereon, when of course it would have been quite possible that the plea of prescription would have been irrelevant. In any case, all the facts would have been before us, and we could then have given a final judgment and the case would have been finished, instead of the present result which is unavoidable.

I agree that there must be a new trial.

Costs to await final judgment.

Khayat J: I am of the opinion that mere registration of the land in dispute as 'Miri' in the Tabu registers is not by itself sufficient justification for dismissing the claim on the ground of prescription, if the Plaintiff is able to prove that the Defendant had admitted that this registration was in fact untrue.

The lower Court should have therefore examined the documents filed by the Plaintiff, and called upon him to prove same, in order to ascertain whether or not they amount to an admission by the Government that the lands in dispute are waqf of the 'untrue' category, and having determined that point to see whether Plaintiff had neglected his rights for a period exceeding the period of prescription laid down for such cases.

I hold, therefore, that the judgment of the lower Court should be quashed and the case remitted to the Land Court to hear the action and give judgment accordingly.

Civil Appeal No. 196 of 1935.

In the Supreme Court sitting as a Court of Appeal.

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

HENRY CATTAN Appellant.

v.

JAMILEH Y. AMA Respondent.

Advocate and client — Agreement between advocate and his client with regard to advocate's remuneration for appearing before Ecclesiastical Court — Agreement in question not within meaning of Section 21 of the Advocates Ordinance.



1937
4th February

Manning S.P.J.
Copland J.
and
Frumkin J.

CA 196/35
Cattan

v.

Ama

The appellant sued the respondent in the Magistrate's Court, Jerusalem (Civil Case No. 545/35) for remuneration due to him under an agreement whereby appellant appeared on behalf of respondent before a religious Court. He succeeded in the Magistrate's Court, but on appeal to the District Court, Jerusalem (Civil Appeal No. 86/35), that Court remitted the case to the Magistrate to consider the issue whether the appellant had done such work as would entitle him to the remuneration in the agreement. Appellant obtained leave to appeal to the Supreme Court on the point of law following, that it is say, "whether or not an agreement made between an advocate and client for fees in respect of proceedings before a Latin Ecclesiastical Court is subject, with reference to the amount of fees, to reduction or control under Section 19 of the Advocates Ordinance, 1922, on the ground it being excessive, or whether such an agreement is outside the operation of the Advocates Ordinance in view of the definition of Civil Court in the said Ordinance as excluding religious Courts and of the other provisions of the said Ordinance."

In dismissing the appeal, the Court of Appeal,

HELD that the agreement between the appellant and the respondent, being concerned with litigation in an Ecclesiastical Court, was not an agreement within the meaning of Section 21 of the Advocates Ordinance.

N. Abcarius for appellant.

Y. Amon for respondent.

Judgment: On the point of law submitted, we decide that the agreement in this case, being concerned with litigation in

1937
4th February
Manning S.P.J.
Copland J.
and
Frumkin J.
CA 196/35
Cattan
v.
Ama

an Ecclesiastical Court, is not an agreement within the meaning of Section 21 of the Advocates Ordinance.

In spite of this ruling, the order of the District Court must stand as there may be other grounds for contesting the payment of the full LP. 90. - agreed on.

Costs to abide the event.

Civil Leave Application No. 5 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

HAYIM ALEXANDER KACHKO Applicant.

v.

AHARON LEVIN Respondent.

Arbitration — Misconduct — Power of Court where misconduct established against an arbitrator or umpire — Arbitration Ordinance, Sections 12 and 13.

1937
12th February
Trusted C.J.
Frumkin J.
and
Khayat J.
CLA 5/37
Kachko
v.
Levin

An award having been given in favour of Levin against Kachko, an application was made to the District Court sitting at Tel Aviv (Civil Case No. 343/36) for the confirmation thereof. The application was opposed by Kachko. The District Court refused to confirm the award, found misconduct on the part of the umpire, and it set aside the award and remitted it to the umpire with certain directions. Having been refused leave to appeal by the District Court, Kachko applied to the Supreme Court for leave to appeal.

In refusing the application, since the judgment of the District Court was in applicant's favour, the Court of Appeal,

HFLD that where misconduct in the technical sense has been found against an arbitrator or umpire, the Court so finding may either set aside the award or remit it, which powers the Court may exercise under Sections 12 and 13 of the Arbitration Ordinance.

P. Goldberg for applicant.

M. Minkovitz for respondent.

Judgment: An application was made to the District Court sitting at Tel Aviv under the Arbitration Ordinance to confirm an award made in an arbitration.

The Court refused to confirm the award and found misconduct on the part of the arbitrators. They therefore set aside the award and went on to hold "We therefore set aside the award, and remit it to the Umpire in order that he may give the Defendant an opportunity of cross-examining the Plaintiff in respect of the statements made and plans produced in his absence, and give a fresh award".

From that judgment the present Applicant, who was the Defendant in the proceedings before the District Court, asks to appeal to this Court by leave under Section 15 (3) of the Arbitration Ordinance.

It is clear according to English Law where misconduct in the technical sense has been found against an arbitrator or an umpire, the Court may either set aside the award or remit it (See Halsbury's Laws of England, Hailsham Edition, Vol. I., p. 676): and it would seem that the same powers may be exercised by the Court under Sections 12 and 13 of the Ordinance.

Unfortunately the judgment of the District Court is not clear, but in our opinion the effect of that judgment is to set aside the award. The present Applicant therefore applies for leave to appeal against a judgment in his own favour and his application is refused, with costs and advocate's fees LP. 3.

High Court No. 31 of 1936.

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

Before: The Chief Justice and Frumkin J.

MEIR CHELOUCHE Petitioner.

v.

1. THE CHIEF EXECUTION OFFICER, JAFFA
2. ALEXANDER KOPPEL Respondents.

Execution proceedings — Delivery of attached goods to two trustees for safe custody — Failure to deliver attached goods to

1937
12th February
Trusted C.J.
Frumkin J.
and
Khayat J.
CLA 5/37
Kachko
v.
Levin

1937
12th February
Trusted C.J.
and
Frumkin J.
HC 31/36
Chelouche
v.
C.E.O. Jaffa
and another

1937
12th February
Trusted C.J.
and
Franklin J.
HC 31/36
Chelouche
v.
C.E.O. Jaffa
and another

Execution Office — Chief Execution Officer held one of trustees responsible for goods and ordered the seizure and sale of said trustee's property — Whether said trustee responsible for whole debt secured by attached goods — Mejelle, Article 647.

In Jaffa Execution File No. 76/35 certain goods belonging to the judgment-debtor of Koppel were attached and delivered to Chelouche and another person. The goods so attached were disposed of, apparently by the judgment-debtor, and on application being made to the Chief Execution Officer by the judgment-creditor, the Chief Execution Officer held Chelouche personally responsible and ordered the seizure and sale of his property. Chelouche thereupon applied for and obtained an order nisi calling upon the Chief Execution Officer of Jaffa to show cause why he (the petitioner) should not be liable only for one half of the value of the goods seized; petitioner's undertaking, together with the other person, being "to keep the attached goods and to deliver them to the Execution Office otherwise he would be responsible for the payment of the debt civilly not criminally." On the return day petitioner argued that the real liability was based upon the responsibility for the payment of the debt, and that in consequence Article 647 of the Mejelle was applicable and therefore he was only responsible for half the debt.

In discharging the rule nisi, the High Court,

HELD (1) that neither Article 647 nor any other article of the Mejelle were applicable to the present case, since the liability was for the goods.

(2) that upon the true construction of the undertaking given the responsibility was several.

S. Gratch for petitioner.

E. Levay for second respondent

Order: This now comes before us as the return to a rule nisi calling upon the Chief Execution Officer of Jaffa to show cause why the Petitioner should not be liable only for one half of the value of certain goods seized.

It seems that the Petitioner was a third party to certain execution proceedings in which he undertook, together with another person, "to keep the attached goods and to deliver them to the Execution Office otherwise he would be responsible for the payment of the debt civilly not criminally".

The order of the Execution Officer was as follows: —

"You have accepted to be third party and responsible for the goods seized, which is also admitted in your application dated 10.12.36.

1937
12th February
Trusted C.J.
and
Franklin J.
HC 31/36
Chelouche
v.
C.E.O. Jaffa
and another

You failed to deliver the goods to the Execution Office when so requested to do and therefore in accordance with Sections 77 and 78 of the Execution Law and failing to deliver the goods seized you are personally responsible and your own property will be seized and sold.

You can appeal to the High Court".

In his application for the rule, the Petitioner stated: —

"In the alternative it is submitted that the petitioner may be held liable only for half of the actual value of the attached property. The Petitioner was a co-custodian of certain property and as such he may be liable only for half of the value of the attached property. There is no provision in law that a co-custodian is jointly and severally liable with the other custodian and in the absence of express provision in law to this effect he may be only liable for half".

It is clear therefore that before the Chief Execution Officer and in the application to this Court the matter turned on the safe custody of the goods.

It is now argued that the real liability is based upon the responsibility for the payment of the debt and that in consequence Article 647 of the Mejelle applies and the Petitioner is only responsible for half the debt.

In our view the question before this Court is as to the liability for the goods, and we are of opinion that that Article of the Mejelle does not apply and that there is no Article of Mejelle applicable.

We, therefore, hold that upon the true construction of the undertaking given the responsibility is several and the rule is in consequence discharged with costs. Advocate's fees LP. 3.

Civil Appeal No. 33 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge and Copland J.

LEA KRAMER Appellant.

v.

- 1. ITZCHAK KIPNIS
- 2. JACOB GUTTERMAN Respondents.

Workmen's Compensation — Workman employed with undertakers for ploughing land by tractors — Work was that of mechanic

1937
17th February
Manning S.P.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

1937
17th February
Manning S.P.J.
and
Copland J.
CA 33/36
Kramer

v.
Kipnis
and another

workman and assistant mechanic — In course of employment workman received a sunstroke — Death ensued — Employment not one of those employments specified in First Schedule to the Workmen's Compensation Ordinance — No compensation payable by undertakers.

One Abraham Kramer, who was employed by the respondents, who were undertakers for ploughing land by tractors, received, in the course of his employment in the fields, a sunstroke which resulted in his death. The question as to the compensation payable was referred to arbitration and the arbitrator gave his award awarding compensation to the appellant, Kramer's widow, but submitted certain questions of law for the decision of the President of the District Court. The points of law were decided by the Relieving President with the result that the award was upset. Kramer's widow appealed to the Supreme Court by leave of the President. The two main arguments were that the President was wrong in deciding that there was no evidence of injury by accident as required by the Workmen's Compensation Ordinance, and that the President was also wrong in deciding that the deceased workman was not engaged in one of the employments specified in the First Schedule to the Ordinance.

In dismissing the appeal, the Court of Appeal,

HELD (1) that an incapacity due to the heat of the sun does not entitle a workman or his dependants to recover compensation unless it is shown that the employment exposed the workman in a special degree to the heat of the sun.

(2) that the employment of ploughing lands by tractors in which the deceased workman was employed was not one of the employments specified in the First Schedule to the Workmen's Compensation Ordinance.

Followed: Brooker v. Borthwick and Sons (1933, W.N. 208)

Referred to: Dennis v. A.J. White and Co. (1917) A.C. 479.

I. Bar-Shira for appellant.

M. Seligman for first respondent — Second respondent did not appear.

Judgment: 1. The facts found by the arbitrator are as follows. One Abraham Kramer was employed by the respondents, who were undertakers for ploughing lands by tractors. Kramer's work was that of mechanic workman and assistant mechanic. On the 28th July 1933 while in the course of his employment in the fields he received a sunstroke. He was taken home and from there to hospital, where he died on the 2nd August 1933.

1937
17th February
Manning S.P.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

The causes of his death were odemia cerebri and urenia, which were a result of the sunstroke. A person working in the fields in July is very likely to receive a sunstroke.

2. The arbitrator made an award in favour of Kramer's widow under the Workmen's Compensation Ordinance, but submitted certain questions of law for the decision of the President of the District Court. These points were decided by the learned President, with the result that the award was upset, but the President granted leave to appeal to this Court.

3. Mr. Bar-Shira, on behalf of the widow, urged that the learned President was wrong in deciding that "there was no evidence of injury by accident as required by the Ordinance." It has been agreed that the learned President meant by these words, "no evidence of injury by accident arising out of the employment". "Injury by accident" is defined in the Ordinance as follows:

"'injury by accident' means any incapacity or personal injury resulting to the workman in the course of his employment from any unlooked-for mishap or occurrence but does not include any injury which is self-inflicted or any injury produced by disease."

4. I think there can be no doubt that "sunstroke" is an "unlooked-for mishap or occurrence." Mr. Seligman, for the first respondent, (the second respondent did not appear) made no point of the fact that the actual causes of death were odemia cerebri and urenia — he accepted the fact, as found by the arbitrator, that the real cause of the death was sunstroke. Neither did he contest that sunstroke, causing incapacity, was an injury by accident. He devoted his main argument to contending that the injury by accident did not arise out of the employment.

5. The principle to be adopted in cases like this was discussed by the Judicial Committee of the Privy Council in the case of Brooker v. Borthwick and Sons (1933, W.N. 208). That case arose out of an accident due to a wall falling during the New Zealand Earthquake of 1931. Lord Atkin, in delivering the judgment of the Judicial Committee, said:

"The accident must be connected with the employment; must arise 'out of' it. If a workman was injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself had no kind of connection with the employment, he could not recover unless he could sufficiently associate such injury with his employment. That he could do if he could show that the employment exposed him in a special degree to suffering such an injury."

1937
17th February
Manning S.P.J.
and
Copland J.
CA 33/36
Kramer
v.
Kipnis
and another

6. This must be taken to be an authoritative statement of the law. An incapacity due to the heat of the sun does not entitle a workman or his dependants to recover compensation unless it is shown that the employment exposed the workman in a special degree to the heat of the sun. The case is differentiated from street accidents where it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under the like conditions (See *Dennis v. A.J. White and Co.* 1917, A.C. 479). This distinction shows that it is not merely because a workman's employment necessitates his working in the fields in the heat of the sun that he is entitled to compensation if he becomes incapacitated by sunstroke. A great many workmen have to work in the open air, they are all equally exposed to the risk of sunstroke — and, as I understand the decision in the *Brooker* case (*supra*), if one of them gets sunstroke, he must, in order to recover compensation, show that his employment in particular exposed him to that risk in a special degree. All that the arbitrator found in this case was "that it is very likely to receive in the end of July a sunstroke in the field.", but he made no finding that the deceased's employment exposed him to any greater risk than other workers in the fields. In my opinion, the learned President was right in the conclusion at which he arrived.

7. Mr. Bar-Shira's second argument was that the learned President was wrong in deciding that the deceased was not engaged in one of the employments specified in the First Schedule to the Ordinance. By Section 2(2) of the Ordinance, the Ordinance applies only to employment by undertakers in any of the employments specified in that schedule. It has been agreed that the only employment applicable in this case is No. 2. viz: "Transport by railway and motor vehicles and works connected therewith." The important word is "transport", and if one turns to the definition of undertaker one finds that it means "in the case of transport operations . . . the person undertaking the conveyance of the goods or persons." This clearly shows that "transport" in the First Schedule means "conveyance of goods or persons". It cannot have any reference to a person employed in a tractor for the purpose of ploughing land. The learned President was right also in his decision on this point.

8. The appeal is dismissed with costs to include LP. 10 advocates' fees.

Civil Appeal No. 194 of 1935.

In the Supreme Court sitting as a Court of Appeal.

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

MUNICIPALITY OF JERUSALEM Appellant.

v.

SHIMON MIZRAHI Respondent.

Ottoman Laws — Ottoman Law promulgated in 1915 declared to be in force in Palestine by Ordinance — High Commissioner can adopt such course — Palestine Order in Council, 1922, Article 46.

In Civil Case No. 41/33 of the Magistrate's Court of Jerusalem appellant claimed from respondent certain rates. The British Magistrate dismissed the action on the ground that the appellant had no jurisdiction over the quarter in which respondent was residing. An appeal was made to the District Court, Jerusalem, (Civil Appeal No. 189/33). The District Court reversed the British Magistrate on the ground of jurisdiction, but affirmed his judgment on other grounds, and it further held the Ottoman Municipal Tax Law which came into force in 1915 and which was declared to be in force in Palestine by the Ottoman Municipal Tax Law Validation Ordinance, 1933, to be ultra vires as it was not so declared to be in force by public notice. An appeal to the Supreme Court was made by leave.

In allowing the appeal and setting aside the judgments of both Courts below, the Court of Appeal,

HELD that if it is necessary to enact that a certain Ottoman Law shall be in force in Palestine, the High Commissioner is not tied down to the procedure by public notice under Article 46 of the Palestine Order in Council, which procedure is merely intended to do away with the necessity for an Ordinance, and by virtue of Article 17(1) of the Order in Council, which empowers him to promulgate such ordinances as may be necessary for the peace, order and good government of Palestine, the High Commissioner may by ordinance declare certain Ottoman Laws to be in force in Palestine.

I. *Olshan* for appellant.

B. *Ben Aharon* for respondent.

Judgment: 1. The respondent was assessed to pay rates to the Municipality of Jerusalem, hereinafter referred to as the Municipality, for the year 1930. He refused to pay on the ground

1937
24th February
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 194/35
Municipality of
Jerusalem
v.
Mizrahi

1937
24th February
Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 194/35
Municipality of
Jerusalem

v.
Mizrahi

that the Makhnaim Quarter, in which he lived, was not within the municipal area of Jerusalem. On being threatened with execution proceedings he paid under protest, and took proceedings against the Municipality for the recovery of the amount paid. The Chief Magistrate decided that in 1930 the Municipality had no jurisdiction over the Makhnaim Quarter, and gave judgment for the respondent.

2. Leave was given to appeal to the District Court. That Court reversed the finding of the Chief Magistrate as to the jurisdiction of the Appellant over the Makhnaim Quarter, but affirmed his decision on other grounds. It then gave leave to appeal to this Court on two points of law which are as follows: —

“1. Were the appellants empowered in law in the year 1930 to demand and collect the Municipal Tax known as the Municipal House Rate Tax?”

2. If they were not so empowered, do the provisions of Section 3 of the Ottoman Municipal Tax Law Validation Ordinance 1933, estop the respondent from recovering the amount paid to the appellants?”

3. Sections 2 and 4 of the Ottoman Municipal Tax Law Validation Ordinance, 1933, hereinafter referred to as the Ordinance, are as follows: —

“2. Save as provided in Section 4 of this Ordinance, the Ottoman Municipal Tax Law of the twenty-sixth day of February, 1330, shall be deemed to be and always to have been validly applied in Palestine and of full effect except in so far as any part thereof has been expressly or impliedly repealed by any Ordinance.

4. Any Municipal house rate assessed by or on behalf of any Municipal Council under the Ottoman Municipal Tax Law of the twenty-sixth day of February, 1330, and charged upon any occupier of immovable property shall be deemed to be and always to have been lawfully assessed, imposed and charged, notwithstanding any provision in such Law contained and such rate shall continue to be imposed and charged upon such occupier”.

4. It is interesting to note that this Ordinance came into force after the decision of the Chief Magistrate had been delivered. It was, however, in force at the time of the decision of the District Court and was considered by it. That Court held that Section 2 was ultra vires, and that in consequence Section 4 was ineffective, as the statutory law on which it is based was non-existent.

1937
24th February
Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 194/35
Municipality of
Jerusalem

v.
Mizrahi

5. The grounds on which the District Court proceeded were as follows. Article 46 of the Palestine Order-in-Council enacts that the Ottoman Law operative in Palestine is to be that law as it existed in Palestine on the 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice. The Ottoman Municipal Tax Law referred to in Section 2 of the Ordinance came into force in 1915. It was declared to be in force by an Ordinance and not by a Public Notice. It is therefore ultra vires.

6. I cannot agree with this reasoning. Under Section 17 (1) of the Order-in-Council, as amended by the Palestine (Amendment) Order-in-Council, 1923, the High Commissioner is empowered to promulgate such Ordinances as may be necessary for the peace, order and good government of Palestine. If it is necessary to enact that a certain Ottoman Law shall be in force, the High Commissioner is not tied down to the procedure by Public Notice. That procedure is merely intended to do away with the necessity for an Ordinance, but it does not in any way detract from the powers of the High Commissioner to promulgate Ordinances for the purposes mentioned.

7. In the present case an Ordinance was necessary as the provisions of the relevant Ottoman Law were to be deemed to have been in force as from the date of their enactment. On this point I have no hesitation in deciding that an Ottoman Law passed after the 1st November, 1914, may be brought into force either by a Public Notice or by an Ordinance. I do not agree that Section 2 of the Ordinance is ultra vires.

8. Section 2 of the Ordinance enacts that the Ottoman Municipal Tax Law of 1330 (i.e. 1915) shall be deemed to be and always to have been validly applied in Palestine. The effect of this is that this Ottoman Law was in force in Palestine in 1930, and according to Section 4 of the Ordinance the municipal house rate assessed under that law must be deemed to have been lawfully assessed, imposed and charged. The result is that the Municipality was empowered in law to demand and collect the Municipal House Rate in 1930.

9. The first question of law should be answered in the affirmative and, this being so, it is unnecessary to answer the second question.

10. In my opinion the judgments of the District Court and the Chief Magistrate should be set aside and the appeal should be allowed with costs to include LP. 10.- advocates' fees.

In the Supreme Court sitting as a Court of Appeal.

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

BANCO DI ROMA Appellant.

v.

- 1. THE PALESTINE ZINC PRODUCTS COMPANY "DLEE"
- 2. EMIL LEOPOLD MESTEL
- 3. CHINDA MESTEL Respondents.

1937
26th February
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 107/36
Banco di Roma
v.
Palestine Zinc
Products
and others

Bankruptcy — Partnership — Application for declaration of a partnership and two individuals bankrupt — Declaration of one of individuals bankrupt — Refusal to declare partnership bankrupt — Whether partnership can be declared bankrupt — Partnership Ordinance, Sections 19, 69, and 72.

The appellant bank obtained on 28th April, 1936, a judgment against the respondents jointly and severally for the sum of LP 27,400. As the judgment debt was not satisfied, the appellant bank applied to the District Court of Jaffa sitting at Tel Aviv (Bankruptcy Case No. 311/36) to declare the respondents bankrupt. In a preliminary ruling the District Court held that it could not declare bankrupt a partnership in the partnership's name and refused to declare bankrupt the first respondent. In its final judgment the District Court declared bankrupt the second respondent. The judgment creditor appealed.

In setting aside the ruling of the District Court which concerned the refusal to declare bankrupt the first respondent and remitting the case to the District Court to deal with the application for the declaration of the bankruptcy of the second respondent, the judgment declaring the bankruptcy of the second respondent remained as it was, the Court of Appeal,

HELD that the District Court was wrong in holding that it could not declare bankrupt a partnership in the partnership name, because Section 19 of the Partnership Ordinance clearly contemplated the bankruptcy of a partnership.

M. Gorodissky for appellant.

No appearance by respondents.

Judgment: The Banco di Roma as the holders of a judgment proceeded against certain persons in the District Court of Jaffa asking *inter alia* for a declaration of bankruptcy.

The Court made an order against some of the Defendants, but in a preliminary ruling held that they did not consider that they could declare bankrupt a partnership in the partnership's name, and in consequence refused to declare bankrupt the first Defendants — a partnership described as "Dlee".

In our view this was not a satisfactory way of dealing with the matter; it would have been better had the material facts been found by the Court and the points raised disposed of in the judgment.

In this Court the appeal against the second and third Respondents was withdrawn, and Mr. Gorodissky who appeared for the Appellants proceeded only against the first Respondents "The Palestine Zinc Products Co. 'Dlee'" — the partnership which the District Court had refused to declare bankrupt. This party was not represented, but we are satisfied that they were properly served (with a notice of appeal).

As we have indicated, the facts were not adequately found by the Court below, but it appears from the Palestine Gazette of 22nd February, 1934, p.150, that a partnership known as "Dlee" was registered to manufacture pails, bath stoves and other metal objects.

The proceedings in the District Court took place before the promulgation of the Bankruptcy Ordinance 1936 which came into operation on the 15th August, 1936.

The question therefore is, if prior to the commencement of the Bankruptcy Ordinance, 1936, the provisions of the Ottoman Commercial Code as to bankruptcy, which clearly contemplated the bankruptcy of a partnership, applied to a partnership registered under the Partnership Ordinance (Drayton, Cap. 103).

Section 76 (2) of the Partnership Ordinance 1930, which was omitted from the Revised Edition of the Laws as having

1937
26th February
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 107/36
Banco di Roma
v.
Palestine Zinc
Products
and others

1937
26th February
Trusted C.J.
Frumkin J.
and
Khayat J.

CA 107/36
Banco di Roma
v.
Palestine Zinc
Products
and others

had its effect, provided that the provisions of Articles 10 to 19, 24, 26, 30, 32, 35 and 52 inclusive of the Ottoman Commercial Code should cease to have effect in Palestine. Section 69 of the Partnership Ordinance provides that the provisions of that Ordinance shall apply to every partnership registered under it to the exclusion of any provisions of the Ottoman Civil Code.

Section 19 of the Ordinance clearly contemplates the bankruptcy of a partnership.

It may be noticed that Section 2(2) of the Partnership Ordinance provides:

"This Ordinance shall be interpreted by reference to the law of England relating to partnerships, and the English rules of equity and common law applicable to partnership shall apply in Palestine, save so far as they are inconsistent with the express provisions of this Ordinance".

In England a partnership cannot be declared bankrupt in the partnership name, but there is no provision in the English Law similar to Section 19 of the Ordinance. Moreover, unlike a partnership under English Law, by Section 61 a partnership under the Ordinance is a legal person and may sue and be sued in the name of the firm.

We are of opinion, therefore, that the District Court was wrong in holding that, in so far as Respondent No. 1 was concerned, it could not declare bankrupt a partnership in the partnership name.

The ruling of the Court below as regards the 1st Respondent is therefore set aside and the case remitted to the Court below to deal with the application for the declaration of the bankruptcy of the Respondent firm.

The judgment declaring the bankruptcy of the second Respondent will stand.

Respondent to pay costs to include LP. 3.-advocate's fees.

High Court No. 84 of 1936.

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

Before: The Chief Justice and Frumkin J.

THE NOXZEMA CHEMICAL COMPANY,
a Corporation of the State
of Maryland, U.S.A. Petitioner.

v.

ATALLAH SALEM BORDCOSH Respondent.

THE REGISTRAR OF TRADE MARKS Third Party.

1937
26th February
Trusted C.J.
and
Frumkin J.

HC 84/36
Noxzema Chemical
Company

v.
Bordcosh
and another

Trade Marks — Application for registration as trade mark of word "Noxzema" — Word "Noxzema" already registered in England since 1923 — American Company formed in 1917 acquired trade mark "Noxzema" which was registered in the United States of America in 1916 — Person applying for registration has his preparation under name of "Noxzema" sold in Palestine since 1923 — American Company sent only one consignment of its preparation to Palestine in 1931 — Whether person applying for registration in Palestine entitled to have the trade mark "Noxzema" registered — Trade Marks Ordinance, Sections 8 and 13.

The respondent applied to have registered as a trade mark the word "Noxzema" and the application was opposed by the petitioner company. The facts, in so far as they are relevant, appear in the order reported hereinafter.

In ordering that the respondent was entitled to have registered as a trade mark the word "Noxzema", the High Court,

HELD that the petitioner had failed to satisfy the High Court that the registration of the mark "Noxzema" by the respondent was calculated to deceive the public or to encourage unfair trade competition. The trade mark which the respondent sought to be registered did not contain the name of the petitioner company but only a part of it, and it was not therefore contrary to Section 8(h) of the Trade Marks Ordinance.

Approved: CA 15/29, 1 P.L.R. 453.

Pianotist Co. Ltd.'s Application, 23 R.P.C. 774.

1937

26th February

Trusted C.J.
and
Frumkin J.

HC 84/36

Noxzema Chemical
Company

v.

Bordcosh
and another

M. Smoira for petitioner.

E.D. Goitein for respondent.

Junior Government Advocate (E. Salant) for third party.

Order: This is an application by a company, known as The Noxzema Chemical Company registered in America (to which I will refer as the American Company), under Section 13 of the Trade Marks Ordinance (Drayton, Cap. 144) raising an objection to the registration of a trade mark, an application for the registration of which was advertised in the Gazette of 19th March, 1936, under No. XLVIII.

This application for registration was in respect of a chemical preparation for external use on the human body, as an ointment for healing eczema, sores, burns and skin eruptions, and was made in the name of Atallah Salem Bordcosh of Jaffa (to whom I will refer as Bordcosh), and the trade mark which it was sought to register was the word "NOXZEMA."

The facts are as follows: —

Bordcosh together with two other persons, trading as The Emsee Company in Liverpool, registered as a trade mark the word "Noxzema" in respect of chemical substances prepared for use as a medical remedy in England in 1923.

In 1926 Bordcosh paid out his partners and returned to Jaffa bringing his stock with him and continued to carry on business there, i.e. in Jaffa.

In July, 1935, the Controller General and Registrar in England, upon the application of the American Company, removed the mark "Noxzema" from the English registers on the ground of non-user.

Bordcosh in his affidavit says he invented a remedy for Eczema known as Noxzema and that he also invented that name and he swears that he has continually sold this preparation in Palestine since 1923. This latter statement is supported on affidavit of two retail chemists.

As I have already stated, Bordcosh made an application in 1936 to register the trade mark in Palestine.

On September 16th, 1936, the opposition to this registration was filed by the American Company.

The American Company was formed in 1917 and acquired the trade mark "Noxzema" which has been registered in the United States of America in 1916 in connection with skin cream. It appears that the American Company have registered this mark at various times and in various countries including Great Britain, France, Italy, Spain, Holland, Canada, Union of South Africa and Cuba, and in an affidavit it has been sworn by the Vice-President of the American Company as follows: —

"3. Noxzema Greaseless Skin Cream and Noxzema Skin Soap was delivered to the Bozen Hygiene Drug Company Tel Aviv, Allenby 38, Palestine, by shipment from the United States on January 8th, 1931, and was sold by them in Palestine.

5. The trade mark is now used in foreign countries; in Canada where hundreds of thousands of dollars' worth of merchandise has been sold and in the United States of America where at the present time between one and two million dollars' worth of merchandise are sold annually."

Section 13 (2) of the Trade Marks Ordinance provides that the notice of opposition to the Registrar of Trade Marks shall include a statement of the grounds of opposition and Section 8 of the Ordinance sets out various prohibitions against registration.

It is necessary to look at the notice, therefore, to see the grounds alleged. They are that the American Company is the true proprietor of the trade mark "Noxzema" which also forms part of their business name and the grounds then go to set out the facts upon which reliance is placed.

Dr. Smoira, on behalf of the American Company, relied firstly upon Section 8 (d) of the Trade Marks Ordinance which provides: —

"marks which are or may be injurious to public order or morality or which are calculated to deceive the public; or marks which encourage unfair trade competition or contain false indications of origin."

1937

26th February

Trusted C.J.
and
Frumkin J.

HC 84/36

Noxzema Chemical
Company

v.

Bordcosh
and another

1937
26th February

Trusted C.J.
and
Frumkin J.

HC 84/36
Noxzema Chemical
Company

v.

Bordcosh
and another

Objection was taken by the Respondent on the ground that the notice of opposition did not contain an express reference to this provision, but we are of opinion that the notice is wide enough to permit of its being invoked.

It is, however, most desirable that applications in opposition under Section 13 of the Ordinance should state with particularity the grounds of the opposition.

This Court, in the case of *George Schicht Altiengesellschaft v. Israel Brikstein*, Civil Appeal No. 15/29 (P.L.R. 1. p. 453), in considering whether a mark was calculated to deceive, held that regard might be had to the fact that a mark was registered outside Palestine and in the judgment at page 454 it is stated: —

“That there are persons in Palestine who are acquainted with the Applicant's Marks and are thus liable to be deceived, cannot be contested, in view of the fact that there are now in the country many thousands of persons who, until recently, were living in countries in which the Applicant's Trade Mark is registered and its goods are on sale.”

As a proposition of law, I am not prepared to dissent from that conclusion, and it seems to me that this principle can be applied with greater force to a mark which is calculated to encourage unfair trade competition; for example it would be hard to argue that a trade mark which consisted of the words “Cadbury” or “Lindt” alone, or in combination with other words used in this country, by persons not authorized by Cadburys or Lindts, in connection with chocolates or sweetmeats would not be calculated to deceive the public or encourage unfair trade competition.

Parker J., in *Pianotist Co. Ltd.'s Application*, 23 R.P.C. 774, which is quoted in *Kerly on Trade Marks*, 1923 Edition, at page 267, laid down the following test: —

“You must take the two words. You must judge of them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider

what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion — that is to say, not necessarily that one man will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public which will lead to confusion in the goods — then you may refuse the registration, or rather you must refuse the registration in that case.”

In my judgment, the question is one of fact to be decided by this Court upon such evidence as is available in the light of tests such as are indicated by Parker J.

In this case the matter is not easy. We have very little information as to the nature and the extent of the business carried on by the American Company except that one consignment of Noxzema Greaseless Skin Cream and Noxzema Skin Soap reached this country in 1931, and that a considerable amount of merchandise has been sold in Canada and in the United States of America, but we do not know the nature of that merchandise and to what extent, if at all, it is similar to Bordcosh's goods. On the other hand, we have evidence that Bordcosh's ointment, under the name of Noxzema, has been sold in Palestine since 1923.

In my judgment, therefore, the applicants have failed to satisfy us that the registration of the mark Noxzema by Bordcosh is calculated to deceive the public or to encourage unfair trade competition.

Dr. Smoira also relied on Section 8(h) of the Ordinance which provides: —

“marks which are or contain the portrait, name or trade name of a person, or the name of a body corporate or an association, unless the consent of the person or persons concerned has been obtained.”

Whether a trade mark contains a trade name is a question of fact. In this case the trade name of the American Company is the Noxzema Chemical Company. The mark which it is sought

1937
26th February

Trusted C.J.
and
Frumkin J.

HC 84/36
Noxzema Chemical
Company

v.

Bordcosh
and another

1937
26th February

Trusted C.J.
and
Frumkin J.

HC 84/36
Noxzema Chemical
Company

to register does not contain that name but only a part of it. That being so, in my judgment, it is not contrary to subsection (h) of Section 8 of the Ordinance, and the mark must be considered upon the grounds which I have already discussed, i. e. Is it calculated to deceive or does it encourage unfair competition?

In my judgment this application should be dismissed with costs. Advocate's fees LP. 4.

v.
Bordeosh
and another

Civil Appeal No. 2 of 1936.



In the Supreme Court sitting as a Court of Appeal.

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

- 1. SALEH ZACHARIA
- 2. JALIL HANNA DAWID Appellants.

- 1. AZIZEH, WIDOW OF THE LATE
ANTON HANNA DAWID,
ON BEHALF OF HIS ESTATE.

- 2. JIRIES HANNA DAWID Respondents.

Appeal — Arbitration — Application to set aside award — Refusal of application — Application for leave to appeal made five days after delivery of judgment refusing application to set aside award — Grant of leave to appeal — Filing of grounds of appeal twenty-eight days after grant of leave to appeal — Whether appeal in time — Arbitration Ordinance, Section 15 (2).

A dispute which arose between appellants and respondents and which concerned a claim for LP. 300 made by appellants against respondents was referred to arbitration. The arbitrator dismissed appellants' claim. Appellants made an application to the District Court of Jerusalem for setting aside the award but the District Court refused the application. The judgment of the District Court refusing the application to set aside was given on 31st October, 1935. Application for leave to appeal to the Supreme Court was filed on 5th November, 1935, the grant of leave was notified on the 13th December, 1935, and the appeal was filed on the 10th January, 1936. At the hearing of the appeal the point was taken that there was no appeal proper before the Court, because a period of more than thirty days, after deducting the period between the date on which the application for leave was filed and the date on which leave was notified, had already elapsed, and because the appellants did not show due diligence in prosecuting their appeal.

In dismissing the appeal, the Court of Appeal,

HELD that on the authority of Civil Appeal No. 18/33 and Civil Appeal No. 126/34 the appeal was three days out of time, and on the authority of Civil Appeal No. 33/36 the appellants, in filing their appeal twenty-eight days after the notification of the grant of leave, did not show due diligence in prosecuting it.

1937
8th March
Copland J.
Khayat J.
and
Abdulhadi J.
CA 2/36
Zacharia
and another
v.
Dawid
and another

1937
8th March
Copland J.
Khayat J.
and
Abdulhadi J.
CA 2/36
Zacharia
and another

Followed: CA 18/33, 2 P.L.R. 45.
CA 126/34.
CA 33/36, 4 P.L.R. 10

I. Olshan for appellants.

I. Hazou for respondents.

v.
Dawid
and another

Judgment: This is an appeal by way of leave granted on 4th December, 1935, against a judgment of the District Court, delivered on the 31st day of October, 1935, whereby an application under Section 15 (2) of the Arbitration Ordinance 1926, was dismissed.

It has already been decided by this Court, in CA 126/34, following CA 18/33, that the period in such appeals, from the date of the judgment appealed against until the time the grounds of appeal are filed, but deducting the period between the date the application for leave to appeal is submitted and the date of the notification of the order granting such leave, must not exceed thirty days.

In a later judgment of this Court, CA 33/36, it was held that it would be unfair to apply Art. 181 of the Code of Civil Procedure in such cases where leave to appeal is required, and that the only question to be considered is whether the Appellant showed due diligence in prosecuting his appeal, once leave to appeal was granted.

The present appeal fails on the authority of either of the above precedents, for judgment in this case as stated above was delivered on 31.10.1935 and application for leave to appeal was filed on 5.11.35; leave was notified on 13.12.35, and the appeal itself was not submitted until the 10th of January, 1936.

Thus, according to the first precedent, it is three days out of time; and we hold that in waiting for twenty-eight days before they put in their grounds of appeal, the Appellants did not in fact display such diligence as is required by the second precedent, alluded to above.

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

Civil Appeal No. 4 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

ISMAIL ALI EL-ABSI

Appellant.

v.

YONINA SHLANK

Respondent.

Evidence, Oral — Usurious interest — Oral evidence permissible to prove usurious interest — Usurious Loans Ordinance, 1934, Section 3.

1937

9th March

Manning S.P.J.
Frumkin J.

and
Khayat J.

CA 4/36

Abssi

v.

Shlank

In an action in the District Court of Jaffa by the respondent against the appellant based on a contract for sale of land between the parties, whereby respondent, relying on a breach of non-performance on the part of appellant, asked for the recovery of LP. 155 paid in advance on account of the purchase price and LP. 200 liquidated damages, the appellant alleged that the sums mentioned in the contract and claimed by the respondent were usurious interest, and wished to establish that fact by oral evidence; his allegation being that the contract in question was merely a document for excessive interest and not a contract for sale of land. The District Court held that the contents of a document could only be rebutted by a document and that oral evidence was not permissible to rebut the contents of the contract. The appellant, against whom judgment was given for the sum mentioned in the contract, appealed.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case to it to hear such witnesses as appellant may produce in support of his allegation of usurious interest and such witnesses, if any, as the respondent may wish to call in rebuttal, and to decide the case according to law, the Court of Appeal,

HELD that when an issue alleging usurious interest is put forward, oral evidence may be allowed to show what was the real agreement between the parties.

E. Georges Elia for appellant.

No appearance by respondent.

Judgment: The Court below misdirected itself on a question of law. When an issue alleging usurious interest is put forward, oral evidence may be allowed to show what was the real agreement between the parties.

1937

9th March

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 4/36

Absi

v.

Shlank

We therefore set aside the judgment of the Court below and remit the case to it with directions to hear such witnesses as the Appellant may produce in support of his allegation of usurious interest and such witnesses, if any, as the Respondent may wish to call in rebuttal, and to decide the case then according to law.

Costs to abide event.

High Court No. 5 of 1937.

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

Before: Copland J. and Frumkin J.

JOSEPH ELYASHAR

Petitioner.

v.

1. PRESIDENT DISTRICT COURT, JERUSALEM
2. CHIEF EXECUTION OFFICER, JERUSALEM
3. MOSHE OXHORN Respondents.

Mortgage — Interest — Chief Execution Officer — Recital in mortgage deed provided for payment of 7% interest as from 1st April 1936 — Mortgage debt fell due on 1st January, 1938 — Special condition in mortgage deed provided for payment of 9% interest if debt not paid at maturity — Mortgage debt payable by monthly instalments of LP. 100 — Failure to pay two consecutive instalments made the whole mortgage debt fall due — Failure to pay — Application for sale of mortgaged property — Rate at which interest is payable after the default — Chief Execution Officer has no power to order payment of a mortgage debt by instalments.

Oxhorn executed a mortgage in favour of Elyashar and the mortgage deed was registered in the Land Registry. The recital to the mortgage deed provided that the mortgage debt was to be paid on the 1st January, 1938, plus interest at the rate of 7% payable monthly as from the 1st April, 1936. One of the special conditions attached to the mortgage deed showed the manner in which the mortgage debt was to be paid, i.e. in monthly instalments of LP. 100 plus interest at the rate of 7% commencing from 1st April, 1936. Another condition was in the following terms: "In case the borrower fails to pay the interest and fails to pay

1937

12th March

Copland J.
and
Frumkin J.

HC 5/37

Elyashar

v.

P.D.C. Jerusalem
and others

the debt after maturity, the borrower will have to pay interest at the rate of 9% for the whole time until full payment without the necessity for sending a notice or protest". A further condition was in the terms following: — "If the borrower shall fail to pay two consecutive instalments in time the payment of the whole mortgage money shall fall due." The mortgagor failed to pay the instalments that fell due on 1.6.36 and 1.7.36, and the mortgagee applied for the sale of the mortgaged property. The Chief Execution Officer held that interest at the rate of 7% was only payable from 1st April, 1936, and not from the date the mortgage was executed, namely 25th October, 1935, that interest at the rate of 7% was only payable and not 9% because the latter rate could only be charged after 1st January, 1938, and that the amount paid by the mortgagor into the credit of the mortgagee in a certain bank must be deducted from the amount due for the instalments and interest. He further gave the mortgagor a period of little more than three months to pay. The mortgagee applied for and obtained an order nisi calling upon the first and second respondents to show cause why the order of the first respondent in Jerusalem Execution Case File No. 2604/36 should not be set aside.

In making absolute the rule nisi, the High Court,

- HELD (1) that interest at the rate of 7% was payable as from 1st April, 1936, only.
- (2) that the date of maturity of a debt is the date on which the debt becomes due, and in this particular case, by the operation of the default clause in one of the special conditions attached to the mortgage deed, the mortgage debt became due on the 2nd July, 1936, and therefore interest at the rate of 9% became payable as and from the 2nd July, 1936.
- (3) that a Chief Execution Officer has no power to order payment of a mortgage debt by instalments; and it follows that a mortgagee cannot be compelled against his will to accept payment of such a debt by instalments.

Followed: HC 50/32, 1 P.L.R., 764.

S. Mizrahi and I. Olshan for petitioner.

N. Levy for third respondent.

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

1937

12th March

Copland J.
and
Frumkin J.

HC 5/37

Elyashar

v.

P.D.C. Jerusalem
and others

1937
12th March
Copland J.
and
Frumkin J.
HC 5/37
Elyashar
v.
P.D.C. Jerusalem
and others

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

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

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

The second point is the meaning to be attached to the phrase "after maturity". The Chief Execution Officer held that interest at 9%, which is payable in case the borrower fails to pay the interest and fails to pay the debt after maturity, could not be charged until after 1st January, 1938, which is the date on which the mortgage sum is expressed to be due. In this, we think, he is wrong. The date of maturity of a debt is the date on which the debt becomes due. By the operation of the usual default clause, this debt became due in whole on the 2nd July, 1936. Interest at 9% is therefore payable as and from this latter date.

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

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

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

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

Land Appeal No. 43 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge and Plunkett Ag. J.

CLAIRE CALMY Appellant.

v.

HERAKLIA POLITIS Respondent.

Immovable property — Sale of land — Delivery of land sold not an essential condition of the sale — Mejelle, Article 262.

Prescription — In calculating period of prescription date of commencement of action to be taken into account and not date when the hearing of the action before the Court began — Period to be calculated in calendar years — Mejelle, Article 1666.

Immovable property — Boundaries — Claim to land — Boundaries not set out in statement of claim — Title deed and map attached to statement of claim — Proper compliance with the law — Mejelle, Article 1623 — Land Courts Ordinance, Section 3(c).

Evidence — Plan produced in evidence found to be inaccurate — Party producing plan not debarred from adducing other evidence.

Bona fides — Plea of purchase of land in good faith — Facts of case entirely against such a plea — Only remedy to rely upon is prescription.

The respondent, whose land was, owing to a mistake that occurred in partition proceedings between appellant and the Government of Palestine, included into the share of either the appellant or the Government of Palestine, or part of that land fell to appellant and the other to the Government of Palestine, commenced proceedings in the Land Court of Jaffa in respect of her land. The Land Court, from the voluminous evidence adduced, both oral and documentary, found in favour of respondent and demarcated her land. The Government of Palestine accepted the decision of the Land Court, but appellant appealed to the Supreme Court (Land Appeal No. 9/36). The Supreme Court remitted the case to the Land Court. The Land Court complied with the order of the Supreme Court, and then delivered a fresh judgment, adhering to its original decision in every respect. The appellant appealed.

In dismissing the appeal, the Court of Appeal.

1937
19th March
Manning S.P.J.
and
Plunkett Ag.J.
LA 43/36
Calmy
v.
Politis

1937

19th March

Manning S.P.J.
and
Plunkett Ag.J.

LA 43/36

Calmy

Politis

HELD (1) that the delivery of the land sold by its original owner to the respondent, the purchaser, was not an essential condition of sale, vide Article 262 of the Mejelle.

(2) that the period of limitation is calculated from the date it commences to run up to the date when the action is commenced in the Courts and not up to the date when the hearing before the Court begins; such period of fifteen years as provided under Article 1666 of the Mejelle is to be computed in calendar years and not in lunar years.

(3) that the respondent, by attaching to her statement of claim a copy of the original kushan showing the registered title of her predecessor in title and a copy of the map showing an area marked out as the land of her predecessor in title, did comply substantially with the requirements of Article 1623 of the Mejelle, the provisions of which must be read in the light of the provisions of Section 3 of the Land Courts Ordinance.

(4) that the rejection of the map produced by the respondent, which the Court below found to be inaccurate, did not debar the respondent from adducing other evidence to help her in proving the approximate situation of the land.

(5) that the appellant was never a purchaser in good faith because she never became the owner of the land claimed by the respondent, and if the appellant occupied any part of the land before 1925, the year in which the partition proceedings took place, she was simply encroaching on the rights of another and appellant could defend her right to occupy only on the ground of prescription.

The relevant facts and grounds of appeal are sufficiently set out in the judgment.

D. Moyal for appellant.

M. Eliash for respondent.

Judgment: 1. The facts giving rise to this appeal are as follows. In 1901 one Moyal and one Esteriades were joint owners of a piece of land in the vicinity of the town of Jaffa. In that year they sold a part of the land, 11850 pics to one Franghia, and 12150 pics to the Greek Patriarch. They continued to be registered owners of the remaining part of the land until the death of Esteriades. He died without heirs and his undivided share passed to the Government of Palestine. After this Moyal sold his share to his son David, and the latter had the property registered in the name of his wife, now Claire Calmy, the appellant in these proceedings.

2. Franghia had the portion he bought registered in his name and shortly afterwards left Palestine for Constantinople. In 1913, having heard that certain of his boundary marks had been obliterated, he returned to Jaffa and had fresh boundary marks placed at the four corners of his land. He then returned to Constantinople. In 1917 he sold the land to his daughter, now Mrs. Politis the respondent in the present proceedings.

3. The position in 1917 was therefore as follows. Of the original land owned by Moyal and Esteriades in 1901, the Greek Patriarch was the registered owner of one small part, the respondent was the registered owner of another small part, and the rest was held in undivided ownership by the appellant and the Government of Palestine. In 1925 the Government made an application for partition of this land between itself and the appellant. The Government produced a map of the land (Exhibit No. 1 in these proceedings) and this map clearly showed a rectangular piece marked "the land of Franghia." This was obviously intended to represent the piece of land purchased by Franghia in 1901 and sold by him to the respondent in 1917. Owing to some mistake this piece of land was included by the Court in the land to be partitioned. The land was partitioned, part went to the Government and part to the appellant. The result was that the land belonging to the respondent fell into the share allotted either to the Government or to the appellant, or part of it to one and part to another.

4. In 1926 the respondent commenced an action for the recovery of her land in the Land Court of Jaffa. She made the appellant and the Government of Palestine defendants. The Government adopted the role of a passive defendant; it took the attitude that if respondent could prove her claim, it had no objection to handing over to her any part of the land ordered by the Court. The Appellant, on the other hand, offered a very strenuous opposition to the respondent's claim.

5. The case dragged on until January 1936, when judgment was delivered by the Land Court in favour of the respondent. The Government accepted the decision of the Land Court, but the appellant appealed. There was a very lengthy argument before a bench constituted of McDonnell, C.J., Baker and Frumkin JJ. Judgment was delivered on May 14th., 1936. The Court began its judgment in the following terms:

"After having read the appellant's voluminous grounds of appeal and listened to her counsel's exposition thereof at great length, there is only one point in the whole case

1937

19th March

Manning S.P.J.
and
Plunkett Ag.J.

LA 43/36

Calmy

Politis

1937
19th March
Manning S.P.J.
and
Plunkett Ag.J.
LA 43/36
Calmy
v.
Pollitis

with which we think it is necessary to deal, and that is the matter relating to maps X and Y prepared by the Assistant Superintendent of Surveys of the Southern District."

The judgment ended as follows:

"We, therefore, set aside the judgment and remit the case to the Land Court to recall the surveyor in order that he may put in the maps in question and be examined and cross-examined if desired upon the discrepancies in map X to which we have referred, the Court to give judgment accordingly. Costs to follow the event."

6. The Land Court carried out the order of this Court and then delivered a fresh judgment, adhering to its original decision in every respect. The appellant again appealed, and the hearing of the appeal commenced on the 28th October 1936 before a Court consisting of myself, Plunkett and Frumkin JJ. Mr. Eliash for the respondent, referring to the opening sentences of the judgment of this Court, said they meant that the Court had decided all points against the appellant except one. It was quite clear to myself and my brother Plunkett that the Court had found it necessary to deal with one point only and that the other "voluminous grounds of appeal" remained undecided. My brother Frumkin, who had been a member of the previous Court, said that the previous Court had meant to decide all points but one. But the judgment did not contain a single reference to the elaborate arguments of appellant's advocate on the numerous other points in the case and we were left entirely in the dark as to what they had meant to decide. In these circumstances my brother Plunkett and I decided (my brother Frumkin dissenting) that there was nothing to be done except to have the whole appeal re-argued before us. When the argument had proceeded for a short time, my brother Frumkin intimated that, having already listened to the argument in the previous hearing, he had already made up his mind on the various issues. He asked to be relieved. The case was continued by consent before myself and my brother Plunkett. I may here remark that two judges constituted a proper Court under Section 3 of the Courts Ordinance, as amended by Ordinance No. 18 of 1935. The amendment came into force on the 16th April, 1935, and this appeal was commenced after that date. Article 186 of the Civil Procedure Code lays it down that the date of the commencement of an appeal is the date on which the application to appeal is presented and registered.

7. There was again a very lengthy argument before us. Mr. Moyal, for the appellant, urged numerous reasons in sup-

1937
19th March
Manning S.P.J.
and
Plunkett Ag.J.
LA 43/36
Calmy
v.
Pollitis

port of his contention that the decision of the Land Court was wrong. I shall deal later with certain specific reasons but before doing so I wish to refer to a matter which goes to the root of the bulk of Mr. Moyal's contentions, namely the procedure adopted by the Land Court in deciding in favour of the respondent's claim.

8. The Land Court found as a fact, and there was abundant evidence to support its finding, that the respondent was owner of part of the land which had been partitioned between the appellant and the Government in 1925. But it had considerable difficulty in determining the situation of the part of the land which belonged to the respondent. The map produced by the Government at the partition proceedings in 1925 was found to be inaccurate. Another map (No. 5), which showed the Franghia land in the same position as map No. 1, was subject to the same defect. There was evidence that the scale was not exact, and that the map was merely a sketch. The same applies to the numerous other maps produced. From a perusal of any of them it was difficult to say with certainty where the Franghia land was actually situated with reference to the land partitioned in 1925.

9. The Land Court, being satisfied that the respondent was the owner of a piece of land which had been comprised in the partitioned area, took the following course in order to determine its position. Various witnesses pointed out marks on the land which they said were at the south-east and south-west points of the land owned by Franghia. These marks differed, but not to any great extent. The Court took the two points most favourable to the appellant, and on the line joining them constructed a rectangle conforming in shape and area to the Franghia land shown on map 5, this being a map which had been produced by the appellant. It declared this rectangular piece of land to be the property of the respondent.

10. This method of procedure was much criticised by Mr. Moyal, but I think the Land Court was justified in its procedure. Land Courts were set up in Palestine by an Ordinance passed in 1921, now Cap. 75 of the Laws of Palestine, Vol. II, p. 828. By Section 3 (d) a Land Court was empowered to decide disputes as to the ownership of land. By Section 3 (b) it was empowered, where it accepted a claim to ownership as valid and undisputed, to demarcate the boundaries and direct registration in the Land Registry. By Section 3 (c) it was empowered, where it accepted a claim as valid, and where only the boundaries were disputed, to give a decision as to the boundaries and to demarcate them in accordance with the decision.

1937
19th March
Manning S.P.J.
and
Plunkett Ag.J.
LA 43/36
Calmy
v.
Politis

11. In the appellant's additional grounds of appeal, dated August 7th., 1936, her advocate said: —

"There is no dispute that Mr. Franghia effected in Constantinople a transfer to the name of the respondent of the land registered in his name on or about July 1333. But this Kushan is not sufficient by itself to show area, boundaries and position of the land."

12. Now, as I have said already, there was a definite finding of fact that this land registered in Franghia's name was part of the land partitioned between the Government and the appellant in 1925. Section 4 of the Land Courts Ordinance provides that there is no appeal save on a question of law. The Land Court had therefore before it a clear admission that Franghia had transferred certain land to the respondent, and it had its own finding of fact that this land was included in the area partitioned between the Government and the appellant in 1925. Owing to inaccurate maps and the defective recollection of witnesses, the Court was unable to determine the exact situation of the land. It had therefore to piece together the various items of evidence, documentary and oral, and to demarcate the boundaries of the land to the best of its ability on the material before it.

13. There is a good deal to be said for the view that on the facts of this case the respondent's claim to ownership was accepted by the Land Court as valid and undisputed, or that in the alternative her claim was accepted as valid, and undisputed except with regard to the boundaries, and that therefore the Court was justified in demarcating the boundaries, in accordance with Section 3 (b and c) of the Ordinance. But even if this were not so, I think the procedure adopted was the only one consonant with justice. It seems to me that this is what Land Courts were set up for. It must have been realised that after the Great War, followed by the British Occupation of Palestine, many cases would arise such as the present one, where there would be no dispute that a person was the owner of certain land, but owing to inaccurate kushans and maps, and discrepancies of witnesses as to boundaries, it would be difficult to say where were the actual boundaries of the land. Land Courts were set up to do substantial justice. Where such a Court finds that a person is indisputably the owner of land, but the situation of that land cannot be accurately determined, then it depends on the evidence whether a final decision can be given. If there is sufficient material to enable such a Court to carve out a piece of land in approximately the position indicated by the evidence, then I think its decision should not be

1937
19th March
Manning S.P.J.
and
Plunkett Ag.J.
LA 43/36
Calmy
v.
Politis

interfered with unless it has caused injustice to some other person. In the present case the Land Court had, in my opinion, sufficient evidence before it to assign to the respondent the portion of land it did. It could not say with certainty that this was the actual situation of the land sold by Franghia to the respondent, but it got as near to its actual position as was possible, and carved out the correct shape and area. For this purpose it took two points favourable to the appellant and used a map produced by the appellant.

14. My decision that the judgment of the Land Court must not be interfered with on account of the procedure adopted disposes of most of the grounds of appeal urged by Mr. Moyal. A good deal of his argument was devoted to criticism of the evidence of the surveyor Davis, and it was owing to such criticism at the first hearing of this appeal that this Court remitted the case to the Court below for further evidence to be taken from Davis in order to explain certain matters which seemed obscure. This further evidence was taken in the Court below, and it took it into consideration when delivering its fresh judgment. Mr. Moyal had an opportunity of cross-examining Davis and of bringing out the matters on which he relied for the purpose of discrediting this witness. He addressed the Court below at length on these matters. They all resolved themselves into questions as to accuracy of certain rough notes made by the surveyor, from which notes he had prepared the plan as ordered by the Court. The surveyor was quite candid in admitting that the notes were rough and that a clerical error had been committed in one instance in transferring rough notes to the Field Book. But he was quite clear that his rough notes were sufficient to make an exact survey and that his memory, together with the notes, was ample to give him complete information. The Court below was the best judge of the cogency of his evidence; it took into consideration the criticisms to which it was subjected by Mr. Moyal; and it decided that these criticisms did not debar it from accepting the evidence and basing its decision upon it. I have perused the evidence and considered the criticisms and I am in agreement with the decision of the Court below.

15. I turn now to consider certain specific grounds of appeal urged by Mr. Moyal. The first of these was that there was no delivery of the land by Franghia to the respondent in 1917. It has been seen that he does not dispute the transfer of the land to the respondent in that year. On the question of delivery, he relied on certain articles in Chapter 5 of the Mejelle. The leading

1937
19th March

Manning S.P.J.
and
Plunkett Ag.J.

LA 43/36
Calmy

v.
Politis

article, No. 262, is as follows (I am using Mr. Hooper's translation):

"Article 262: Taking delivery is not an essential condition of sale. After the conclusion of the contract, however, the purchaser must first deliver the price to the vendor, and the vendor is then bound to deliver the thing sold to the purchaser."

16. It is quite clear that taking delivery is not an essential condition of sale. The remaining words of the article merely indicate that on payment of the price the vendor is bound to deliver if he is asked to do so by the purchaser. The other articles of the Chapter relate entirely to what constitutes delivery. This ground of appeal fails.

17. The second ground is on the question of limitation. The Court below found as a fact that Franghia exercised his rights of possession over the land in 1913. There was evidence to support this finding and this Court should not interfere with it. The present action was commenced in 1926. Article 1660 of the Mejele fixes the period of limitation at 15 years, so that the action seems to have commenced in time. But Mr. Moyal has put up an ingenious argument to defeat this conclusion. He says that the crucial date is not the date of the commencement of the action, but the date when the hearing before the Court begins. He further says that the period is to be reckoned in lunar, not in calendar, years. The date on which this case first came on for hearing was the 6th December 1927, and Mr. Moyal says, if this date be taken and if the period be calculated in lunar years, then the respondent's claim is barred.

18. In support of his first proposition he relies on Article 1666 of Mejele. This is as follows:

"Article 1666: If any person brings an action in Court against any other person in respect to some particular matter once in a certain number of years, without the case being finally decided, and in this way fifteen years pass by, the hearing of the action is not barred. But any claim made out of Court does not cause the period of limitation to cease to run. Consequently, if any person makes a claim in respect to any particular matter elsewhere than in Court, and in this way the period of limitation elapses, the hearing of an action by the plaintiff is barred."

19. I do not see how this supports his contention. The intention of the article is to stress the point that the claim must be made before a Court, and that a claim otherwise made will

1937
19th March

Manning S.P.J.
and
Plunkett Ag.J.

LA 43/36
Calmy

v.
Politis

not cause the period of limitation to cease to run. But the article does not suggest that the commencement of an action in Court is the date on which the actual hearing begins; the Code of Civil Procedure lays it down that an action commences when the claim is presented and registered. Mr. Moyal said that his view is supported by the commentaries of jurists such as Ali Haider and Salim Baz. If this is so I must say that I do not agree with these jurists. With regard to lunar years Mr. Moyal has not produced any authority, and the practice of the Courts in this country since the Occupation has been to compute the period of limitation in calendar years. I think the Court below was right in rejecting the defence of limitation, and this ground of appeal also fails.

20. A third ground of appeal was that the respondent did not set out the boundaries of the land claimed in her statement of claim. Mr. Moyal relies on Articles 1619, 1620, and 1623 of the Mejele. These articles, especially Article 1623, support his contention that in an action for the recovery of land the boundaries must be set out. But this ground of appeal must be considered in the light of what I have already said as to the functions of Land Courts. The respondent did, however, attach to her statement of claim a copy of the original kushan showing the registered title of Franghia, and she also produced a copy of the Map (Exhibit No. 1), showing an area marked out as the land of Franghia. I think she substantially complied with the requirements of the law, and this ground of appeal must also fail.

21. A fourth ground of appeal is connected with the production by the respondent of the map above referred to. As I have already pointed out it was found during the hearing to have been inaccurately made and the respondent produced another map later on which she said represented the locality more accurately. Mr. Moyal says she ought not to have been allowed to do this, she based her claim on map 1, and she is estopped from relying on any other evidence. I do not see any force in this argument. Map 1 was simply a part of the respondent's evidence; when it was found to be inaccurate, the Court had to make the best use of it it could. This it did in the light of all the other evidence adduced, but it was not bound to reject the respondent's claim merely because for some reason a surveyor had got his compass points wrong or his scale incorrect. It is necessary to repeat that the Land Court was satisfied that the respondent's claim to land was a good one and that it found in the evidence sufficient material for it to say approxi-

1937
19th March
Manning S.P.J.
and
Plunkett Ag.J.
LA 43/36
Calmy
v.
Politis

mately where that land lay. When map 1 was found to be inaccurate the respondent was not debarred from adducing other evidence to help her in proving the approximate situation of the land. This ground of appeal also fails.

22. A fifth ground of appeal is based on the doctrine of bona fides. The appellant became in good faith the registered owner of certain land, she remained the registered owner for a number of years, she was a purchaser in good faith without any knowledge that part of the land belonged to anyone else. She should not therefore be disturbed. But the facts of this case are entirely against any plea of this nature. The appellant never became the owner of the piece of land claimed by the respondent. That land was registered in the name of Franghia since 1901 and in the name of respondent since 1917. If the appellant occupied any of this land before 1925 she was simply encroaching on the rights of another and could defend her right to occupy only on the ground of prescription. And at the time of the partition proceedings between herself and the Government in 1925, map 1 was produced by the Government, showing clearly a rectangular piece of land marked "the land of Franghia." This was adequate notice to the appellant of an adverse title to this piece of land, and when she allowed it to be included in the partitioned land, she did so at the risk of being ousted at a later date. This ground of appeal also fails.

23. There is a sixth ground of appeal on the question of costs, but I see no reason to interfere with the decision of the Court below as how the costs of the action should be borne.

24. I have read through my notes of Mr. Moyal's argument several times, and cannot find any grounds of appeal other than those I have already dealt with. There is a continual recurrence to the ground that the Court below had no legal evidence on which to base its decision. With this I disagree and in my opinion this appeal should be dismissed with costs. Having regard to the fact that there were two prolonged arguments before this Court these fees should include LP. 50 advocates' fees.

Criminal Appeal No. 24 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Shaw P.D.C. and Khayat J.

MUHEEB KANA'AN Appellant.

v.

ATTORNEY GENERAL Respondent.

Accomplice — Corroboration — Need of corroboration of an accomplice's evidence.

Evidence — Accused — Same evidence against two accused — Court acquitting one and convicting the other — Whether Court entitled to do so.

Trials — Trial upon Information — Law providing that certain offences ordinarily triable upon information to be tried summarily — Trial of one of such offences upon information — Whether trial in order — Courts (Temporary Constitution) (Further Provisions) Ordinance, 1936.

Special treatment — Not within power of Court of Appeal to order.

The appellant, together with another person not involved in this appeal, was charged before the District Court of Jaffa (Criminal Case No. 16/37) with attempted murder with premeditation contrary to Article 170 of the Ottoman Penal Code and Sections 3, 4 and 9 of the Criminal Law Amendment Ordinance (No. 2) of 1927, in that appellant on or about the 25th August, 1936, at Jaffa, with premeditated intent to murder, did send an instantaneous bomb to a certain Schriber at Tel Aviv by rail service thereby attempting to kill the said Schriber. He was convicted of the charge as laid and was sentenced to ten years imprisonment. Hence this appeal. The grounds urged on behalf of appellant appear in the judgment reported hereinafter.

In dismissing the appeal by majority (Khayat J. dissenting), the Court of appeal,

- HELD (1) that it is dangerous to convict an accused on the evidence of an accomplice alone without some further corroboration of the evidence of that accomplice.
- (2) that a trial Court may find on the same evidence one co-accused guilty and the other co-accused not guilty, and what a court of appeal has to determine is whether

1937
20th March
Manning S.P.J.
Shaw P.D.C.
and
Khayat J.
CRA 24/37
Kana'an
v.
Attorney General

1937

20th March

Manning S.P.J.
Shaw P.D.C.
and
Khayat J.

CRA 24/37
Kana'an

v.

Attorney General

any good reason is advanced for disturbing the conviction of the person found guilty; the mere fact that the other co-accused was acquitted is no ground of appeal.

(3) that the trial of appellant upon information and not summarily was all in favour of appellant. The intention of the Courts (Temporary Constitution) (Further Provisions) Ordinance, 1936, is that preliminary investigations may be dispensed with, but if they are not, an accused person has no ground of complaint.

(4) that it is not within the power of the Court of Appeal to order special treatment.

N. Abcarius and M.E. Mogannam for appellant.

Government Advocate (Moussa Alami) for respondent.

Manning, S.P.J.: On the 4th February, 1937, the Appellant was convicted before the District Court, Jaffa, of an attempt to commit murder with premeditation. He was convicted on the evidence of two witnesses, one of whom was definitely found by the Court to be an accomplice. The President of the District Court, who tried the case sitting alone, gives no indication in his judgment that he directed his mind to the question of whether the other witness was an accomplice. The Government Advocate, however, in replying to Appellant's argument on the appeal, said that in his opinion both the witnesses were accomplices.

If both witnesses were accomplices, then it was dangerous to convict the Appellant on their evidence alone without some further corroboration. But the learned President did direct his mind to the question of one witness, and I think the question of whether the other witness was an accomplice or not must have been present to his mind. There was obviously material in the evidence on which he could discriminate between the two witnesses, one of them had taken an active part in the transaction; the other had refused to take any part. I think it was, therefore, implicit in the judgment that the learned President found that the witness Hassan was not an accomplice, and I do not think that what the Government Advocate has said in Court can affect this implicit finding. The learned President was therefore justified in considering that the evidence of the accomplice was corroborated, and not by another accomplice.

Abcarius Bey, who argued the appeal on behalf of the Appellant, urged very strongly that the Court below had behaved illogically in finding the Appellant guilty, while finding another

1937

20th March

Manning S.P.J.
Shaw P.D.C.
and
Khayat J.

CRA 24/37
Kana'an

v.

Attorney General

person charged together with him not guilty. He says there was the same evidence against both. I cannot see that this is a ground of appeal. What we have to determine is whether any good reason is advanced for disturbing the conviction of the Appellant. It is not such a reason that the Court seems to have given the benefit of the doubt to some other person accused at the same time, even if the evidence was the same.

Another ground of appeal was that under the provisions of Ordinance 47 of 1936 this case should have been tried summarily, whereas there had been a preliminary investigation before a Magistrate. The fact that there had been such an investigation was all in favour of the Appellant, and I see no merits in this ground of appeal. The intention of the Ordinance is that preliminary investigations may be dispensed with, but if they are not, an accused person has no ground of complaint.

It has been also urged that the sentence is too severe. I do not agree; the facts disclose a dastardly attempt to cause death and serious injury to many persons.

In my opinion the appeal should be dismissed, and the conviction and sentence affirmed.

Abcarius — asks special treatment and sentence to commence from judgment of District Court

COURT: — Order of special treatment is not within our power.

We order sentence to commence from date of conviction of District Court.

Shaw, P.D.C.: I concur.

Khayat J.: I am of the opinion that Section 6 of the Law of Evidence Amendment Ordinance 1924 does not allow the evidence of a witness, where there is doubt as to the truth of his evidence, such as an accomplice, to be accepted with corroboration, especially if the witness corroborating the evidence of the doubtful witness is considered by the Prosecution to be an accomplice too. I therefore hold that there is no admissible evidence in law upon which the conviction could be based, the conviction and sentence should be quashed and the appellant acquitted.

Civil Appeal No. 18 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

1937
22nd March

Copland J.
Khaldi J.
and
Abdulhadi J.

CA 18/36
Palestine Land
Development Co.

v.
Ziadeh

PALESTINE LAND DEVELOPMENT CO. Appellant.

v.

SALEM SAMAAAN ZIADEH Respondent.

Contracts — Agency — Parties to contract appointed one person as their agent — Liability of principals in damages: (1) where agent commits a personal breach, and (2) where breach committed by agent is due to fault of one of the parties.

Under the terms of an agreement between the respondent, as vendor, and the appellant, as purchaser, certain plots of land were to be transferred by way of sale to the appellant by the respondent. Under clause 4 of the agreement, the clause in question appears in the judgment reported hereinafter, both parties to the agreement agreed that the vendor should appoint a certain Shehadeh Ahmad Mustafa Barakat or any other person to complete the transfer. Shehadeh Barakat resigned without having completed the transfer transaction in the Land Registry. Thereafter the appellant company brought an action in the District Court of Jerusalem (Civil Case No. 178/35) claiming the return of the money paid in advance on account of the purchase price plus LP. 1500 damages; appellant's allegation being that Shehadeh Barakat was unable to prepare and complete the transfer as the respondent committed a breach of his undertakings under the agreement. The respondent also claimed damages in a separate action. The District Court dismissed both actions for damages but gave judgment in favour of appellant for the return of the money paid in advance on account of the purchase price. The company appealed.

In setting aside that part of the judgment of the District Court dealing with the question of damages, and remitting the case to it to hear evidence as to who of the parties was responsible for the breach, if any, the Court of Appeal,

HELD that from the wording of clause 4 of the agreement Shehadeh Barakat was the agent of both parties and acted in two separate capacities. Had Barakat committed a personal breach, which was not due to the fault of either party, then in such a case both parties would be responsible for that breach and no claim for damages by either party would arise, but in case the breach

committed by the agent was due to the fault of one of the parties, then that party alone would be responsible for damages; and the innocent party could not be held responsible.

I. Olshan for appellant.

Hanna Atalla and George Salah for respondent.

Judgment: The Respondent in these proceedings entered on the 24th August, 1934, into an agreement whereby he undertook to sell and transfer certain plots of land. Clause 4 of the said agreement is as follows: —

“Second party undertakes to appear in the Tabu in order to accept the transfer of the said plots within the limited time, after first party fulfils his undertaking in accordance with the above-mentioned terms. Second party undertakes to appear in the Tabu within a week after he receives the registered letter to the effect that the transfer transaction is ready and awaiting the fixing of signatures in the Tabu. Both parties agreed that first party should appoint Shehadeh Ahmad El-Mustafa Barakat or any other person to complete the transfer transaction in the Tabu but second party should pay the expenses.

2. The said Shehadeh Ahmad Barakat resigned without having completed the transfer transaction in the Land Registry.

3. The Appellant brought an action in the District Court claiming the return of the sum of LP. 225 paid in advance on account of the purchase price with LP. 1500.-damages, alleging that the said Shehadeh Ahmad Barakat was unable to prepare and complete the transfer as the Respondent committed a breach of his undertakings under the agreement. The respondent filed a separate action claiming damages.

4. The District Court dismissed both Appellant's and Respondent's claims for damages, and gave judgment in favour of the Appellant for the return of the sum of LP. 225 with interest.

5. It is clear from the wording of clause 4 of the agreement that Shehadeh Ahmad Barakat was the agent of both parties. But he acted in two separate capacities. Had the agent committed a personal breach, which was not due to the fault of either party, it would seem that both parties would be responsible for that breach and no claim for damages by either party would arise.

1937
22nd March

Copland J.
Khaldi J.
and
Abdulhadi J.

CA 18/36
Palestine Land
Development Co.

v.
Ziadeh

1937
22nd March
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 18/36
Palestine Land
Development Co.

But in case the breach committed by the agent is due to the fault of one of the parties, that party alone would be responsible for damages: and the innocent cannot be held responsible.

6. The lower Court heard no evidence on this point. We therefore set aside the judgment of the lower Court on this point to hear as to who of the parties, or both, was responsible for the breach, if any.

7. The Appellant took another point regarding the date from which interest is payable on the sum of LP. 225. - which was paid in advance on the account of the purchase price. The District Court did not state in its judgment the date from which the interest is payable on that sum. Clause 8 of the agreement, however, provides that interest is payable on that sum from the date of payment, and we therefore amend this part of the judgment of the lower Court accordingly.

8. The Respondent is to pay the costs of this appeal to include LP. 3. - advocate's fees.

Civil Appeal No. 26 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

1937
24th March
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 26/36
Wahhab
and another
v.
Ala-ed-Din

- 1. BUTROS SALEM WAHHAB
- 2. NA'IM GEORGE TAWIL Appellants.

ALI SALEH ALA-ED-DIN Respondent.

Contracts — Immovable property — Land — Contract for sale of land — Duty of vendor to arrange for and complete transaction of sale in absence of anything to the contrary in the contract.

In a contract for sale of immovable property, in the absence of anything to the contrary in the contract, it is the duty of the vendor to arrange for and complete the transaction of sale.

The facts, in so far as they are relevant to this report, appear from the judgment.

M.E. Mogannam for appellants.

E. Georges Elia for respondent.

Judgment: In this case a contract was entered into between the parties, whereby Respondent undertook to sell to Appellants a plot of land for the agreed price.

Clause 5 of the said agreement, on the construction of which this appeal depends, declares it to be the duty of the Appellants to pay the expenses of the transaction and all fees and taxes that may fall due after the date of the contract.

The transfer did not take place, and the Appellants therefore brought an action before the District Court claiming the sum of LP. 120 which they had paid in advance, plus the sum of LP. 250 as liquidated damages.

The two Judges constituting the Court of trial disagreed, one of them holding that both parties were equally at fault and that thus no damages can be awarded; while the other held that Plaintiffs' willingness to perform their obligations was never questioned and that judgment must thus be given for the full amount of their claim. The former being the view advantageous to the defendant, it was adopted, and judgment was therefore given ordering him to refund the sum of LP. 120, but Plaintiffs' claim for damages was dismissed.

There is nothing in the contract to vary the general rule that it is the vendor's duty to arrange for and complete the transaction of sale. Clause 5 of the agreement merely entitles the Respondent, who is the vendor in this case, having prepared the transaction, to call upon the Appellants to reimburse him for what he has spent, but it is not the latter's duty to tender the money beforehand.

As a matter of fact, however, the Respondent failed to prepare the transaction or even open a file in the Land Registry, and though the Appellants went out of their way in calling Respondent's attention to that effect, the latter still did nothing and did not even care to reply.

For these reasons, we are of the opinion that Appellants failed in nothing that it was their duty to perform under the contract, and their appeal must therefore be allowed and judgment entered for them in the sum of LP. 250 as damages, in addition to the sum of LP. 120 awarded by the District Court, with costs and advocate's fees assessed at LP. 3.

1937
24th March
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 26/36
Wahhab
and another

v.
Ala-ed-Din

Civil Appeal No. 30 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abduldadi J.

SHLOMO FRIED Appellant.

v.

CHAYA ESTHER WOLANSKY Respondent.

Interest — Agreement as to payment of interest — Interest continues payable after maturity of debt.

On the strength of a promissory note made by Wolansky in favour of Fried which was in the terms following: "On the 28th Elul 5692, I the undersigned am bound to pay against this bill to the order of Mr. Shlomo Fried the sum of four hundred pounds Palestine — value received in cash — payment in Jerusalem", Fried sued Wolansky in the District Court of Jerusalem (Civil Case No. 280/35) for the amount plus 9% interest. Wolansky alleged, and produced evidence in support of her allegation, that the rate of interest agreed upon between her and Fried was the rate which banks usually charge, namely 2 1/2%. The District Court, from the evidence before it, both oral and documentary, came to the conclusion that interest at the rate 2 1/2% was agreed upon, and ordered the payment thereof from the date of the making of the note until complete payment. Fried appealed.

In dismissing the appeal, the Court of Appeal,

HELD that there was evidence to support the District Court's finding that the agreed rate of interest between the parties was 2 1/2%, and as this rate had been agreed upon it continued even after the maturity of the bill.

J. Frank for appellant.

E.D. Goitein for respondent.

Judgment: We are of opinion that there was evidence to support the District Court's finding that the agreed rate of interest between the parties was 2 1/2%, and we cannot therefore interfere. And this rate having been agreed upon, it continues even after the maturity of the bill.

The appeal is, therefore, dismissed with costs and LP. 3.-advocate's fees.

1937

24th March

Copland J.
Khaldi J.
and
Abduldadi J.

CA 30/36

Fried

v.

Wolansky

Civil Appeal No. 44 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Khayat J. and Abduldadi J.

GENERAL MOTORS ACCEPTANCE CORPORATION Appellant.

v.

KAMEL WAFI DAJANI Respondent.

Hire-purchase agreement — Test to be applied to determine whether agreement is one of sale or one of hire.

Appeal, Leave to — Considerations to be kept in view when determining an application for leave.

1. In determining whether a hire-purchase agreement is one of sale, whereby the property passes to the hirer, or whether it is one of hire, whereunder the property is still vested in the lessor, the test to be applied is whether there is a binding obligation upon the hirer to buy. Where the agreement upon its true construction is an agreement to hire, with an option to purchase, the property in the goods does not pass to the hirer until he has exercised the option in accordance with the provisions of the agreement.

2. The procedure to be followed where leave to appeal to the Supreme Court is sought under Section 6 of the Magistrates' Courts Jurisdiction Ordinance, 1935, is for the presiding Judge of the Court to consider if the judgment in question involves a point of law, and if it does, if that point of law is such a point that by reason of its novelty or complexity an appeal to the Supreme Court is justified.

Referred to: PCLA 4/35, 2 P.L.R. 423.

The facts, in so far as they are relevant, appear from the judgment.

Philip Joseph for appellant.

Rashed Haddad for respondent.

Judgment: This case arises out of an agreement of hire-purchase dated 30th June, 1934, whereunder Muhammad Amin Ja'bari (described in the agreement as the Hirer) hired a motor truck from Tannous Brothers (described as the Lessor).

1937

24th March

Trusted C.J.
Khayat J.
and
Abduldadi J.

CA 44/36

General Motors
Acceptance Corporation

v.

Dajani

1937
24th March
Trusted C.J.
Khayat J.
and
Abdulhadi J.

CA 44/36
General Motors
Acceptance Cor-
poration
v.
Dajani

The agreement contained a guarantee whereby Naser Eddin guaranteed its due performance by the Hirer and it also contained an assignment and guarantee whereunder Tannous Brothers assigned their rights upon the terms and conditions therein set out to the General Motors Acceptance Corporation.

In the course of certain execution proceedings Kamel Wafa El-Dajani obtained an order of attachment against the movable and immovable property of Muhammad Amin Ja'bari and the Execution Officer attached the motor truck, the subject of the above mentioned hire-purchase agreement, which was then in the garage of Tannous Brothers. In consequence the General Motors Acceptance Corporation commenced these proceedings on the ground that Muhammad Amin Ja'bari had no right of ownership in the said truck.

In these circumstances the Magistrate should have addressed his mind to two questions: —

- (a) Was the truck the property of Muhammad Amin Ja'bari?
- (b) Was the truck the property of the Plaintiffs, the General Motors Acceptance Corporation?

In order to answer these questions it is necessary to consider the hire-purchase agreement to which I have referred. It is a long and involved document which provides shortly that the hirer is to pay an advance rental for the first month's use of the car and thereafter monthly rentals for the hire of the car, and that the rentals are to be evidenced by promissory notes to be given by the hirer.

The agreement further provides: —

"10. If during the continuance of this contract Hirer shall duly perform and observe all the stipulations and conditions in this contract contained, he shall be entitled to purchase car by paying to Lessor all outstanding monthly rentals for hire together with all or any other sums payable by him hereunder and abandoning all right to the repayment to the said deposit which shall then be treated as part of the purchase price but, until all such payments as aforesaid have been made, the car shall remain the exclusive property of the Lessor. If Hirer shall not elect to buy car, he shall redeliver same to Lessor in good and complete order and repair immediately upon the expiration or sooner termination of the hiring by Lessor; and Hirer shall thereupon, subject always to his having paid all the monthly rentals for hire specified in the schedule hereto and having duly performed all other obligations under this contract, be paid

1937
24th March
Trusted C.J.
Khayat J.
and
Abdulhadi J.

CA 44/36
General Motors
Acceptance Cor-
poration
v.
Dajani

or credited with the deposit and shall be entitled to the return of the promissory notes hereunder given as evidence of indebtedness but shall not in any event be entitled to repayment, credit or allowance in respect of any other payments made or to be made by hirer under the contract. And the Lessor hereby expressly undertakes to do and perform all things and acts that may be necessary to obtain for and to give unto the Hirer or eventual purchaser, should Hirer so become, a complete and valid title to the said car."

Agreements of this kind frequently give rise to disputes, particularly when, as in this case, third parties who are creditors of the Hirer are concerned. Such disputes most frequently turning upon the question: Is the contract one of sale whereby the property has passed to the Hirer, or is it a contract of hire whereunder the property is still vested in the Lessor?

The test is whether or not there is a binding obligation upon the Hirer to buy. Where the agreement upon its true construction is an agreement to hire with an option to purchase, the property in the goods does not pass to the Hirer until he has exercised the option in accordance with the provisions of the agreement.

We are satisfied that under the contract with which we are concerned there is no sale, but only a hire until the hirer has exercised his option in the manner provided in the clause to which I have referred.

The first point for the decision of the Magistrate was therefore: Had the property passed under that clause to the Hirer?

It appears from the learned Magistrate's judgment that he took the view that the property had not passed on the ground that it had been established that Defendant No. 2 (Muhammad Amin Ja'bari) had committed a breach of the agreement, but it does not appear to us that this was necessarily conclusive.

Before the learned Magistrate the first Defendant Kamel Wafa El-Dajani wished to call evidence to prove that certain instalments, which had not been paid by the Hirer, had in fact been paid before the due date by Tannous Brothers (the Lessor) to the General Motors Acceptance Corporation as parties to the bills, but the learned Magistrate refused to hear such evidence.

The Defendant therefore appealed to the District Court. It would appear that the District Court ignored the fundamental question whether the property had passed to the Hirer and failed to consider the effect of clause 5 of the assignment and guarantee given to the General Motors Acceptance Corporation which provides: —

1937
24th March

Trusted C.J.
Khayat J.
and
Abdulhadi J.

CA 44/36
General Motors
Acceptance Corporation

v.
Dajani

"5. The foregoing guarantee is given to the assignee on the express condition that even though the guarantor is jointly and severally liable with the hirer the benefit of this guarantee cannot be claimed by the hirer or any other guarantor and on condition that upon fulfilling his/its guarantee hereunder the guarantor shall be entitled to be subrogated to the rights of the assignee existing at the time."

In the course of argument before us, Dr. Joseph stated that that clause of the assignment and guarantee had not become operative. Had it become operative Tannous Brothers would appear to have become the owners and not the hirers of the truck. Whether or not it had become operative depends upon the facts which are not sufficiently found to enable us to express an opinion, but the facts and the application of this clause to them may affect the second question to which I referred at the beginning of this judgment.

We agree with the District Court that this case should go back to the Magistrate, but we are of opinion that it should do so in order that he may find the facts and consider the case in the light of the observations in this judgment.

It was argued by Rashed Eff. that no appeal lies to this Court from the judgment given by the District Court. The provision of the law applicable is section 6 of the Magistrates' Courts Jurisdiction Ordinance 1935, which provides that the decision of a District or Land Court in an appeal from a Magistrate's Court shall be final but the presiding Judge of the Court may grant leave to appeal to the Supreme Court on a point of law, and we are of opinion that where the decision of the District Court involves a point of law leave to appeal may properly be given.

We do not think that the decision in the Palestine Jewish Colonization Association and another v. The Village Settlement Committee, Arab Infiat, P.C.L.A. No. 4/35, is an authority, as that case deals with appeals to the Privy Council and Article 3 (b) of the Palestine (Appeal to Privy Council) Order-in-Council 1924 expressly refers to final judgments.

The President of the District Court in giving leave to appeal set out some proved facts, some allegations and arguments and concluded by formulating two questions of law upon which leave to appeal was granted.

Neither the learned Magistrate nor the District Court appear to have given any express decision upon the first of these questions, and the second, which is based on the first, involves the decision of the District Court to which I have referred.

In my opinion the correct procedure where leave to appeal is sought under the section to which I have referred is for the President of the District Court to consider if the judgment in question involves a point of law, and, if it does, if that point of law is such a point that by reason of its novelty or complexity an appeal to this Court is justified.

If he is of opinion that it is a point of law which justifies an appeal, he should grant leave to appeal against the judgment in so far as it involves a decision of law as distinct from findings of fact.

I do not think that the President of the District Court should formulate such propositions as may appear to him to be involved. The inconvenience of his so doing is well exemplified in the present case. The District Court has remitted the case to the Magistrate with an expression of its views. If this Court answers the questions formulated by "yes" or "no", as their form invites, presumably the judgment of this Court would not affect the judgment of the District Court although it might be clear from the answers given that this Court did not agree with the judgment of the District Court.

In the result the appeal will be dismissed and the case remitted to the Magistrate for his further consideration as I have already indicated.

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

Civil Appeal No. 7 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

ADOR HALBIAN Appellant.

v.

ALEXANDER ANTABILIAN Respondent.

Damages — Attachment, Conservatory — Procedure to be followed by a third party in whose hands there is property on which a conservatory attachment is levied — Ottoman Magistrates Law, Article 7.

1937
24th March

Trusted C.J.
Khayat J.
and
Abdulhadi J.

CA 44/36
General Motors
Acceptance Corporation

v.
Dajani

1937
25th March

Trusted C.J.
Khaldi J.
and
Frumkin J.

CA 7/36
Halbian

v.
Antabilian

1937
25th March
Trusted C.J.
Khaldi J.
and
Frumkin J.
CA 7/36
Halbian
v.
Antabilian

1. Where a conservatory attachment is ordered on property in the hands of a third person and that person claims to be the owner of that property, it is for that person, if he is not summoned to appear before the Magistrate's Court in accordance with the provisions of Article 7 of the Ottoman Magistrates Law for the purpose of hearing his objections, to enter an appearance himself and ask for his objections to be heard. In this case the third person, the appellant, was duly informed that his car was attached for the payment of the debt of another and he should have taken steps at once to have the attachment removed.

2. The principle of liability for damages in cases of conservatory attachment is established by the provision in Article 7 of the Ottoman Magistrates Law which provides that no conservatory attachment shall be ordered unless the parties claiming it produce a sufficient guarantee to make good any possible damage to the person whose property has been attached.

The facts sufficiently appear from the judgment.

The judgment of the Court was delivered by Frumkin J.
Zaki Ousta for appellant.

Henry Cattan for respondent.

Judgment: On 24th August, 1928, in connection with an action brought before the Magistrate's Court, Jerusalem, against one, Yacoub Kiforkian, the Respondent in this case obtained an order for the conservatory attachment of a car which he assumed to be the property of the said Yacoub.

The car was at that time in the possession of the present Appellant, and it was later established to be his property.

The order for the conservatory attachment was confirmed by the Magistrate's Court on 14th October, 1928, in its judgment for the Respondent against the said Yacoub.

On 20th October, 1928, the Appellant informed the Respondent by notarial notice that he is the owner of the said car by purchase from the said Yacoub which sale he alleged took place on the 7th March, 1928.

The Appellant filed an action in the District Court to establish his ownership to the car, which the Court dismissed for want of jurisdiction. He then, on the 31st December, 1929, obtained a judgment from the Magistrate's Court establishing his ownership of the car. The Respondent appealed and the judgment of the Magistrate's Court was upheld on 25th June, 1930.

The Appellant then filed the present action before the District Court claiming damages for the period the car was out of work, namely from the 20th October, 1928, the date of the notarial notice, until the 25th June, 1930, being the date of the

1937
25th March
Trusted C.J.
Khaldi J.
and
Frumkin J.
CA 7/36
Halbian
v.
Antabilian

judgment of the District Court in its appellate capacity confirming his ownership of the car.

The District Court dismissed the action and hence this appeal.

The first point which arises out of the appeal is whether there is any legal liability at all upon a person attaching the property of others to compensate the owner of the property if the attachment was not warranted.

As the attachment was ordered by the Magistrate in an action before the Magistrate's Court, the case must be governed by Article 7 of the Ottoman Magistrates Law, of which the relevant portion reads as follows: —

"The applicant for attachment should apply to the Magistrate and submit his documents and deeds or be accompanied by witnesses in support of his claim and demand. The Magistrate shall examine the plaintiff alone or the plaintiff and his witnesses, and if he finds that the claim for attachment is rightful and in accordance with the provisions of the Code of Civil Procedure, he demands from him an attested guarantee made by a considerate guarantor to indemnify the person whose property is to be attached for all damages and losses that may later accrue to him. He then decides on the attachment. The guarantee may be attested by the body of the elders of the village or quarter. The Magistrate shall, on deciding upon the attachment, fix the day for the trial and summon the parties. If there is a third party in the attachment, he shall also summon him."

Mr. Cattan for the Respondent argued that the Magistrates Law is a law of procedure and not of substantive law and can therefore impose no liability for damages. I do not think that this principle can apply to Ottoman Laws where, for instance, the Law of Procedure itself contains provisions of the nature of substantive law while the Civil Code contains entire books dealing with procedure. In my view the principle of liability for damages is established by the said provision of the Ottoman Law which provides that no conservatory attachment shall be ordered unless the parties claiming it produce a sufficient guarantee to make good any possible damage to the person whose property has been attached.

Before we come to the question of the measure of damages and the period from which such damages may be claimed, it is necessary to deal with the procedure to be adopted in a claim of this nature.

Article 7 of the Magistrates Law provides that the third party who is in possession of the property alleged to belong

1937
25th March
Trusted C.J.
Khalidi J.
and
Frumkin J.
CA 7/36
Halbian
v.
Antabillan

to the debtor must be summoned before the Magistrate's Court for the purpose of hearing his objection. Had this rule been applied the matter of ownership would have been settled there and then; but the Appellant was not so summoned and the question now arises whether the omission of the Magistrate to summon him entitles the third party to sleep on his rights for over a year and then to come forward with a claim for damages.

In my view, matters of this nature must not be allowed to protract for unnecessary lengthy periods without good cause. The Appellant was duly informed that his car was attached for the payment of the debt of another and he should have taken steps at once to have the attachment removed. If he was not summoned to appear before the Magistrate's Court, he could have entered an appearance himself and asked for his objections to be heard. If any legal authority is wanted, he could avail himself of Article 279 of the Code of Civil Procedure which Code is imported by same Article 7 of the Magistrates Law and which gives that party 8 days within which to apply. Instead of so doing, he waited until the attachment was confirmed and only then lodged an action in the wrong Court and so allowed time to pass without any justification.

The Appellant argues that he could not object at once as he had first to go to Amman to obtain evidence to prove his ownership of the car. There is nothing in this argument, as he could have applied to the Magistrate and asked for an adjournment for the purpose.

The Appellant's remedy lies in Article 7 of the Magistrates Law which provides for an expeditious procedure to safeguard the interests of all parties concerned. Had he availed himself of the provisions of this Article, he would have been entitled to damages from the date of attachment until the date of the restitution of the property to him, which would necessarily have been a short period. Nothing to this effect having been done, his claim must fail.

Having come to this conclusion, it is not necessary for me to deal with the question of the measure of damages and whether or not the liability for damages is to be restricted to the guarantee given at the time of attachment.

For the reasons cited, the judgment of the District Court is confirmed and the appeal dismissed with costs to include LP. 3.- advocate's fees.

Civil Appeal No. 43 of 1937.
In the Supreme Court sitting as a Court of Appeal.
Before: The Chief Justice, the Senior Puisne Judge and Frumkin J.

HAIM RAKOVER Appellant.
v.
"SWITZERLAND" (La Suisse)
GENERAL INSURANCE CO. LTD. Respondent.
Evidence, Negative — Insurance — Contracts — Provision
in contract to prove a negative not illegal and void — Mejelle,
Article 1699.
"Indubitable" — Meaning of word in an insurance policy.

The appellant had effected a policy of insurance against fire with the respondent company in the sum of LP. 3000. A fire broke out in the premises of the appellant on the night of the 25/26th of April, 1936. Appellant made a claim for the insurance money and on the 8th May, 1936, he was requested by the respondent's advocate to furnish the necessary proof in accordance with clause 6 of the insurance policy. The appellant sent in copies of two letters addressed to him by the police in the first of which it was stated that at the time there was no evidence to show whether the fire was accidental or due to some criminal act, and in the second it was said that no evidence of arson was discovered in connection with the fire. The District Court held that the appellant made no real effort to submit satisfactory proof and therefore the action was premature and should be dismissed. The appellant appealed.

In dismissing the appeal, the Court of Appeal,
HELD that there can be no reason why a party to a contract should be barred by Article 1699 of the Mejelle, which provides that the object of evidence is to prove a right and that negative evidence is inadmissible, from undertaking, if he is so minded, in certain circumstances to prove a negative.

View of the Court as to the meaning of the word "indubitable".

Approved: Hooley Hill Rubber and Chemical Company
v. Royal Insurance, (1920) 1 K.B. p. 257.
M. Eliash for appellant.
N. Abcarlus and D. Aboulafia for respondent.



1937
14th April
Trusted C.J.
Manning S.P.J.
and
Frumkin J.
CA 43/37
Rakover
v.
Switzerland
General
Insurance Co. Ltd.



1937
14th April

Trusted C.J.
Manning S.P.J.
and
Frumkin J.

CA 43/37

Rakover

v.

Switzerland
General
Insurance Co. Ltd.

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

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

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

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

The defendant put in no defence.

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

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

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

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

Clause 6 of the policy provides that the policy does not cover loss or damage which arises directly or indirectly or which is the consequence of a number of excepted causes, for example, earthquakes or meteorological phenomena, invasion, riots, political trouble etc., and goes on to provide, that in the event of a claim for indemnity for loss or damage following a fire being made

1937
14th April

Trusted C.J.
Manning S.P.J.
and
Frumkin J.

CA 43/37

Rakover

v.

Switzerland
General
Insurance Co. Ltd.

under the policy, the company may require the insured to furnish satisfactory and indubitable proof, that the loss or damage had taken place independently of such causes and further provides that upon failure of such satisfactory proof the company will not be obliged to pay any indemnity.

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

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

Abcarius Bey argued that these letters did not comply with the requirements of the clause, and on this point, in its judgment, the District Court held: "in fact, plaintiff made no real effort to submit satisfactory proof", and in the result decided that the action was premature and should be dismissed with costs. Against that judgment, the plaintiff now appeals.

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

As to the interpretation of clause 6 of the policy, Dr. Eliash argues that, owing to the provisions of Article 1699 of the Mejlle which provides that the object of evidence is to prove a right, negative evidence is inadmissible, and that consequently a provision in a contract which may, in certain circumstances, call upon the party to prove a negative, e. g.

1937
14th April
Trusted C.J.
Manning S.P.J.
and
Frumkin J.
CA 43/37
Rakover
v.
Switzerland
General
Insurance Co. Ltd.

that there was not an earthquake, is illegal and consequently void. With that contention I do not agree. Whatever may be the true effect of the article of the Mejele it is a provision as to evidence, and I can see no reason why a party to a contract should be barred by it from undertaking, if he is so minded, in certain circumstances to prove a negative.

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

It seems to me that the meaning of the clause is clear, i.e. the policy does not extend to loss by fire resulting directly or indirectly from certain stipulated perils, and that the company, if they so desire, may call upon the insured to show that the loss for which he claims arose independently of such excepted perils. I can see no reason why the parties should not enter into such an agreement if they wish, and I am strengthened in that view by a passage in the judgment of Scrutton, L.J. in *Hookey Hill Rubber and Chemical Company and Royal Insurance (1920, 1, K.B. p. 257)* at the bottom of page 272 and top of page 273 as follows: —

“Thirdly, explosion followed by fire; as to that the memorandum says that the policy does not cover loss caused by the fire unless it be proved that the fire was not caused directly or indirectly by the explosion, or was not the result thereof. The effect of this is that, where damage is done by an explosion and fire following it, the assured cannot recover unless he can prove that the fire was not caused by the explosion. This case is specifically dealt with by the last part of the memorandum.”

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

1937
14th April
Trusted C.J.
Manning S.P.J.
and
Frumkin J.
CA 43/37
Rakover
v.
Switzerland
General
Insurance Co. Ltd.

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

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

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

Civil Appeal No. 69 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdalhadi J.

N'EMEH AWAD EL KHOURI Appellant.

v.

SAID AWAD EL KHOURI Respondent.

Arbitration — Misconduct — Arbitrator meeting one of parties and discussing with him questions pertaining to the controversy — Whether such amounts to misconduct.

1937
14th April
Copland J.
Khaldi J.
and
Abdalhadi J.
CA 69/36
Khouri
v.
Khouri

It is a misconduct on the part of an arbitrator to meet one of the parties to the arbitration and discuss with him questions pertaining to the controversy; it is an arbitrator's duty not merely to see that justice is done, but also to behave in such a way that justice appears to be done.

1937
14th April
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 69/36
Khouri
v.
Khouri

Followed: In re Brien and Brien (1910) 2 Ir. R. 84.

Fouad Atalla for appellant.

Hanna Asfour for respondent.

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

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

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

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

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

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

Criminal Appeal No. 35 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Copland J. and Khayat J.

WAKIM YOUSEF ABU AMSHA Appellant.

v.

ATTORNEY GENERAL Respondent.

Judgments — Sentences — Accused found guilty of murder — Signature of verdict by all judges of whom Court constituted — Signature of sentence by presiding Judge of Criminal Assize Court — Omission did not cause miscarriage of justice.

1937
22nd April
Trusted C.J.
Copland J.
and
Khayat J.
CRA 35/37
Abu Amsha
v.
Attorney General

The appellant was convicted of murder by the Court of Criminal Assize and was sentenced to death. He appealed, and the main ground in the appeal was that the sentence was only signed by the presiding Judge of the Assize Court.

In dismissing the appeal, the Court of Appeal,

HELD that since all the Judges constituting the Court had signed the verdict finding the accused guilty, and by Section 215 of the Criminal Code Ordinance, 1936, one sentence only can be passed when a man is found guilty of murder, the signature of the sentence of death by the presiding Judge of the Court of Criminal Assize did not cause any miscarriage of justice.

George Salah for appellant.

Assistant Government Advocate (Fawzi Ghussein) for respondent.

Judgment: The Appellant was convicted of murder with premeditation contrary to Section 214 of the Criminal Code Ordinance, 1936, by the Court of Criminal Assize sitting in Jerusalem and was sentenced to death.

The facts are simple. The murdered man was engaged to marry the prisoner's sister and on the 18th January, 1937, the prisoner and the murdered man, after some conversation with reference to the engagement, set off together to the home of the prisoner's father. The prisoner was carrying a rifle, and it is

1937
22nd April
Trusted C.J.
Copland J.
and
Khayat J.

CRA 35/37

Abu Amsha

v.

Attorney General

not suggested that he was doing so legitimately. On the way prisoner shot the deceased — three shots being fired — from behind and caused his death. There were signs that an attempt had been made to hide the body and when enquiries were made as to the deceased's whereabouts the prisoner gave evasive answers.

There is no evidence of any motive for this shooting. It was stated in evidence by the girl who was engaged to the deceased man that she went with him to Bethlehem in order to be photographed, but no photograph was taken, and a witness (Anton Elias) stated, "a fiancée should not, according to custom, go about alone with her fiancé" from which it may have been intended to suggest that the visit had angered the prisoner, but the suggestion was not developed, and the girl stated that she did not know if her brother heard of the visit and that her brother did not question her about it. Both she and the witness Anton stated that the prisoner and the deceased were dear friends.

The evidence against the prisoner is based to some extent upon a statement which he made to the police on 2.2.37. In that statement he admits that he was carrying a rifle and that he actually shot the deceased but says he did so accidentally and then ran away and concealed the rifle. He only admits to firing one shot. His story is corroborated in part by the finding of the rifle with one empty cartridge in the breach and six live rounds in the magazine in a spot which he pointed out to a police officer, and by technical evidence that the three empty cartridge cases, found at the scene of the crime, were fired from that same rifle.

It is clear from the medical evidence that the deceased was shot at short range from behind and that three shots were fired.

The defence was that the killing was accidental, but the Court of Assize, having regard particularly to the fact that three shots were fired, found that the killing was deliberate.

Before this Court it was argued by George Eff. Salah on behalf of the prisoner, firstly, that the sentence of death was only signed by the President of the Court of Assize. This is true, but all the judges signed the verdict finding the prisoner guilty, and by Section 215 of the Criminal Code Ordinance, one sentence only can be pronounced when a man is found

1937
22nd April
Trusted C.J.
Copland J.
and
Khayat J.

CRA 35/37

Abu Amsha

v.

Attorney General

guilty of murder, and we are satisfied that the omission causes no miscarriage of justice.

It was also argued before us that the prisoner's statement was a confession and it was inadmissible in that Section 9 of the Evidence Ordinance, which deals with the admissibility of confessions, had not been complied with.

The circumstances in which the statement of 2.2.37 were made are set out in the statement itself and are stated in the evidence of Ibrahim Jarjoura, the Police Inspector. The proceedings record that no objection was taken to the statement, and the prisoner, in a statement from the dock, said: "The statement I made to the Police is the same as I make today. That's all." That presumably had reference to the statement which had been put in evidence. It is true that in cross-examination the Police Inspector said that the prisoner had made an earlier statement in which he denied any knowledge of the crime, but the prisoner in his statement from the dock did not deny having committed the crime and we do not think therefore he can have been referring to that earlier statement. We are of opinion that the statement was admissible.

The third ground of appeal was that the requirements of Section 216 of the Criminal Code Ordinance were not satisfied.

By Section 214 of the Criminal Code Ordinance, to constitute the offence of murder, death must be caused, *inter alia*, with premeditation, and Section 216 sets out the three ingredients of premeditation, and the onus is upon the prosecution to show that they are present.

For the purposes of this case there must be a resolution to kill; the killing must be "in cold blood without immediate provocation in circumstances in which he was able to think and realise the result of his actions;" and there must be some preparation by the accused person of himself or of the instrument used.

The Assize Court drew the inference from the number of rounds fired and the carrying of the rifle that the accused has resolved to kill the deceased. We think that it was entitled to do so.

The Assize Court found, "There is not the slightest ground to infer that there was any provocation" (Then follows a discussion as to whether the incident of the girl going with the

1937
22nd April
Trusted C.J.
Copland J.
and
Khayat J.
CRA 35/37
Abu Amsha
v.
Attorney General

deceased to Bethlehem could be immediate provocation, which it clearly could not be), and the Court goes on to state: "We are entitled to infer from the circumstances that the accused, at the time of the shooting, was able to think, and to realise the result of his action."

The form of the first of these statements may be open to some criticism. The question is, Was there evidence from which an inference could be properly drawn that the prisoner killed the deceased in cold blood, etc. which is substantially the form in which the second statement of the Court was framed.

We are of opinion that from the evidence — including the evidence that the deceased was shot from behind, of which the Assize Court makes no express mention — that that Court was justified in drawing the conclusion that Section 216(b) had been satisfied.

The Court found that the carrying of the rifle was the necessary preparation, which we think it was entitled to do.

In the result, we are of opinion that there was evidence before the Court of Assize upon which it could come to the conclusions to which it did, and this appeal is dismissed.

Civil Appeal No. 2 of 1934.

In the Supreme Court sitting as a Court of Appeal.

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

BECKY SILVERMAN Appellant.

v.

LOUIS SILVERMAN Respondent.

Foreign bills — Stamp duty — When does a foreign bill become liable to stamp duty — Stamp Duty Ordinance, Section 27.

A foreign bill does not become liable to stamp duty except when it is presented for payment or endorsed, transferred or in any manner negotiated, or paid.

1937
23rd April
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 2/34
Silverman
v.
Silverman

Approved: Griffin and others v. Weatherby and Henshaw, 18 L.T.R. 881.

The relevant facts are set out in the judgment.

P. Goldberg for appellant.

Ph. Joseph for respondent.

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

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

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

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

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

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

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

1937
23rd April
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 2/34
Silverman
v.
Silverman

1937
23rd April
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 2/34
Silverman
v.
Silverman

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

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

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

Advocate's fee. LP. 3.

Civil Appeal No. 60 of 1935.

In the Supreme Court sitting as a Court of Appeal.

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

HENRY HOCHBERG Appellant.

1937
23rd April
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 60/35
Hochberg
v.
Bergmann
and others

1. BELLA BERGMANN
2. ZVI BERGMANN
2. SHULAMIT MONDERS (BERGMANN) Respondents.

Legislation — Later legislation with retrospective effect — Its effect on earlier legislation.

Evidence, Hearsay — Admissibility of — Mejelle, Article 1688.

The appellant, whose opposition to an application for the probate of the will of the late Jacob Bergmann was refused, appealed to the Supreme Court. It was argued on behalf of appellant that the District Court was improperly constituted as it consisted of the President alone, and that the President of the District Court was incorrect in having grave doubts as to the

1937
23rd April
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 60/35
Hochberg
v.
Bergmann
and others

admissibility of the declarations of the deceased to the effect that the appellant was his son. The details of the submissions in support of the above points appear in the judgment reported hereunder.

In dismissing the appeal by majority (Frumkin J. dissenting), the Court of appeal,

HELD (1) that the Succession Amendment Ordinance, 1932, which was enacted on 15th January, 1932, amending the Succession Ordinance of 1923 with retrospective effect as from 1st April, 1923, was later than the Courts Ordinance which was enacted in 1924, because the Succession Amendment Ordinance, 1932, had its provisions into force as from the date of its enactment, but with retrospective effect as from 1st April, 1923, and instead of the Courts Ordinance prevailing over the Succession Amendment Ordinance, 1932, the latter prevailed over the former by providing that from 1st April 1923, in cases under the Succession Ordinance, a District Court was properly constituted if it consisted of a President sitting alone.

(2) that hearsay evidence as to declarations by the deceased that the appellant was his son is admissible under Article 1688 of the Mejelle provided it is given as direct evidence, i.e. evidence of reputation and of matters of common knowledge.

The relevant facts and arguments as well as the relevant evidence appear in the judgment.

M. Ben Ari and M. Stein for appellant.

M. Gorodissky for respondent.

Manning, S.P.J.: 1. One Jacob Bergmann, a member of the Jewish Community, died in Palestine on the 2nd August, 1932. By his last will and testament, dated November 15th, 1931, he disposed of his real and personal property situated in Palestine. On the 30th April, 1934, his widow petitioned for probate in the District Court of Jaffa. The petition was opposed by a person named Henry Hochberg, hereinafter called the appellant, who claimed that he was an illegitimate son of the deceased. The grounds of his opposition were firstly that the real property left by the deceased was miri land and that this could not be disposed of by will, and secondly that the will was not executed in accordance with the law.

2. The appellant had no *locus standi* in the proceedings unless he could prove that he was a son of the deceased. This issue was tried by the District Court, which was constituted of the learned President sitting alone. After hearing evidence and the arguments of the advocates the learned President came

1937

23rd April

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 60/35

Hochberg

v.

Bergmann

and others

to the conclusion that the opposer had not proved that he was the illegitimate son of the deceased. He consequently rejected the opposition and pronounced in favour of the will.

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

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

5. I cannot agree with this argument. The later Ordinance is not the Courts Ordinance 1924, but the amendment made by the Ordinance enacted in 1932. The fact that this latter Ordinance was made retrospective does not make it earlier in date so as to apply the rule of interpretation as to inconsistent enactments. The logical result is that the Ordinance of 1932 provided that the District Court could be constituted, in cases such as this, of a President sitting alone. From the date of its enactment in 1932 its provisions were in force and its retrospective effect was the opposite to that for which Mr. Ben-Ari has contended. Instead of the Courts Ordinance prevailing over the amendment, the amendment prevailed over the Courts Ordinance by providing that from April 1st, 1923, in cases under the Succession Ordinance, a District Court was properly constituted if it consisted of a President sitting alone.

1937

23rd April

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 60/35

Hochberg

v.

Bergmann

and others

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

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

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

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

10. Then there was documentary evidence. These were, firstly, a letter from the deceased in Cyprus to Bella Hochberg in Paris, dated 13th February, 1917, enclosing a cheque for LP. 9, and stating that he had sent her a similar amount the

1937
23rd April
Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 60/35
Hochberg
v.
Bergmann
and others

previous December. Secondly, there was a document signed by the Appellant, engaging to claim nothing further from the deceased "en qualité de parent", and setting out various sums given by the deceased to the appellant during the year 1930, amounting altogether to LP. 296.

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

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

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

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

15. From what I have said there was undoubtedly corroboration of the evidence. If I may say so with respect, it would have enabled the learned President to get a clearer view of the evidence if he had approached the matter from another angle. The first evidence to be considered was that of the mother of the appellant. She gave a circumstantial account of her relations

1937
23rd April
Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 60/35
Hochberg
v.
Bergmann
and others

with the deceased. She said that the appellant was the son of the deceased. She was corroborated by the facts that the deceased supported her after the birth of the child, that he afterwards supported the child, and that he paid a large sum of money to the child in 1930 on condition that the child renounced all future claims on him. This evidence was sufficient to constitute a *prima facie* case on behalf of the appellant without taking into consideration the declarations alleged to have been made by the deceased, or the evidence of common knowledge.

16. I do not think that one should take strictly what the learned President said on the question of corroboration. His judgment must be looked at as a whole, and in another part of it he comments on the "absence of any evidence of a kind which would be conclusive". I can read into the judgment a reluctance to declare that the appellant was the illegitimate son of a person who was dead at the time of the trial and who could not come forward to repel the allegations that he had been unfaithful to his wife and had seduced his wife's niece (as Bella Hochberg was) when she was staying as a guest in his house. He clearly wanted better evidence than the testimony of interested parties like the appellant and his mother or the alleged declarations of the deceased. He does not seem to have attached much importance to the payments of money on account of the relationship existing between Bella Hochberg and the deceased's wife. He says he found the case a very difficult one, but that considering the evidence as a whole he came to the conclusion that the appellant had not proved that he was the illegitimate son of the deceased.

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

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

1937
23rd April
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 60/35
Hochberg
v.
Bergmann
and others

Frumkin J: 1. I concur in the judgment in so far as it deals with the power of the President of the District Court to hear the case.

2. I need not go into the facts of this case nor can I usefully add anything to the analysis of the evidence before the Court below which was so clearly put in the judgment of my learned brother presiding. But on the very same analysis of facts and evidence I come to a different conclusion. The learned President of the District Court, with due respect, erred in holding that the only evidence of value in support of the alleged paternity was in effect statements alleged to have been made by the deceased. There was to my mind ample evidence and corroboration admissible in law apart from such statements; and it is because the other evidence was regarded in the Court below only as corroboration to the statements which were admitted with grave doubt that the learned President arrived at the decision he did, and the judgment cannot therefore stand.

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

Khayat J: I concur with the Senior Puisne Judge.

Civil Appeal No. 67 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

1937
23rd April
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 67/36
Etablissements
Rocca.
Tassy & De Roux
v.
Schatzky

ETABLISSEMENTS ROCCA,
TASSY & DE ROUX Appellants.

v.

ISRAEL COHEN SCHATZKY Respondent.

Contracts — Lapse of unreasonably long time since execution of contract without acting thereon — Contract must be deemed to have been abandoned.

By a contract for sale dated 4th June, 1928, respondent agreed to purchase from appellants 175 boxes of vegetaline of 2 tons and 23 Kgs. a box, at £. 458.10. a ton of 1015 Kgs. The goods were to be delivered on the demand of the purchaser

1937
23rd April
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 67/36
Etablissements
Rocca.
Tassy & De Roux
v.
Schatzky

and the orders of delivery were to be in approximately monthly equal quantities. The purchaser made two orders but did not order the balance. A notarial notice dated 1st June was sent by the sellers to the purchaser notifying him to take the balance of the goods ordered, in default of which, the sellers would have to take legal proceedings against him. The purchaser did not reply and the sellers commenced proceedings in the District Court of Jaffa (Civil Case No. 66/35) claiming the price of the goods ordered by the purchaser but not demanded by him. The District Court held that, in view of the facts of the case, it was unable to entertain the claim and that the sole remedy open to the sellers was in an action for damages for breach of contract, but that in view of the unreasonably long period which had elapsed since the contract, nearly a period of seven years, it held that the parties must be deemed to have abandoned the contract.

In dismissing the appeal, the Court of Appeal,

HELD that the District Court, in holding that the parties must, after the lapse of an unreasonably long period of nearly seven years since the contract, be deemed to have abandoned the contract, acted upon a right principle.

Approved: Pearl Mill Company Ltd. v. Ivy Tannery Company Ltd., 120 L.T.R. 28.

M. Gorodissky for appellants.

S. Gratch for respondent.

Judgment: This is an appeal from the District Court of Jaffa.

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

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

"THEREFORE, the firm hereby warn you that you should within one week notify the firm directly or through their agent Mr. M.L. Gorodissky, advocate, of your intention to take from the said firm the balance of the goods ordered by you on the 4th June, 1928, failing which the firm will institute an action against you in which case you shall have to pay, besides the cost of the goods, also in respect of all damages caused to the said firm by you, with costs and advocate's fees".

1937
23rd April
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 67/36
Etablissements
Rocca,
Tassy & De Roux
v.
Schatzky

In reply to this notice the buyer did not state that there was no binding contract or that deliveries were to be monthly, as was suggested by his advocate in argument before us, neither did he reply that, owing to the lapse of time, the contract must be deemed to have been abandoned. In fact, he did not reply at all and his advocate, in answer to a question by me, stated that it was sometimes considered safer not to reply. I can only say that in my opinion that is an unsatisfactory attitude for a business man to adopt in connection with a business transaction.

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

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

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

Land Appeal No. 37 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khayat J. and Abdulhadi J.

- 1. SOL GORFINKEL
- 2. ZALKIND STALBOW Appellants.
- v.
- 1. ELIEZER FEINSTEIN
- 2. NATHANIEL FEINSTEIN
- 3. AMINADAV FEINSTEIN
- 4. KOUNE SARA LEVIN Respondents.

Court, Land — Jurisdiction — Highways, Public — Land Court competent court to declare a public right.

1937
26th April
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
LA 37/36
Gorfinkel
and another
v.
Feinstein
and others

A certain strip of land, which had been declared as a public highway by the Land Settlement Officer and which was registered as such in the Land Registry registers, was closed by appellants and they added it to their parcel of land. The respondents, being aggrieved by appellants' act in that they were unable to make use of the road to have access to their lands, commenced proceedings in the Land Court of Jaffa (Land Cases Nos. 22 and 23 of 1933) asking for an order to issue against defendants requiring them to open the road in question. The Land Court gave the order prayed for. The defendants appealed. The main ground of appeal was as to the jurisdiction of the Land Court to entertain the action; the submission being that the District Court had no jurisdiction in such a dispute.

In dismissing the appeal, the Court of Appeal,

HELD that as the dispute concerned rights in or over land it was within the jurisdiction of the Land Court.

E. Ben Shemesh for appellants.

S. Turtledove for respondents.

Judgment: The facts in this action are that there was a decision of a Land Settlement Officer declaring certain land to be a public highway. The Appellants disregarded this declaration and the Respondents took this action in a Land Court to assert the public right. The Appellants object that the Land Court has no jurisdiction, but we are of opinion that there was a dispute as to rights in or over the land and that the Land Court had jurisdiction.

The Appellants had a second ground of appeal. They had applied under Sec. 66 of the Land Settlement Ordinance for rectification of the Register and they now urge that the present action should not have been decided till that application had been dealt with. They call in aid Articles 23 and 113 of the Code of Civil Procedure, but we do not think either of them apply to the facts.

The appeal is dismissed with costs to include LP. 5.- advocate's fees.

1937
26th April
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
LA 37/36
Gorfinkel
and another
v.
Feinstein
and others

Privy Council Appeal No. 80 of 1935.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

Before: Lord Atkin, Lord Thankerton and Lord Roche.

DIMITRI N. TADROS Appellant.

v.

HASHEM ABOU KHADRA Respondent.

Contracts — Time of essence of contract — Undertaking given conditional on fulfilment of terms of contract — Contract not performed — Undertaking rendered nugatory.

Tadros obtained on 5th November, 1929, a judgment against Abou Khadra, his mother and his seven brothers and sisters for the sum of LP. 15000. Negotiations for a settlement went on between the parties and an agreement was come to which was embodied in a notarial declaration under which Tadros was to accept LP. 11000 and the judgment debtors were to secure the amount by effecting a mortgage for one year on their properties mentioned therein. The notarial deed, the text whereof appears in the judgment reported hereunder, also contained certain other conditions. On the same day on which the notarial deed was executed, Tadros gave Hashem Abou Khadra a letter in which he freed Abou Khadra from any liability in respect of LP. 4000 due to a certain bank and also in respect of LP. 2000 due to a certain individual and agreed to include them in the compromise; there was also a note to the letter discharging Hashem Abou Khadra from any liability for any debts due to Tadros that were contracted before the date of the letter except LP. 11000 covered by the notarial deed. Certain occurrences followed, the details of which are fully set out in the judgment of the Privy Council, until in 1932, when Abou Khadra filed an action claiming LP. 6000 as being due to him from Tadros upon the undertaking in the letter given by Tadros, which claim was reduced to LP. 2000. The District Court gave judgment in favour of Abou Khadra which was confirmed on appeal. Tadros appealed to the Privy Council.

In humbly advising His Majesty that the appeal should be allowed, that the judgments of the District Court and of the Supreme Court should be set aside and that the suit should be dismissed, the Judicial Committee of the Privy Council,

HELD that the respondent had no ground of action against the appellant because, in the first place, the terms of the obligation by the respondent and the other Abou Khadra heirs in the notarial declaration of the 14th April, 1930, to execute and register the mortgage over the Barka lands within the period and under the indemnity specified

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

made it clear that time was of the essence of the contract and that on the expiry of the three months on the 14th July, 1930, without the execution of any mortgage, the respondent and the other heirs became liable in an unsecured debt to the appellant of LP. 12000 and LP. 3000 of indemnity, and the other provision of the agreement disappeared, and, in the second place, the terms of the letter of the 14th April, 1930, made clear that the obligations undertaken by the appellant were conditional on the execution of the mortgage in terms of the agreement of even date, and, in consequence, the failure to execute the mortgage within the time prescribed rendered the obligations by the appellant nugatory.

The judgment of the Board was delivered by Lord Thankerton.

Judgment: This is an appeal from a judgment of the Supreme Court of Palestine, sitting as a Court of Appeal, dated the 16th April, 1934, which confirmed a judgment of the District Court of Jaffa, dated the 20th December, 1932, whereby the appellant, as defender of the suit, was held liable to the respondent as plaintiff in the sum of LP. 2,000 in respect of an undertaking given by the appellant to the respondent by a letter dated the 14th April, 1930.

The claim arises out of a series of transactions in which the appellant on the one side and the respondent, his mother and his seven brothers on the other side, were concerned. On the 5th November, 1929, the appellant obtained judgment against the respondent, his mother and his seven brothers, as the heirs of Ramadan Abou Khadra, for the sum of LP. 15,000. The parties negotiated as to some settlement of this debt, and an arrangement was come to between all these parties, which was embodied in a notarial declaration dated the 14th April, 1930, which is in the following terms:

“As we are indebted to Mr. Dimitri Tadros for the sum of fifteen thousand Palestine Pounds by virtue of a deed of sale signed by one of us Hashem on behalf of himself and on behalf of the rest of us for the orange grove called “Rafoulieh” for the above mentioned sum and this sale has not been duly registered to him and he has made legal proceedings against us in the District Court of Jaffa demanding the return of the above-mentioned debt and the fulfilment of the conditions contained in the deed and there was a judgment in his favour against the majority of us in our presence and Hashem and Fouzi by default on the 5.11.1929 Register 395/1929 and 450/1929 for the refund to him of the said debt of 15,000 Palestine Pounds with interest

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

from the date of the said deed dated 14/4/1929 up to the full payment of the said debt with costs and we have submitted to this Judgment and now we have come to an agreement with Mr. D.N. Tadros to accept from us LP. 11,000 as a compromise for the said amount of 15,000 pounds and interest and cost and we undertake to give him as security for this amount a mortgage on all our shares as herein mentioned.

"We the undersigned Hanon the daughter of Suleiman Aboukhadra the widow of Ramadan Aboukhadra and her children Hashem, Fouzi, Musbah, Husni, Zakieh, Husson, Ra'aisseh, and Akfeh children of Ramadan Aboukhadra Landed Proprietors and residents of Jaffa have appointed on our behalf Mr. Benjamin John Maxwell Nimmo, British Subject and Abdelatif the son of Ibrahim Aboukhadra both residents of Jaffa, jointly and singly to admit on our behalf before the Land Registrar of Gaza and all official, Civil and Judicial Departments that we have mortgaged to Mr. Dimitri Tadros all our shares in all the lands of the village of Barka in the District of Gaza which we inherited from Ramadan Aboukhadra for one year from the date of the transfer in the Registry Office for the amount of 12,000 pounds of which LP. 11,000 agreed upon as a compromise and one thousand pounds to be paid to us and then added to the mortgage to enable us to pay any accumulated taxes for tithes, werko and any expenses on making the necessary formalities. Should the period elapse and we do not repay him the twelve thousand pounds he is entitled to put up the shares in the above-mentioned land and sell it by auction and if the proceeds do not realise the amount due he has the right to demand any balance from our other properties without procuring a Judgment from a Court and the interest to be accounted for on the amount due or on what remains from the date of its due until full payment, without making any objection for the sale of our other properties in the event of our not paying, and we have given them power to sign on our behalf all necessary documents and receipts for the completion of all formalities for the registry of the mortgage and to admit in the Registry Office on our behalf that we have received the above amount and to register in the name of our creditor Mr. D.N. Tadros or in the name of whoever Mr. D.N. Tadros wishes to either individuals or companies and it will not be lawful for us to dismiss both our attorneys or one of them before the full payment of the debt of 12,000 pounds during the time specified below and we hereby guarantee to remove at our expense all seizures mortgages and any obstacles made by a third party which may hinder registration and we give permission to Mr. D.N. Tadros to pay on our behalf the sum of 1,000 pounds above mentioned in different payments for registrations, etc., according to need to Abdelatif or Mahmoud Aboukhadra as if it was paid to us. We bind ourselves to prepare all formalities to be ready to be registered in the Land Registry within three months maximum from this

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

date and if this period elapses without the mortgage being registered we undertake to refund him the said 12,000 pounds and to pay over and above 3,000 Palestine pounds as an indemnity agreed upon between us from now without necessity for Notarial Notice and we have given permission to any of the two attorneys to give power of attorney to a third party for the fulfilment of the aforesaid formalities or part of them."

On the same day, the 14th April, 1930, the appellant gave to the respondent alone a letter in the following terms: —

"As you are indebted to the Banco di Roma for an amount over LP. 4,000 under my guarantee and the guarantee of Mr. Alfred Rock and Mohamed Abdel Rahim, and there was a judgment against you for this amount and a judgment against Mr. Alfred Rock your guarantor for the sum of LP. 2,000 due to Joseph Abdelnour, and as you, your mother, and your brothers are indebted to me for LP. 15,000 with interest and expenses, and there was a judgment against you to me for this amount, and as we have compromised on the said LP. 15,000 and interest and the expenses for the amount of LP. 11,000 against which you have guaranteed to mortgage to me the lands of Barqua as security and I have agreed to pay you LP. 1,000 over and above according to a Notarial Agreement dated 14th April, 1930, therefore I have accepted that the amount which I paid to the Banco di Roma for you and the amount of Abdelnour that they be included in this compromise, so that you will be freed from any liability in respect of the amount of LP. 4,000 odd owing to the Banco di Roma and from the LP. 2,000 due to Yusef Abdelnour in consideration of the compromise which has been effected between us in accordance with the terms and conditions of the above mentioned Notarial Declaration.

"Yours faithfully,

"(Signed) D.N. Tadros

"P.S. — The said compromise will include all debts to me besides these debts which may appear before the date of this letter, excepting the LP. 11,000 above mentioned".

The claim in the present suit is based on the undertaking given in that letter.

Prior to the date of these documents, the Banco di Roma had recovered judgment on the 5th December, 1929, for LP. 4,723 against the respondent and his three guarantors, the appellant, Alfred Rock and Abdel Rahim, and on the 1st February, 1930, the appellant had paid LP. 2,000 under the judgment to the Bank and had obtained release as a guarantor. Abdel Rahim had also obtained judgment for LP. 2,000 against the respondent and Rock as his guarantor.

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

It is clear from the terms of the letter of the 14th April, 1930, that, in any question between the appellant and the respondent, it formed part of the settlement contained in the notarial declaration and falls to be read along with it. The appellant duly provided the LP. 1,000 referred to in the declaration, but before the other parties had executed the mortgage for LP. 12,000 and before the expiry of the three months limited for its execution, the respondent was declared bankrupt on the 15th June, 1930.

On the 18th June, 1930, Barclays Bank intimated that they had a seizure on all the Aboukadra lands for LP. 5,000. On the 14th July, 1930, the appellant filed with the Syndic of the respondent's bankruptcy a claim for the recovery of the LP. 2,000 paid by him to the Banco di Roma.

It appears that the New York Achooza Aleph Incorporated of New York, a foreign company registered in Palestine, were prospective purchasers of the Barka lands, which were to have been the subject of the mortgage under the notarial declaration, and that negotiations took place between the appellant, the Khadra family other than the respondent and the New York company, who were ready to purchase the interests of the Khadra family other than the respondent in the Barka lands, the price to be used in the first place for discharge of the claim of Barclays Bank. In result, an agreement was made on the 4th August, 1930, between these parties; the respondent was not a party thereto nor was the Syndic of his bankruptcy a party thereto. The material provisions of this agreement are as follows:—

“THIS AGREEMENT is made the fourth day of August 1930 BETWEEN Hanon daughter of Suleiman Aboukkadra, widow of Ramadan Aboukhadra and her children Fouzi, Musbah, Husni, Zakieh, Husson, Ra'aisseh and Akfeh children of Ramadan Aboukhadra, Landed Proprietors and residents of Jaffa (hereinafter called the Vendors which expression shall include their heirs and assigns) of the one part Dimitri Nicolas Tadros, Landed Proprietor of Jaffa (hereinafter called the Mortgagee) of the second part and New York Achooza Aleph Incorporated of New York a foreign Company registered in Palestine vide Official Gazette No. 56 dated 1st December 1921 (hereinafter called the Purchasers) of the third part.

“WHEREAS by a written declaration dated the fourteenth day of April 1930 made before the Notary Public of Jaffa the Vendors together with one Hashem Aboukhadra declared that they were indebted to the Mortgagee in the sum of fifteen thousand pounds Palestine (LP. 15,000) plus interest and costs as therein stated.

“AND WHEREAS the said Hashem Eff. Aboukhadra (signatory of the said declaration) has now become bankrupt and the Mortgagee has agreed to release him from his liability thereunder subject to the joint and several guarantee of the remainder of the signatories of the said declaration that a minimum quantity of four thousand six hundred (4,600) dunams of land at least shall be made available for the security and the sale hereinafter mentioned.

“AND WHEREAS the Mortgagee has agreed to reduce the said total debt to the sum of twelve thousand pounds Palestine (LP. 12,000) on condition that the Vendors, as security for the said reduced sum, should execute in favour of the Mortgagee a mortgage upon all their respective shares 'musha' in all the lands of and about the village of Barka in the district of Gaza as more particularly described in the Schedule hereto annexed (and hereinafter referred to as the Property) believed to contain four thousand six hundred (4,600) dunams more or less the actual area whereof is to be determined on survey.

“AND WHEREAS the Vendors have undertaken within two months from the date hereof to execute the aforesaid mortgage free from incumbrances in favour of the Mortgagee in consideration of the reduction of the debt before referred to.

“AND WHEREAS the Purchasers are desirous of purchasing (immediately after execution of the said mortgage and subject thereto) all the said property of the Vendors as aforesaid on the terms hereinafter contained.

“NOW THEREFORE IT IS AGREED between the parties as follows:—

“(1) The Vendors shall at their own cost within two months from the date hereof mortgage the property free from incumbrances to the Mortgagee in form approved by him for the sum of twelve thousand pounds Palestine (LP. 12,000) at 7% (seven per centum) per annum. The said interest shall commence to run from the date of the said mortgage. In the event of any failure whatsoever on the part of the Vendors or any of them (no matter from what cause or excuse) to complete the said mortgage within the said period of two months the Vendors shall be jointly and severally liable to pay to the Mortgagee on demand as liquidated damages the sum of LP. 3,000 (three thousand pounds Palestine) in addition to the sum of LP. 12,000 (twelve thousand pounds Palestine) before mentioned.

“(2) The Vendors undertake to sell and the Purchasers to buy the aforesaid property (subject to the said mortgage) as determined by the survey for the price of three pounds Palestine five hundred mils (LP. 3.500 mils) per metric dunam mafrous payable as follows:—

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

“(a) On signature of these presents two thousand pounds Palestine (LP. 2,000) shall be paid by the Purchasers on deposit to Barclays Bank (Dominion Colonial and Overseas) Jaffa and two thousand pounds Palestine (LP. 2,000) in bills payable: One bill for LP. 1,000 (One thousand pounds Palestine) payable six months from date of this contract and another for a similar sum payable in one year from date of this contract, and the said cash and bills shall be held by the Bank until the transfer (musha) in the Land Registry to the Purchasers upon which event the said sum and bills shall become the property of the said Bank to be applied by it in reduction of certain indebtedness existing as a result of a judgment obtained by the said Bank against the Vendors and deposited in the Execution Office at Jaffa between the Bank and the Vendors and the said Hashem Aboukhadra. The said transfer shall be executed simultaneously with (but subject to) the said mortgage.

“(b) The balance in equal instalments shall be paid to the Mortgagee within thirty (30) months of the date of the transfer ‘Musha’ to the Purchasers and shall be applied in discharge of the mortgage, the first of which instalments shall become payable upon completion of the legal partition (mafrous) of the Property and the balance at three months intervals thereafter. In the event of any dispute at any time arising as to whether in fact the legal partition of the Property as contemplated in this contract by the Vendors has been effected or not or as to upon what date such partition was effected the same shall be submitted to and finally determined by Mr. C. F. Reading or if he is unable to act by some person appointed by him.

“(c) In the event of the actual purchase price (as and when ascertained by measurement of the property) being less than sufficient (after deduction of the LP. 4,000 (four thousand pounds Palestine) paid to the said Bank) to satisfy the principal sum of twelve thousand pounds Palestine (LP. 12,000) due to the Mortgagee under the said mortgage then the Vendors shall be jointly and severally liable to repay forthwith such balance remaining unsecured and due to the Mortgagee thereunder. Once the mafrous of the property has been completed as contemplated by sub-clause (b) above no claim on the part of the Purchasers against the Vendors or otherwise shall effect the right of the Mortgagee to receive from them punctual payment of the balance of the purchase price.

“(3) The Mortgagee undertakes to consent to the said sale (subject to his mortgage) and agrees likewise to give his consent to any re-transfer of the property to the Vendors (subject to the said mortgage) in the event of the exercise of the option mentioned in Clause 8 below provided always

that the Purchasers shall remain liable on the said mortgage (as they hereby agree to do) until the actual re-transfer is effected in the Land Registry whereupon the mortgage shall immediately become payable in full by the Vendors notwithstanding anything to the contrary herein contained.

“(4) The Purchasers agree after purchase by them ‘Musha’ as aforesaid to pay the interest at seven per centum (7%) on the said mortgage annually in arrear with effect from the date of the said mortgage and punctually to pay the Mortgagee all interests and instalments becoming payable in respect thereof.

“(5) Notwithstanding anything to the contrary herein contained in the event of the Purchasers failing to pay to the Mortgagee any interest or any instalments on due date the mortgage shall become immediately due and the Mortgagee shall have full right after giving sixty days notice by registered letter to the Purchasers to exercise all legal rights and remedies of a Mortgagee whose mortgage debt has become due.

“(6) The area shall be determined forthwith by a duly licensed Surveyor appointed and paid by the Vendors.

“(7) The property is at present musha with the exception of an area believed to be about one thousand (1,000) metric dunams (more or less) within the blocks at present known as Wadie el Assal and Tel el Ramal which is ‘mafrous Khasousi’ as this area shall be included within the total area of four thousand six hundred (4,600) dunams as roughly delineated for identification on the plan attached which shall be so partitioned as to constitute a single block of four thousand six hundred (4,600) dunams. The Purchasers shall be at liberty to enter upon the Mafrous Khasousi parcel at any time after the ‘musha’ transfer in the Land Registry and shall be entitled to sink a well, cultivate and plant thereon. Any such well and trees planted and any constructions thereon shall form part of the security of the Mortgagee.

“(8) The transfer of the Vendors shares in the property shall be effected ‘musha’ (subject to the said mortgage) within two calendar months from the date of this Contract and the legal partition ‘mafrous’ shall be fully completed by the Vendors at their own expense within one year from the date of transfer ‘Musha’ and in the event of the Vendors failing so to partition within the said period the Purchasers shall have the option to be exercised by registered letters addressed to the Vendors with copy to the Mortgagee (such option only to be exercised not later than the fifteenth month after the said transfer ‘Musha’) requiring a refund from the Vendors of all sums paid to them in respect of the purchase price with interest at 7% plus a sum of three

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

thousand pounds Palestine (LP. 3,000) as agreed and liquidated damages and upon payment thereof the Vendors may require all the property to be re-transferred back to them subject to the said mortgage and the Vendors shall in such event be liable to refund to the Purchasers any money expended by the latter according to their official books upon improvements to the land.

“(9) The fact that the area of the property is found to be in excess or less than the 4,600 dunams shall not affect this contract except so far as it operates to vary the purchase price. In the event of the purchase price exceeding the sum required to pay the bank plus the mortgage and costs, the balance shall be paid to the Vendors.

“(10) Transfer fees in respect of the said transfer to the Purchasers in the Land Registry shall be paid by the Purchasers but all other expenses and taxes shall be paid by the Vendors, who shall deliver the property, except for the mortgage aforesaid, free of all charges and claims whatsoever including claims (if any) for compensation of cultivators.

“(11) The Vendors undertake to keep open the present direct road leading from the property to the main road known as Jaffa-Gaza Road.

“(12) The Mortgagee shall discharge from time to time such portion of the land comprised in his mortgage as he (after consultation with Purchasers) shall deem fit having regard to the repayments made to him by the Purchasers and the preservation of his security.

“(13) The commission of any breach hereof by or any failure on the part of any party hereto shall itself be deemed notice thereof as contemplated by Article 107 of the Code of Civil Procedure and no Notarial Notice shall be deemed necessary upon any matter arising out of this contract. Any notice required to be given shall be by ordinary registered letter to the following address which shall also be the address for service respectively in the event of any litigation and proof of posting of such registered letter or delivery of any process at such address shall be deemed sufficient proof of service.

“(14) Until after the execution of the mortgage before referred to nothing contained in this agreement shall prejudice the rights and remedies of the Mortgagee existing or arising by virtue of the before recited declaration of 14th April 1930.”

The vendors failed to execute the mortgage before the expiry of the two months prescribed on the 4th October, 1930, and the appellant gave them notarial notice and obtained pro-

visional seizure. On the 9th February, 1931, the vendors executed the mortgage in the appellant's favour of their shares in the Barka lands and executed a transfer of these shares to the New York Company, who paid off Barclays Bank.

On the 24th June, 1931, the respondent's bankruptcy was rescinded, and on the 20th September, 1931, the respondent, though not asked to do so by the appellant, made a transfer of his share of the Barka lands to the New York company. Even with this addition, the area of these lands ultimately proved to be short of the 4,600 dunams guaranteed in the agreement of 4th August, 1930, and, on the 23rd November, 1933, the appellant obtained judgment against the Khadra family other than the respondent for the resulting deficit of LP. 2,085.703 mils on the amount due under the mortgage of 9th February, 1931.

After a notarial notice given on the 24th January, 1932, the respondent brought the present suit against the appellant, claiming the sum of LP.6,000 to be due to him upon the undertaking in the appellant's letter of the 14th April, 1930, to free him of liability in respect of LP.4,000 due to the Banco di Roma and LP. 2,000 due to Abdel Nur. The claim was reduced to LP. 2,000 on the appellant objecting that the former debt had been discharged.

The District Court gave judgment in the respondent's favour for LP. 2,000, holding that the appellant's letter of the 14th April, 1930, was a part of, and had effect together with, the second agreement of the 4th August, 1930. They stated in their judgment: —

“The defendant got the security, though not quite the same, which he would have got under the first agreement. It was the best which he could get under the existing circumstances. We must remember that when the plaintiff's bankruptcy was annulled, he himself threw his share into the mortgage, though not asked to do so, thereby increasing the defendant's security.”

This judgment was affirmed on appeal by the Supreme Court, on the ground that the second agreement of the 4th August, 1930, was a mere modification of the first agreement of the 14th April, 1930, rendered necessary, as its second recital indicates, by the respondent's bankruptcy, and that, this being so, the second agreement did not annul the letter of the 14th April, 1930, which must in consequence be read in conjunction with the second agreement.

1937

26th April

Lord Atkin
Lord Thankerton
and
Lord Roche

PCA 80/35

Tadros

v.

Abou Khadra

1937
26th April
Lord Atkin
Lord Thankerton
and
Lord Roche
PCA 80/35
Tadros
v.
Abou Khadra

Their Lordships regret that they are unable to agree with these grounds of judgment, as, in their opinion, the terms of the obligation by the respondent and the other khadra heirs in the notarial declaration of the 14th April, 1930, to execute and register the mortgage over the Barka lands within the period and under the indemnity specified make clear that time was of the essence of the contract, and that, on the expiry of the three months on the 14th July, 1930, without the execution of any mortgage, the respondent and the other heirs became liable in an unsecured debt to the appellant of LP. 12,000 and LP. 3,000 of indemnity, making LP. 15,000 in all. The other provisions of the agreement disappeared. In the second place, in their Lordships' opinion, the terms of the letter of the 14th April, 1930, make clear that the obligations undertaken by the appellant were conditional on the execution of the mortgage in terms of the agreement of even date, and, in consequence, the failure to execute the mortgage within the time prescribed, rendered these obligations by the appellant nugatory. This was the position rightly taken up by the appellant in his reply, dated the 30th January, 1932, to the respondent's notary notice of the 24th January, 1932.

Their Lordships are also of opinion that the second agreement of the 4th August, 1930, was not a modification of the earlier agreement, but was a new agreement with different parties and under different conditions. As already stated, the first agreement had disappeared, leaving the Khadra heirs liable for an unsecured debt of LP. 15,000. Obviously the appellant was anxious to get payment or security; it was useless to approach the respondent, in view of his bankruptcy, and accordingly negotiations were confined to the other debtors.

Accordingly, their Lordships are of opinion that the respondent has no ground of action against the appellant, and they will humbly advise His Majesty that the appeal should be allowed, that the judgments of the District Court and of the Supreme Court should be set aside and that the suit should be dismissed. The appellant will have his costs in the appeal and in the Courts below.

Land Appeal No. 56 of 1935.

In the Supreme Court sitting as a Court of Appeal.

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

- 1. AHMAD MUHAMMAD AMIN ABU HAJLA
 - 2. HALIMA MAHMOUD ISMAIL MUNIF
 - 3. FATMEH MUHAMMAD KHALIL KAMAL Appellants.
- v.
- 1. MAS'AD ES SAYEGH
 - 2. ANDRAWES SALIBA DALLAL
 - 3. DIAB HAMDAN
 - 4. YESHUA HANKIN Respondents.

1937
28th April
Manning S.P.J.
Frumkin J.
and
Khayat J.
LA 56/35
Abu Hajla
and others
v.
Sayegh
and others

Evidence, Oral — Immovable property — Claim to land registered in Land Registry — Admissibility of oral evidence against title deeds.

A dispute arose between appellants and respondents as to the western boundary of a plot of land belonging to appellants. It was before the Land Settlement Officer who decided the dispute in favour of respondents (plaintiffs before him) on the ground that they were the registered owners of the land they claimed. In arriving at that decision the Land Settlement Officer relied on Land Appeal No. 137/23, 1 P.L.R. 13. By leave, appellants appealed to the Land Court of Jaffa (Settlement Appeal No. 35/32) and their appeal was dismissed. They appealed to the Supreme Court.

In allowing the appeal, setting aside the decisions of the Land Settlement Officer and the Land Court and remitting the case to the Land Settlement Officer with directions to take all relevant evidence into consideration whether it is in writing or not and to decide the dispute in accordance with the law, the Court of Appeal,

HELD that in deciding an issue as to the title of a claimant to land, a Court is bound to consider all relevant evidence placed before it, whether that evidence be oral or documentary, and if oral evidence is admissible as to possession and boundaries, then such evidence has to be weighed in conjunction with the documentary evidence. A Court is at liberty to refuse to rely on such oral evidence but if it regards such oral evidence as convincing it is not entitled to disregard it merely because it is oral.

1937
28th April
Manning S.P.J.
Frumkin J.
and
Khayat J.

LA 56/35
Abu Hajla
and others
v.
Sayegh
and others

Disapproved: LA 137/23, 1 P.L.R. 13.

Auni Abdulhadi for appellants.

I. Olshan for fourth respondent, rest in person.

Judgment: 1. This appeal arises out of a dispute as to the western boundary of land belonging to the appellants. The Land Settlement Officer decided in favour of the respondents on the ground that they were the registered owners of the land they claimed. He relied on a decision of this Court in Land Appeal No. 137 of 1923 (1 P.L.R. 13) in which it was said:

“There is no written evidence to contradict the registered title which carries a presumption of ownership; the evidence of witnesses, the possession of the parties, however convincing, are not sufficient to over-ride the general rule that has been established in this Court that a registered title will not be set aside except by some evidence in writing sufficient to support an adverse title or to corroborate evidence in support of such adverse title.”

2. The appellants were granted leave to appeal to the Land Court, Jaffa. The Land Court decided the appeal in chambers without hearing the parties. In its judgment it made no reference to the facts of the case or to their bearing on the justice of the appellants' claim, it contented itself with relying on the passage cited above from the judgment of this Court in Land Appeal No. 137 of 1923.

3. This passage certainly seems to lay down a general rule as to evidence in actions with respect to land. So far as it purports to be such a rule it does not meet with our acceptance. In deciding an issue as to the title of a claimant to land a Court is bound to consider all relevant evidence placed before it, whether that evidence be oral or documentary. If oral evidence is admissible as to possession and boundaries, then such evidence has to be weighed in conjunction with the documentary evidence. A Court is at liberty to refuse to rely on it, but if it regards it as convincing it is not entitled to disregard it merely because it is oral.

4. To apply any such rule in the present case would be to beg the question at issue, for the substance of the appellants' claim is that the respondents succeeded in registering a larger area than that to which they were entitled. A perusal of the Land (Settlement of Title) Ordinance and especially of section 51

1937
28th April
Manning S.P.J.
Frumkin J.
and
Khayat J.

LA 56/35
Abu Hajla
and others
v.
Sayegh
and others

shows that oral evidence of possession may be considered by a Settlement Officer and that such evidence may decide an issue as to the ownership of land in opposition to a registered title.

5. In the circumstances we have no option but to set aside the decisions of the Land Settlement Officer and the Land Court and to remit the dispute to the Settlement Officer with directions to take all relevant evidence into consideration whether it is in writing or not, and to decide the dispute in accordance with law. Costs of this appeal will abide the event.

Land Appeal No. 52 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

ABDUL RAHIM IBN SHEIKH RASHID DANAF,
on behalf of the estate of his father . . . *Appellant.*

v.

1. ABDEL AFU IBN SHEIKH SAID DANAF,
as sole heir of his mother Rukieh
and his brother Yusef.
2. HAJ MUSTAFA DANAF,
as heir of his son Aahed and as
guardian of his grandson Mousa . . . *Respondents.*

Jurisdiction — Immovable property — Action for non-interference in enjoyment of one's immovable property within jurisdiction of Land Court.

An action for the non-interference by a person in the enjoyment by another of his immovable property is within the jurisdiction of a Land Court — So laid down by the Supreme Court sitting as a Court of Appeal.

George Salah for appellant.

Jawdat Kazimi for respondents.

Judgment: Plaintiffs (Respondents) claimed ownership with Defendant in two houses by way of inheritance from their

1937
28th April
Copland J.
Khaldi J.
and
Abdulhadi J.
LA 52/36
Danaf
v.
Danaf
and another

1937
28th April

Copland J.
Khaldi J.
and
Abdulhadi J.

LA 52/36
Danaf

v.
Danaf
and another

ancestors, and that after having enjoyed the possession of their shares for many years, the Defendant started to interfere with with their possession

Several documents were produced in the Court below, including kushans and werko receipts, in support of Plaintiffs' claim, but the Defendant (Appellant) claimed that the kushans were forged.

The Land Court stated in its judgment that there was no evidence before it to prove that the kushans were forged.

On the evidence and documents produced the Court below was satisfied that the Plaintiffs own shares in the two houses in claim by way of inheritance through their ancestors, and ordered the Defendant to refrain from interfering with the ownership of Plaintiffs.

The counsel for Appellant argued before us that the Land Court had no jurisdiction to order the non-interference by Defendant (Appellant) in the enjoyment by Respondents of their shares in the houses, but the Court did not see its way to entertain his argument in view of the provisions of the Land Courts Ordinance.

The only other real point raised on appeal was the question of the alleged forgery of the kushans. The Court below went into this question in detail and very carefully, and decided on the documents and evidence produced that the forgery of the kushans was not established. This is a question of fact and there does not appear to us to be any reason for interfering with the finding of the Court below with regard to this question.

We, therefore, dismiss the appeal with costs and LP. 3.- advocate's fees.

High Court No. 12 of 1937.

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

Before: Copland J. and Abdulhadi J.

FARIDEH JIRIES SALEM KATTAN Petitioner.

v.

1. CHIEF EXECUTION OFFICER, JERUSALEM
2. IBRAHIM ELIAS FARAH KATTAN Respondents.

Execution proceedings — Ottoman Law of Execution, Article 90 — Provisions of article inapplicable to a daughter of a deceased debtor where that daughter is married.

1937
29th April
Copland J.
and
Abdulhadi J.
HC 12/37
Kattan
v.
C.E.O. Jerusalem
and another

The provisions of Article 90 of the Ottoman Law of Execution do not apply to the daughter of a deceased debtor where that daughter is married, since she cannot be considered any more of the family of her father who would be no more responsible for her support.

H. Cattan for petitioner.

Y. Amon for second respondent.

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

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

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

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

The Court, therefore, orders that the rule nisi be discharged with costs and LP. 3.- advocate's fees.

Land Appeal No. 50 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

FAYEZ ODEH ELIAS Appellant.

v.

BISHARA ODEH ELIAS Respondent.

Evidence, Oral — Admissibility of oral evidence against a document where parties to litigation are brothers — Ottoman Code of Civil Procedure, Articles 80 and 82 — Land Courts Ordinance, Section 8.

In an action brought in the Land Court of Jerusalem, the appellant sought a rectification of a title deed in the name of the respondent. Both parties are brothers, and the appellant's allegation was that he and the respondent had jointly purchased land and had contributed jointly to building thereon, that respondent registered the property in his name and refused to acknowledge that appellant owned any part of the house and land. The Land Court heard the evidence of the parties but refused to hear the evidence of witnesses whom the appellant wished to call in support of his claim. It held that there was no fraud against the title deed and that no admissions had been proved. It accordingly dismissed the action. The appellant appealed.

In allowing the appeal, setting aside the judgment of the Land Court and remitting the case to it with directions to hear the evidence of any witnesses whom the appellant may desire to call in support of his claim and the evidence of any witnesses the respondent may desire to call in reply and to decide the case in accordance with the law, the Court of Appeal,

HELD that the Land Court was wrong in considering itself bound by Article 80 of the Ottoman Code of Civil Procedure, because the effect of Article 82 of the same law is to lay down that Article 80 does not apply when the parties are brothers, and because Section 8 of the Land Courts Ordinance provides that a Land Court is not bound by the rules of evidence contained in that Code.

E. Georges Elia for appellant.

Respondent in person.

Judgment: In this case the appellant sought the rectification of a document, namely a certificate of registration in the

1937
30th April
Manning S.P.J.
Frumkin J.
and
Khayat J.
LA 50/36
Elias
v.
Elias

Land Registry. He alleged that he and his brother, the Respondent, had jointly purchased land and had contributed jointly to building a house thereon, that they had agreed that they should jointly own the house and land, Appellant as to one third, Respondent as to two thirds. The Respondent, however, he said, registered the house in his (the Respondent's) name solely and refused to acknowledge that the Appellant owned any part of the house and land. The Respondent being registered as owner, the Appellant has no title unless he succeeds in his claim for rectification.

The Land Court heard the evidence of the parties but refused to hear the evidence of witnesses whom the Appellant wished to call in support of his claim. The Land Court apparently relied on Article 80 of the Ottoman Code of Civil Procedure and considered it was precluded from hearing the evidence of witnesses to contradict the effect of a document. It held that there was "no fraud against this kushan" and that no admissions had been proved, and dismissed the Appellant's case.

We think that the Land Court was wrong in considering itself bound by Article 80 of the Ottoman Code of Civil Procedure. Section 8 of the Land Courts Ordinance provides that a Land Court is not bound by the rules of evidence contained in that Code.

Further, and on broader grounds, we think that the Land Court should have heard the witnesses whom the appellant desired to call. If the Appellant's story is true, he has an equitable right to one-third of the house and land and the Respondent is a trustee as to that one-third. If the Respondent, by registering the land in his own name, intended to deprive the Appellant of his right, he was committing a fraudulent breach of trust. If there is no provision in the Ottoman Law by which a written document can be contradicted on the ground of fraud, then Article 46 of the Palestine Order-in-Council has to be resorted to and English Law may be applied. There can be no doubt that under that Law the Appellant was entitled to call witnesses as to the circumstances under which the land was bought and the house erected.

Lastly, even if the rules of evidence contained in the Ottoman Code of Civil Procedure are resorted to, it seems that the effect of Article 82 is to lay down that Article 80 does not apply when the parties are brothers, as they are in this case.

1937
30th April
Manning S.P.J.
Frumkin J.
and
Khayat J.
LA 50/36
Elias
v.
Elias

1937

30th April

Manning S.P.J.
Frumkin J.
and
Khayat J.

LA 50/36

Elias

v.

Elias

We are of opinion that the Land Court erred in refusing to allow the Appellant to prove his claim by the oral evidence of witnesses, and we order that the judgment appealed against be set aside and the case remitted to the Land Court with directions to hear the evidence of any witnesses whom the Appellant may desire to call in support of his claim and the evidence of any witnesses the Respondent may desire to call in reply and to decide the case in accordance with law.

Costs of this appeal will abide the event.

Civil Appeal No. 75 of 1934.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

SAID EL KARMI Appellant.

v.

ALBERT FAR'OUN Respondent.

Interest — Interest clause in mortgage deed filled with dashes — Claim for interest on mortgage money — From which date interest payable.

In a claim for interest in respect of mortgage money, where the relevant clause in the mortgage deed dealing with interest was not only left empty but dashes were placed in the space provided for the insertion of the amount of interest, interest is payable only as from the date when application was first made to the Execution Office for the execution of the mortgage deed, and no interest is payable during the running of the deed — So decided by the Supreme Court sitting as a Court of Appeal.

The facts, in so far as they are relevant, are set out in the judgment.

Auni Abdulhadi for appellant.

Jacob Levy for respondent.

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

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

This case arose out of a mortgage-deed under which Respondent lent to Appellant a sum of LE. 1000 (equivalent to



1937

11th May

Copland J.
Khaldi J.
and
Abdulhadi J.

CA 75/34

Karmi

v.

Far'oun



1937
11th May
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 75/34
Karmi
v.
Far'oun

LP. 1025.641 mils). The interest clause was not only left empty but dashes were placed in the space provided for the insertion of the amount of interest which shows clearly that the intention of the parties was that no interest should be paid.

The debt not having been paid in time, the mortgaged property was sold, but it only realised LP. 636.210 mils. The Respondent therefore raised an action in the District Court of Nablus for the sum of LP. 803.983 mils, being the balance of the debt, costs and interest.

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

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

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

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

Civil Appeal No. 102 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

1937
11th May
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 102/36
Abu Habel
v.
Saleh

HASSAN YASIN MUSTAFA ABU HABEL . . . Appellant.

v.

SALEH MUHAMMAD SALEH . . . Respondent.

Evidence, Oral — Inadmissible against documentary evidence.

Oral evidence is not admissible to contradict the contents of a written document. Even between relations oral evidence is not admissible against a written document.

Said Zein Eddin for appellant.

Fahmi Hussein for respondent.

Judgment: This is an appeal from the judgment of the District Court of Jaffa dated the 25th June, 1936, which entered judgment for the Plaintiff (Respondent) against the Defendant (Appellant) for the sum of LP. 100 by the former to the latter under an agreement, and LP. 200 as liquidated damages with costs and expenses.

The case centres around two documents between relatives:-

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

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

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

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

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

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

1937
11th May
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 102/36
Abu Habel
v.
Saleh

Civil Appeal No. 12 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khayat J. and Abdulhadi J.

1937

13th May

Manning S.P.J.
Khayat J.
and
Abdulhadi J.

CA 12/36

Aidey

v.

Amr

BADRI AIDEY Appellant.

v.

HUSEIN AMR. Respondent.

Res judicata — Action on promissory note insufficiently stamped. — Dismissal of action — Fresh action for money lent — Whether matter *res judicata* — Mejlle, Article 1837.

Decisive oath — Time for tendering it — Mejlle, Article 1818.

Husein Amr sued Aidey for LP. 150 due on a promissory note insufficiently stamped. The action was dismissed on the ground that it could not be brought on the note. An appeal to the Supreme Court was dismissed on the ground that Amr could not recover on an insufficiently stamped promissory note and that he could not call oral evidence to prove the debt independently of the note, as the only cause of action was that on the promissory note. Amr then sued Aidey in the Magistrate's Court of Haifa (Civil Case No. 5/35) for the recovery of the LP. 150 as money lent. Aidey raised the points of *res judicata* and the inadmissibility of oral evidence to prove a claim exceeding LP. 10. The British Magistrate ruled against Aidey on the points raised. Amr's advocate thereupon called upon Aidey to take the decisive oath. Aidey's advocate said that his client would not take the decisive oath until the two points raised and overruled by the British Magistrate had been decided on appeal. The British Magistrate then entered judgment for Amr. Aidey appealed to the District Court of Haifa, and owing to disagreement between the two members of whom the Court was constituted the appeal was dismissed. The President of the District Court granted Aidey leave to appeal to the Supreme Court on the two points raised by him before the British Magistrate and overruled.

In allowing the appeal, setting aside the judgments of the Magistrate's Court and of the District Court and remitting the action to the Magistrate's Court for tendering the decisive oath to appellant and for deciding the action thereafter in accordance with the law, the Court of appeal,

HELD (1) that the local provision with regard to *res judicata* was contained in Article 1837 of the Mejlle, which clearly meant that when an action had been followed

by a valid judgment, setting out the *ratio decidendi*, then that action could not be brought again. The Article did not mean that when an action on a promissory note failed because the note was insufficiently stamped, the plaintiff was precluded from bringing an action on the debt which gave rise to the promissory note. In this particular case the original cause of action was the promissory note and there had been no amendment of the claim, and if respondent lent money to appellant, he had a separate cause of action independently of the promissory note.

(2) that a decisive oath under Article 1818 of the Mejlle cannot be called for unless a plaintiff is unable to prove his case by evidence.

Referred to: CA 100/29, 1 P.L.R. 528.

N. Abcarius for appellant.

George Salah for respondent.

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

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

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

1937

13th May

Manning S.P.J.
Khayat J.
and
Abdulhadi J.

CA 12/36

Aidey

v.

Amr

1937
13th May
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 12/36
Aidey
v.
Amr

decided on appeal. The learned Chief Magistrate then entered judgment for the respondent for the amount claimed.

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

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

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

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

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

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

1937
13th May
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 12/36
Aidey
v.
Amr

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

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

“Claims based upon a contract, agreement, partnership, lease or debt, which by law or custom are reduced to writing and which exceed 1,000 piastres in value must be proved by a sanad.

Every claim disputing liability under a sanad shall be proved by a sanad, or by the admission or account books of the defendant, even if the amount in question do not exceed 1,000 piastres”.

9. The learned Chief Magistrate held that Section 14 of the Evidence Ordinance repealed Article 80 of the Ottoman Code of Civil Procedure. In coming to this conclusion he relied on a decision of this Court in Civil Appeal No. 100 of 1929, in which the facts were somewhat different. In the present case I do not think it is necessary for us to decide whether the learned Chief Magistrate was right in his conclusion. After he had disposed of the two objections the respondent's advocate did not apply to call oral evidence. What he did do was to call on the appellant to give the decisive oath. The relevant articles of the Mejelle are as follows: —

“Article 1818: If the plaintiff proves his case by evidence, the judge shall give judgment accordingly. If he cannot prove it, he has a right to the oath and if he asks to exercise such right, the judge shall accordingly tender the oath to the defendant.

Article 1819: If the defendant swears the oath, or if the plaintiff does not ask for the oath to be administered, the judge shall order the plaintiff to give up his claim upon the defendant.

Article 1820: If the defendant refuses to take the oath, the judge shall deliver judgment based upon such refusal. If the defendant states that he is prepared to swear an oath, after judgment has been so delivered, the judgment shall remain undisturbed”.

10. The oath cannot be called for unless the plaintiff is unable to prove his case by evidence. The learned Chief Magistrate had ruled that the respondent might give evidence on his own behalf and also call the appellant as a witness. The respondent did not avail himself of this ruling, he chose to call on the appellant to give the decisive oath under Article 1818 of the

1937
13th May
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 12/36
Aidey
v.
Amr

Mejelle, thereby renouncing his right to call any evidence in support of his claim. In the course that the action took, no question therefore arose as to the right of the respondent to call oral evidence in support of his claim and for this reason I consider it unnecessary for this Court to deal with the second point of law on which leave was given to appeal.

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

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

Civil Appeal No. 108 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

1937
13th May
Copland J.
Frumkin J.
and
Khayat J.
CA 108/36
Banco di Roma
v.
Nouriel

BANCO DI ROMA Appellant.

v.

JACOB NOURIEL Respondent.

Promissory notes — Prescription — Indorsement of a promissory note and discount thereof with a bank — Signing of a declaration by indorser that bank not responsible to perform legal proceedings against makers or drawers or indorsers — Non-payment of promissory note on maturity by maker — Action against indorser after lapse of one year from maturity of note — Action barred by limitation — Clause in declaration not containing a waiver of the provisions of Section 96 (1) of Bills of Exchange Ordinance.

1937
13th May
Copland J.
Frumkin J.
and
Khayat J.
CA 108/36
Banco di Roma
v.
Nouriel

A promissory note signed by a third person to the order of Nouriel was endorsed by the latter and discounted in Banco di Roma. On discounting the note, Nouriel signed a declaration, the essential clause of which is reproduced in the judgment reported hereinafter. The note was not paid by the maker on maturity and Banco di Roma sued Nouriel as indorser of the note in the Magistrate's Court of Jerusalem (Civil Case No. 2100/36). The Magistrate dismissed the action on the ground that it was instituted after the lapse of one year from the date of maturity and therefore barred by limitation under Section 96 (1) of the Bills of Exchange Ordinance. On appeal to the District Court, Jerusalem (Civil Appeal No. 77/36) that Court confirmed the judgment of the Magistrate, but the President thereof granted leave to appeal to the Supreme Court on the point of law quoted in the judgment of the Court of Appeal.

In dismissing the appeal, the Court of Appeal,

HELD that the clause in the declaration signed by the indorser, the text whereof appears in the judgment reported hereinafter, did not contain a waiver of the provisions of Section 96 (1) of the Bills of Exchange Ordinance with regard to instituting an action within the period of one year, but that the effect of the clause in question was limited to such proceedings as making protests against the indorsers and such like.

E. Georges Elia for appellant.

B. Ben Aharon for respondent.

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

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

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

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

1937
13th May
Copland J.
Frumkin J.
and
Khayat J.
CA 108/36
Banco di Roma
v.
Nouriel

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

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

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

We are of opinion that this clause does not contain a waiver of the provisions of Section 96(1) with regard to instituting an action within the period of one year, but that its effect is limited to such proceedings as making protests against the indorsers, and such like.

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

Civil Appeal No. 115 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

1937
18th May
Copland J.
Frumkin J.
and
Khayat J.
CA 115/36
Shimon
v.
Department of
Customs

SHLOMO BEN SHIMON Appellant.

v.

DEPARTMENT OF CUSTOMS Respondent.

Customs dues — Refusal by importer of goods to pay the customs dues as assessed by customs authorities — Sale of goods as unclaimed goods — Action for recovery of value of goods sold — Course to be followed by importer in such instances — Customs Ordinance, Sections 131, 147 and 154.

1937
18th May
Copland J.
Frumkin J.
and
Khayat J.
CA 115/36
Shimon
v.
Department of
Customs

Certain goods imported by the appellant were valued for the purposes of customs duty at 5% more than the value thereof as declared by the importer. The importer refused to pay the customs duty as assessed by the customs authorities, and after having failed in his efforts to convince the customs authorities of the correctness of his views, the importer initiated proceedings in the District Court of Jerusalem (Civil Case No. 119/36) for the release to him of the goods against payment of the customs duty according to his declaration of value, or against payment of the customs dues in kind, or that the goods be taken by Government under Section 131 of the Customs Ordinance. In the meantime the goods had already been sold by the customs authorities as unclaimed goods. The District Court, while dismissing the action, held that the Director of Customs was entitled to insist on collecting the *ad valorem* duty on the value of the goods as assessed under Section 131 of the Customs Ordinance, and if the importer was not satisfied with the assessment the only course open to him was to proceed in accordance with Section 154 of the Ordinance. The importer appealed. The only point in the appeal was whether the Director of Customs should apply the provisions of Section 131 or Section 147 of the Customs Ordinance to a case such as this.

In dismissing the appeal, the Court of Appeal,

HELD that the Director of Customs, in a case as the present, has absolute discretion as to whether he should apply Section 131 or Section 147 of the Customs Ordinance. On a true and proper construction of the relevant sections of the Customs Ordinance the Director of Customs is entitled to insist on collecting the *ad valorem* duty on the value as assessed under Section 131 of the Customs Ordinance, and if the importer is not satisfied with the assessment then the only course open to him is to proceed in accordance with Section 154.

N. Levy and A. Amdur for appellant.

Junior Government Advocate (E. Salant) for respondent.

Judgment. This is an appeal from the judgment of the District Court of Jerusalem where the Plaintiff, a merchant, raised an action against the Customs Department claiming the value of certain goods on which he had refused to pay Customs duty and which were eventually sold as unclaimed goods.

The District Court of Jerusalem gave judgment against the Appellant on the ground that the Director of Customs has entire discretion as to which particular Section of the Customs Ordinance he should employ.

The only point in this appeal is whether the Director of Customs should apply the provisions of Section 131 or Section 147 of the Customs Ordinance to a case such as this.

1937

18th May

Copland J.
Frumkin J.
and
Khayat J.

CA 115/36

Shimon

v.

Department of
Customs

We think that the District Court judgment is correct and we really can add very little as to the statement made by them that on a proper and true construction of the relevant Sections of the Ordinance the Director is entitled to insist on collecting the ad valorem duty on the value as assessed under Section 131 of the Customs Ordinance, and that if the importer is not satisfied with the assessment then the only course open to him is to pay under protest in accordance with Section 154 of the Ordinance and thereafter to bring an action for the recovery of any alleged excess in duty in accordance with Section 154 (2) and (3).

We agree with the District Court that the Director of Customs has absolute discretion as to whether he should employ Section 131 or Section 147 of the Ordinance, and we cannot interfere with such a discretion.

The appeal is, therefore, dismissed with costs and LP. 3. - advocate's fees.

We, however, wish to place on record that as there were negotiations still going on between Appellant and the Director of Customs with regard to the amount of customs duty payable on the goods in question, the Director of Customs would have been better advised had the Appellant been served with a written warning of the contemplated action of the Department before the goods were sold as "unclaimed goods".

Land Appeal No. 58 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

YEHIA HAMUDEH Appellant.

v.

1. HADASSAH MEDICAL ORGANIZATION
2. KEREN KAYEMETH LEISRAEL LTD. . . Respondents.

Immovable property — Expropriation — Price of expropriated land not agreed upon — Application to Land Court to

1937

18th May

Copland J.
Frumkin J.
and
Khayat J.

LA 58/36

Hamudeh

v.

Hadassah Medical
Organization
and another

determine compensation payable — Assessment of compensation by Land Court at mean of the three figures given by the experts — Matter one for appreciation of Land Court upon facts before it.

Having failed to come to an agreement as to the value to be paid for land owned by appellant which was expropriated by the respondents, the latter applied to the Land Court, Jerusalem (Land Case No. 89/36) for the assessment of the compensation payable by them. Three experts were appointed, they valued the land, and their valuation differed widely. The Land Court, on the evidence before it, took the mean of the three figures given, namely 450 mils per square metre. Dissatisfied with that decision of the Land Court, Hamudeh appealed.

In dismissing the appeal, the Court of Appeal

HELD that the matter of taking the mean of the three figures advanced by the experts as representing the price of the land was one for the appreciation of the Land Court upon the facts before it with which the Court of Appeal could not see its way to interfere.

Aff Khoury for appellant.

A. Levin for respondents.

Judgment: The Respondents obtained a certificate from His Excellency the High Commissioner to the effect that the construction of the Rothschild - Hadassah - University Hospital was an undertaking of a public nature within the meaning of the Expropriation of Land Ordinance, which certificate was published in the Gazette.

A notice to treat was therefore issued by the promoters and approved by the High Commissioner in respect of the required plot of land on Mount Scopus, Jerusalem, and the notice was duly served on the appellant.

The Respondents then applied to the Land Court of Jerusalem to fix the amount of compensation payable in respect of the land in question to the owners thereof.

A committee of experts was appointed who differed in their estimation of the value of the land, and the Court, after hearing certain evidence, decided that the price should be at 450 mils per square metre.

1937

18th May

Copland J.
Frumkin J.
and
Khayat J.

LA 58/36

Hamudeh

v.

Hadassah Medical
Organization
and another

1937
18th May
Copland J.
Frumkin J.
and
Khayat J.

LA 58/36
Hamdeh

v.
Hadassah Medical
Organization
and another

The appeal is against this decision of the lower Court, and the appellant contended before us that the value of the property was more than the award: and that the judgment of the Land Court was contrary to the evidence.

The three experts differed widely in their estimation of the value of the property, but the Land Court, on the evidence before it, seems to have taken the mean of the three figures advanced by them.

This is a matter for the appreciation of the lower Court upon the facts before it and we do not see our way to interfere with their decision.

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

Land Appeal No. 14 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

AHMAD ISSA ABU HAMDEH,
and eight others Appellants.

v.

1. ELIAZAR YOSEF ELYASHAR
2. HAY R. ELYASHAR Respondents.

Jurisdiction — Prior purchase (Awlawiyeh) — Whether a Land Settlement Officer has jurisdiction to hear a claim for prior purchase — Land (Settlement of Title) Ordinance, Section 10(1) — Ottoman Land Code, Articles 41 and 45.

A claim for prior purchase was brought before the Land Settlement Officer, Jaffa Settlement Area, and was dismissed on the ground that the Settlement Officer had no jurisdiction to hear and decide it. On appeal to the Land Court of Jaffa (Settlement Appeal No. 28/33) that Court confirmed the view of the Settlement Officer. The claimants of the right of prior purchase appealed to the Supreme Court.

In dismissing the appeal, the Court of Appeal,

HELD that the Land Settlement Officer was correct in deciding that he had no jurisdiction to hear and decide the claim, for his powers are defined in Section 10(1) of the Land

1937
19th May
Trusted C.J.
Frumkin J.
and
Khayat J.

LA 14/36
Abu Hamdeh
and others

v.
Elyashar
and another

1937
19th May
Trusted C.J.
Frumkin J.
and
Khayat J.

LA 14/36
Abu Hamdeh
and others

v.
Elyashar
and another

(Settlement of Title) Ordinance, and because actions for prior purchase are not actions involving a dispute as to ownership or possession of land.

Observations with regard to the right of prior purchase, that it is an optional right, limited to a period within which it can be exercised and that the claimant thereof cannot be forced to accept it.

The judgment of the Court was delivered by Khayat J.

Nasri Nasr for appellants.

M. Eliash for respondents.

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

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

I am of opinion that: —

- (1) the right of priority is an optional right and individuals cannot be forced to make use of it, and therefore such right cannot be registered;
- (2) the said optional right is limited to a period and can be claimed at any time during that period which is prescribed by law, and the individuals cannot be forced to make use of it at a certain date to be fixed by the Judge; and
- (3) even though a judgment is given in favour of a claimant of the right of priority and the Badal el Misl having been fixed, he can, at any time, withdraw from taking the land and cannot be forced to accept it.

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

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

Civil Appeal No. 80 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

1937
20th May

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 80/36
Shlank
v.
Bahloul

YONINA SHLANK Appellant.

v.

MAHMOUD MUHAMMAD BAHLOUL . . . Respondent.

Usurious interest — Contracts — Contract for sale of oranges — Allegation that contract one of money lending and containing usurious interest — Permissible for party alleging to produce oral evidence to prove nature of contract — Usurious Loans Ordinance, 1934, Sections 2 and 3 — Ottoman Code of Civil Procedure, Article 80 — Evidence Ordinance, Sections 13 and 14.

Evidence — System, Evidence of — May be admitted in civil cases.

By a written contract entered into between appellant and respondent, the latter had agreed to deliver to the former 800 boxes of oranges at a price of 110 mils per box. At the time of making the contract, the respondent received from the appellant a sum of LP. 60, and further sums amounting in all to LP. 23, it was alleged, were received by respondent at various later dates. Respondent failed to deliver the oranges and appellant took proceedings against him in the District Court of Jaffa claiming the LP. 83 money advanced, and damages at the rate of 400 mils per box not delivered. The respondent pleaded that the contract though in form was a contract for the sale of oranges, yet in reality it was a transaction of money lending at usurious interest, and that the LP. 60 was a loan. The District Court came to the conclusion that the LP. 60 was not paid, and as to the usurious interest point, after allowing the respondent to call his witnesses in support of his allegation that the transaction was one of money lending, it held that the transaction was one of money lending at usurious interest. In the result it gave judgment in favour of appellant for LP. 60 with interest at the legal rate but rejected the claim for damages. The appellant appealed. The two main grounds of appeal were, first, that the District Court erred in allowing witnesses to be called by the respondent to show that the contract of sale was in reality a money lending transaction and, second, that evidence was wrongly admitted on the point that while the contract was one for sale of oranges in reality it was one of money lending.

In dismissing the appeal, the Court of Appeal,

HELD (1) that although Section 3 of the Usurious Loans Ordinance, 1934, which recognises that the local law restricts the admission of parol evidence in certain cases, vide Article 80 of the Ottoman Code of Civil Procedure, makes an exception with regard to the admissibility of parol evidence as to the rate of interest but makes no exception as regards the admissibility of oral evidence to show the nature of the transaction, yet the object of the Usurious Loans Ordinance, 1934, must be construed so as to prevent the respondent from being allowed to call oral evidence to show that the transaction was in reality a money lending transaction.

(2) that the respondent was not entitled to call oral evidence to show that the transaction was in reality a money lending transaction.

Referr

A. Le

Responde

Manning, J.

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

(2) In his statement of defence the respondent pleaded that though the transaction was in form a contract for the sale of

Vendredi 17 Février

Février 1937							فبراير ١٩٣٧								
V	S	D	L	M	M	J	ا	ب	ج	د	هـ	و	ز	ح	ط
..	..	..	..	..	1	2	..	..	..	..	..	..	..	..
3	4	5	6	7	8	9	١٠	١١	١٢	١٣	١٤	١٥	١٦	١٧	
10	11	12	13	14	15	16	١٨	١٩	٢٠	٢١	٢٢	٢٣	٢٤	٢٥	
17	18	19	20	21	22	23	٢٦	٢٧	٢٨	٢٩	٣٠	٣١	..	..
24	25	26	27	28	..	..	..	..	..	..	..	..	..	..

1937
20th May
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 80/36
Shlank
v.
Bahloul

In the Supreme Court sitting as a Court of Appeal.

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

1937

20th May

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 80/36

Shlank

v.
Bahloul

YONINA SHLANK Appellant.

v.

MAHMOUD MUHAMMAD BAHLOUL . . . Respondent.

Usurious interest — Contracts — Contract for sale of oranges — Allegation that contract one of money lending and containing usurious interest — Permissible for party alleging to produce oral evidence to prove nature of contract — Usurious Loans Ordinance, 1934, Sections 2 and 3 — Ottoman Code of Civil Procedure, Article 80 — Evidence Ordinance, Sections 13 and 14.

Evidence — System, Evidence of — May be admitted in civil cases.

By a written contract entered into between appellant and respondent, the latter had agreed to deliver to the former 800 boxes of oranges at a price of 110 mils per box. At the time of making the contract, the respondent received from the appellant a sum of LP. 60, and further sums amounting in all to LP. 23, it was alleged, were received by respondent at various later dates. Respondent failed to deliver the oranges and appellant took proceedings against him in the District Court of Jaffa claiming the LP. 83 money advanced, and damages at the rate of 400 mils per box not delivered. The respondent pleaded that the contract though in form was a contract for the sale of oranges, yet in reality it was a transaction of money lending at usurious interest, and that the LP. 60 was a loan. The District Court came to the conclusion that the LP. 60 was not paid, and as to the usurious interest point, after allowing the respondent to call his witnesses in support of his allegation that the transaction was one of money lending, it held that the transaction was one of money lending at usurious interest. In the result it gave judgment in favour of appellant for LP. 60 with interest at the legal rate but rejected the claim for damages. The appellant appealed. The two main grounds of appeal were, first, that the District Court erred in allowing witnesses to be called by the respondent to show that the contract of sale was in reality a money lending transaction and, second, that evidence was wrongly admitted on the point that while the contract was one for sale of oranges in reality it was one of money lending.

In dismissing the appeal, the Court of Appeal,

HELD (1) that although Section 3 of the Usurious Loans Ordinance, 1934, which recognises that the local law restricts the admission of parol evidence in certain cases, vide Article 80 of the Ottoman Code of Civil Procedure, makes an exception with regard to the admissibility of parol evidence as to the rate of interest but makes no exception as regards the admissibility of oral evidence to show the nature of the transaction, yet the object of the Usurious Loans Ordinance, 1934, must be considered, and a debtor must be allowed to call oral evidence to show the nature of the transaction, as if the position was otherwise then no court will be able to make use of Section 2(3) of the Ordinance in favour of an oppressed debtor, where the claim is founded on an instrument in writing, unless that debtor is allowed to call evidence to show the real nature of the transaction; he may give evidence himself, and he should not be obliged to rely on his evidence alone if other witnesses in his favour are available. It is implicit in the Usurious Loans Ordinance, 1934, that when a transaction is not in form one of money lending, but is alleged to be so, the party so alleging should be allowed to call witnesses other than the opposite party to support his allegation, even if the opposite party is relying on documents in writing.

(2) that there was no reason why evidence as to system, which is generally considered in relation to criminal law, should not be admitted in civil cases on the same principles and for the same reason, and in this present case it was rightly received to rebut the allegation that the transaction was an ordinary one relating to the sale of oranges.

Referred to: Rein v. Flint (CA 75/32).

A. Levitsky for appellant.

Respondent in person.

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

2. In his statement of defence the respondent pleaded that though the transaction was in form a contract for the sale of

1937

20th May

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 80/36

Shlank

v.

Bahloul

1937
20th May
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 80/36
Shlank
v.
Bahloul

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

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

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

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

6. Mr. Levitsky does not deny that the Court below had jurisdiction to sift the nature of the agreement between the parties, even though its form was that of a contract for the sale of oranges. He urges, however, that the Court below erred in allowing witnesses to be called by the respondent to show that the contract of sale was in reality a money lending transaction. He agrees that the respondent might himself give evidence and might call the appellant as witness, but says that the present state of the law in Palestine does not allow any other witnesses to be called.

1937
20th May
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 80/36
Shlank
v.
Bahloul

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

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

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

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

"Claims based upon a contract, agreement, partnership, lease or debt, which by law or custom are reduced to writing and which exceed 1,000 piastres in value must be proved by a sanad.

Every claim disputing liability under a sanad shall be proved by a sanad, or by the admission or account books of the defendant, even if the amount in question do not exceed 1,000 piastres."

10. Mr. Levitsky cited an authority as to the effect of this article, viz the case of Rein v. Flint, reported on page 133 of Mr. Hooper's Civil Law of Palestine and Transjordan, Vol. II. In that case the Court said "The general rule under the Civil Procedure Code, Article 80, is clear: namely that an agreement varying an agreement in writing must be proved by evidence in writing: or by the admission of the defendant or his account books. In the absence of written evidence, therefore, we have to see whether there was an admission by the appellant". The Court then considered the evidence and found there had been an admission by the appellant, who happened to be the plaintiff in the case. I am informed by my brethren, however, that the word "defendant" in article 80 is not to be construed strictly, and that it has always been construed in the loose

1937

20th May

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 80/36

Shlank

v.

Bahloul

sense of a person resisting a claim, whether that person be the plaintiff or defendant in the action.

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

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

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

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

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

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

defendant is precluded from calling oral evidence to show the real nature of the transaction. One has to consider the object of the Usurious Loans Ordinance. The first part of section 2 deals with proceedings for the recovery of money lent and allows a Court to re-open all accounts between the parties and to give consequent relief to the person sued. Then sub-section 3 enacts as follows: —

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

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

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

17. Mr. Levitsky's next ground of appeal is that the Court below wrongly admitted evidence on this issue. Three witnesses, who knew nothing whatever about this particular transaction, gave evidence to the effect that on previous occasions they had borrowed money from the appellant and that on each occasion the transaction took the form of a contract for the sale of oranges. When the loan was repaid the contract was torn up. A

1937

20th May

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 80/36

Shlank

v.

Bahloul

1937
20th May
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 80/36
Shlank
v.
Bahloul

fourth witness said he knew the plaintiff and that it was her practice to lend money at interest and to conceal the nature of the transaction by negotiating with the debtor a contract for the sale of oranges. This witness also knew nothing of the transaction between the parties in this case. The only other witness was a person who said that the appellant had admitted to him that the contract was a contract of security. There can be no doubt as to the admissibility of the evidence of this last witness, but there is a legislative enactment in Palestine, section 6 of the Evidence Ordinance, which forbids a Court to give judgment on the evidence of a single witness. The result would be that, if the evidence of system was wrongly admitted, the Court below erred in deciding the issue in favour of the respondent.

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

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

Frumkin J: I fully concur.

Khayat J: I concur.

Civil Appeal No. 101 of 1936.
In the Supreme Court sitting as a Court of Appeal.
Before: Greene J. and Frumkin J.

MORDECHAI SHABETAI COHEN Appellant.
v.
SHLOMO YAMMER Respondent.

1937
21st May
Greene J.
and
Frumkin J.
CA 101/36
Cohen
v.
Yammer

Waiver — Contracts — Knowledge on part of purchaser of existence of defects in thing sold — Purchaser wrote to vendor complaining about certain matters but no mention made about defects — Purchaser's conduct amounted to waiver.

Interest — From what date payable on money paid on account of purchase price.

Owing to failure to carry out the transfer of a house which appellant agreed to sell to respondent, the appellant sued the respondent in the District Court of Jerusalem (Civil Case No. 183/35) for damages for breach of contract. The respondent counter-claimed in damages and claimed the return of the money paid by him on account of the purchase price. The District Court found that both parties were at fault and both claims for damages were dismissed. The claim for the money paid on account of the purchase price was allowed by the District Court. The vendor appealed and the purchaser cross-appealed.

In dismissing the appeal and allowing the cross-appeal to the extent that the interest be paid on the money paid on account of the purchase price as from the date the counterclaim was made, the Court of Appeal,

HELD (1) that the letter sent by the purchaser to the vendor, after the former had knowledge of the defects in the property sold to him by the latter, in which he complained about certain difficulties in letting the house without mentioning any word about the defects in the house, amounted to a waiver on his (purchaser's) part and the District Court was correct in disallowing his counterclaim for damages.

(2) that interest at the rate of 9% as from the 28th July, 1935, the date of filing the counterclaim, should be paid to the purchaser on the amount he paid on account of the purchase price.

The judgment of the Court was delivered by Frumkin J.

S. Mizrahi for appellant.

A. Levitsky for respondent.

1937
21st May
Greene J.
and
Frumkin J.
CA 101/36
Cohen
v.
Yammer

Judgment: 1. The parties to this case on the 20th of November, 1934, entered into an agreement whereby the Appellant undertook to sell to the Respondent (Cross-Appellant) a house to be transferred in the Land Registry not later than April, 1935.

2. The house was not transferred although both parties appeared in the Land Registry on the 29th of April. The Appellant instituted the present action for damages under the agreement, alleging that the Respondent committed a breach by refusing to accept transfer.

3. The Respondent lodged a counterclaim for damages alleging that the breach was committed by the Appellant in that he was not in a position to deliver the house in good condition as required by clause 9 of the agreement. He also claimed the return of the LP. 180 paid on account of the purchase price with interest from date of his counterclaim.

4. Both parties failed in their respective claims for damages, and hence this appeal and cross-appeal.

5. The Court below found as a fact that the Appellant was not prepared to deliver the house in good condition. With this finding of fact, based on evidence which the Court accepted, we do not interfere. It follows that the Respondent was not bound to accept transfer, and, therefore, committed no breach; hence the Appellant's appeal must fail.

6. As regards the cross-appeal, it appears that as early as February the Respondent knew of the defects of the house. From his own evidence in the Court below it is clear that the defect became apparent after the rains. Yet, in a letter he writes to the Appellant after the rainy season on April 8th, he complains about certain difficulties in letting the house but mentions no word about the house not being in good condition. About that date he let the house to tenants. All this amounts to a waiver on his part, and the Court was right in disallowing him damages.

7. Another point in the cross-appeal is that the Respondent is entitled to interest on the amount paid by him from the date of his counterclaim. I hold that on this point he must succeed, as this amount is not damages but money actually paid. To this extent only the cross-appeal will be allowed and the judgment varied by ordering the Appellant to pay to the Respondent LP. 180 plus interest at the rate of 9% from 28th July, 1935, until date of payment.

8. Each party will pay its own costs.

Civil Appeal No. 104 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Greene J. and Frumkin J.

ZWI LABEL Appellant.

v.

JOHANAN MATTIAS Respondent.

1937
21st May
Greene J.
and
Frumkin J.
CA 104/36
Label
v.
Mattias

Bills of exchange — Promissory notes — Promissory note bore signature other than that of maker on face thereof at bottom right hand corner — Above signature words "Pour aval maker" appeared — Below signature impression of a seal worded "Bon pour aval for the maker(s) of note" appeared — Allegation by signatory that inscriptions added above and below his signature without his knowledge and consent and therefore the note was altered — Signatory disallowed to prove that note was altered on ground that alteration was not apparent — Bills of Exchange Ordinance, Section 64.

A promissory note made payable on demand bore at the bottom right hand corner the signature of appellant. Above the signature there appeared in handwriting the words "Pour aval maker" and below the signature there appeared the impression of a seal worded "Bon pour aval for maker(s) of note." The note was not met and appellant was sued for the value thereof in the District Court of Jaffa (Civil Case No. 60/33). He alleged that he could not be regarded as a guarantor by an aval, since the inscriptions both above and below his signature were added later without his knowledge and consent, but as an indorser under Section 56 of the Bills of Exchange Ordinance. The District Court gave judgment against appellant in his capacity as a signatory by aval. He appealed. The main ground in the appeal was that the District Court erred in disallowing appellant to prove that the note was altered.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case to it to determine by hearing the evidence tendered by the parties whether or not the note was altered, the Court of Appeal.

HELD that when the liability of a defendant in the case of a bill alleged to have been altered would be different when taken in its apparent form and in its unaltered form according to its original tenor, an opportunity must be given to such a defendant to prove the alleged alteration

1937
21st May
Greene J.
and
Frumkin J.
CA 104/36
Lebel
v.
Mattias

although not apparent; the only concession granted by the law is that given by the proviso to Section 64(1) of the Bills of Exchange Ordinance to a holder in due course where the alteration is not apparent.

The judgment of the Court was delivered by Frumkin J.

S. Lebel for appellant.

M. Gorodissky for respondent.

Judgment: 1. The Appellant in this case was sued under a promissory note payable on demand signed by him at the bottom right hand corner of the note. Above his signature there is an inscription in handwriting "pour aval maker", and somewhat below the signature appears the impression of a seal worded "Bon pour aval for maker(s) of note"

2. The Appellant does not deny his signature, but alleges that he signed the note in blank and that the inscription both above and underneath his signature were added later without his knowledge and consent. He is, therefore, according to his allegation, not to be regarded as a guarantor by an aval under Section 57 of the Bills of Exchange Ordinance but as an indorser under Section 56.

3. On this basis he advanced a series of defences which were all overruled by the Court below where judgment was given against him on the bill as a signatory by aval. From this judgment he now appeals.

4. The principal ground of appeal is that the Court erred in disallowing the Appellant to prove that the bill was altered. I propose to deal with this point first, as on that may depend the fate of this appeal.

5. The Court seems to have concentrated upon the question whether the alteration, if any, was apparent or not, and having found as a fact that it was not apparent, decided against the Appellant on all the other points.

6. I agree that a finding to the effect that the bill was not altered at all would dispose of the matter, because all the other defences in the Court below and the grounds of appeal would have no foundation if the bill was never altered. The Appellant would have been in the position of a guarantor by aval and as such he failed to submit any valid excuse.

1937
21st May
Greene J.
and
Frumkin J.
CA 104/36
Lebel
v.
Mattias

7. But there was no such finding; the Court below appears to have attached too much importance to the fact that the alteration was not apparent.

8. It is the general rule that where a bill is materially altered the bill is avoided. By the proviso to Section 64(1) of the Bills of Exchange Ordinance the law however grants a concession to a holder in due course where the alteration is not apparent in that the bill is not avoided, but such holder may avail himself of the bill as if it had not been altered and enforce payment of it according to its original tenor.

9. It follows that when the liability of a defendant in the case of a bill alleged to be altered would be different when taken in its apparent form and in its unaltered form according to its original tenor, an opportunity must be given to such a defendant to prove the alleged alteration although not apparent.

10. Furthermore, the concession referred to above is only given to a holder in due course, and it was one of the defences of the Appellant in the Court below that the Respondent was not a holder in due course. The Court therefore erred in refusing to hear the evidence tendered by the Appellant.

11. The appeal must therefore be allowed and the judgment of the District Court set aside and the case remitted for the Court below to determine by hearing the evidence tendered by the parties whether or not the bill was altered. And if it comes to the conclusion that it was altered, to determine the effect of such alteration on the liabilities of the Appellant. Costs to follow the event.

Civil Appeal No. 4 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Greene J. and Khaldi J.

SHIHADDEH YOUSEF BUDEIRI Appellant.

v.

FAREEDEH JIRYES SLIMAN ABU DAYEH Respondent.

Personal status — Succession — Jurisdiction — Moslem Religious Courts — In matters of succession to the estate of a Moslem, the Moslem Religious Courts have exclusive jurisdiction —

1937
24th May
Copland J.
Greene J.
and
Khaldi J.
CA 4/37
Budeiri
v.
Abu Dayeh

1937

24th May

Copland J.
Greene J.

and

Khalidi J.

CA 4/37

Budeiri

v.

Abu Dayeh

*Palestine Order in Council, 1922, Articles 38, 46, 52 and 57 —
Palestine (Amendment) Order in Council, 1923 — Succession
Ordinance, Sections 6, 21 and 24.*

A Christian woman, who got married to a Moslem in July 1916, in a Protestant Church, applied, after her husband's death which occurred in December, 1935, to the District Court of Jerusalem (Succession File No. 27/36) for an order declaring the succession to her deceased husband. In the meantime the Moslem Religious Court had issued a certificate of succession to the estate of the deceased under which the widow, owing to the difference in religion, was disinherited. Thereafter an opposition to the application made by the widow to the District Court was filed, in which it was alleged that a certificate of succession had already been issued by the Moslem Religious Court and that the District Court had no jurisdiction in cases of personal status of Moslems. The District Court held that it had jurisdiction under Section 24 of the Succession Ordinance and it accordingly made an order giving the widow the share to which she would have been entitled if she had been a Moslem and not a Christian. Hence this appeal.

In allowing the appeal, setting aside the judgment of the District Court and entering judgment for the appellant, the Court of Appeal,

HELD (1) that the terms of Article 52 of the Order in Council were very definite and they gave to the Moslem Religious Courts exclusive jurisdiction in matters of personal status of Moslems, matters of succession were one of which, and the words "as amended by any ordinance or rules" appearing in the said Article 52 did not affect this exclusive jurisdiction — they only referred to amendments of the laws of procedure of Moslem Religious Courts.

(2) that Section 24(2) of the Succession Ordinance clearly infringed the provisions of Article 52 of the Order in Council and must therefore be treated as void in so far as it purported to deal with questions of succession to the estates of Moslems.

(3) that the Palestine (Amendment) Order in Council, 1923, did not validate any inconsistencies between the Succession Ordinance and the Palestine Order in Council, 1922, because there could be no doubt that the intention of the legislator was to validate the enactment of the various Ordinances and other measures which had been issued between the 1st of September 1922 and the 29th of May 1923, regarding the regularity of which enactment doubts had arisen, but the main principles and limitations in the principal Order in Council remained unaffected.

Observations with regard to the variation of an Order in Council by the local legislature.

Followed: PCA 98/25, 1 P.L.R. 71.

The facts, in so far as they are relevant, appear from the headnote and the judgment.

Ibrahim Kamal for appellant.

Mogannam E. Mogannam for respondent.

Copland J.: This appeal raises an interesting point, and one not free from difficulty, which has hitherto not come before this Court.

The Respondent, Fareedah Jiryeh Sliman Abu Dayeh, a member of the Protestant faith, was married to one Aref el-Budeiri, a Moslem, in the German Evangelical Protestant Church on 7th July, 1916. Her husband died intestate on or about 8th December, 1935, leaving him surviving the following, namely: —

1. His widow — the present Respondent,
2. His mother,

and two major sons and two minor sons.

On the 3rd of April, 1936, his widow applied to the District Court, Jerusalem, for an order declaring the succession to her deceased husband. In the meantime, on 11th January, 1936, the Sharia Court of Jerusalem had issued a notice stating that it had been represented to them that the above persons were the only heirs of the late Aref el-Budeiri, and stating that any objection should be made to that Court within 15 days.

On the 10th May 1936 the Sharia Court issued a certificate of succession confining the inheritance to the mother and children of the deceased, and disinheriting the widow stating that they did so "because of the difference in religion by virtue of the Sharia Law of Inheritance".

On the 16th May 1936, the present Appellant, as guardian to the minor children of the deceased and as attorney for the mother, filed a notice of opposition in the District Court of Jerusalem to the Respondent's application, alleging that an order of succession had already been issued in the only competent Court, the Sharia Court, and that the District Court had no jurisdiction in cases of personal status of Moslems.

The application duly came on for trial before the District Court which decided that under Section 24 of the Succession Ordinance

1937

24th May

Copland J.
Greene J.

and

Khalidi J.

CA 4/37

Budeiri

v.

Abu Dayeh

1937
24th May
Copland J.
Greene J.
and
Khaldi J.
CA 4/37
Budeiri
v.
Abu Dayeh

1923 it had jurisdiction to reopen questions of succession where heirs had been deprived of their share on account of their nationality or religious belief, and accordingly they made an order giving the Respondent the share to which she would have been entitled if she had been a Moslem and not a Christian. The guardian has now appealed to this Court.

It may be convenient here to set out the various sections of the law to which reference has been made in the course of the argument before us.

The Succession Ordinance (Cap. 135 — Revised Edition of the Laws) lays down the following: —

Sec. 6(1) The Moslem Religious Courts shall have exclusive jurisdiction as to all matters relating to succession upon death to the estate of a Moslem, whether under a will or otherwise.

Sec. 21 Every Court having jurisdiction in matters of succession shall, in all cases, determine the rights of succession to miri land in accordance with the provisions of the Ottoman Law and such provisions shall be applied notwithstanding any disposition made, or power of attorney given, by the deceased intended to take effect after death, whether by way of will or otherwise.

Sec. 24(1) No person shall be deemed to be under a legal incapacity to take any share in a succession to property in Palestine or to take under a will by reason only of his nationality or religious belief.

(2) Where, under the law then applicable in Palestine, any person has been excluded from a share in the succession to a person who has died possessed of property in Palestine, since the 31st December, 1918, by reason only of his nationality or religious belief, the person so excluded or his heirs may apply to the district court, which, upon such application and upon consideration of all the circumstances, may make such order as it thinks fit, reopening the succession and granting to the applicant such share in the succession as may, in the circumstances, appear equitable:

The following are the relevant articles in the Palestine Order-in-Council 1922 as amended: —

1937
24th May
Copland J.
Greene J.
and
Khaldi J.
CA 4/37
Budeiri
v.
Abu Dayeh

Art. 38. The Civil Courts hereinafter described shall subject to the provisions of this part of the Order exercise jurisdiction in all matters and over all persons in Palestine.

Art. 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted;

Art. 52. Moslem Religious Courts shall have exclusive jurisdiction in matters of personal status of Moslems in accordance with the provisions of the Law of Procedure of the Moslem Religious Courts of the 25th October, 1933, A.H., as amended by any Ordinance or Rules.

Art. 57. Subject to the provisions of any Ordinance or Order establishing a Supreme Council for Moslem Religious Affairs, the constitution and jurisdiction of Religious Courts established at the date of this Order may be varied by Ordinance or Order of the High Commissioner.

The terms of Article 52 of the Order-in-Council are very definite — they give to the Moslem Religious Courts exclusive jurisdiction in matters of personal status of Moslems, and I do not think that the words "as amended by any Ordinance or Rules" affect this exclusive jurisdiction. They can refer only, from their context, to amendments of the Laws of Procedure of Moslem Religious Courts; and Section 6(1) of the Succession Ordinance, following Article 52 of the Order-in-Council, gives exclusive jurisdiction in all matters relating to succession upon death of the estate of a Moslem to the Moslem Religious Courts. It is apparent, therefore, that there is a conflict between Section 24(2) of the Succession Ordinance on the one hand, and Section 6(1) of the Succession Ordinance and Article 52 of the Order-in-Council on the other. It is true that an Ordinance must be read as a whole, and if there were no other considerations, I would be prepared to hold that Section 24(2) imposed a qualification in certain cases on the otherwise exclusive jurisdiction of Moslem Religious Courts in relation to the succession to the estates of deceased Moslems. But an Ordinance must be in conformity with the provisions of the Order-in-Council, under which it is made, for the legislative authority in this country derives its power from the Order-in-Council.

1937
29th May
Copland J.
Greene J.
and
Khaldi J.
CA 4/37
Budeiri
v.
Abu Dayeh.

If authority be needed for this proposition, it may be found in the often quoted case of Jerusalem-Jaffa District Governor and another v. Murra and others (P.L.R. I, p. 71), where Viscount Cave L.C., in delivering the judgment of the Judicial Committee of the Privy Council, said at p. 76 "The Ordinance was made under the authority of the Order-in-Council of May 4, 1923, and if and in so far as it infringed the conditions of that Order in Council, the local Court was entitled and indeed bound to treat it as void." Section 24(2) of the Succession Ordinance clearly infringes the provisions of Article 52 of the Order in Council and must therefore be treated as void in so far as it purports to deal with questions of succession to the estates of Moslems.

I do not think that Article 38 of the Order-in-Council is of any help to the Respondent. An Order-in-Council, just as an Ordinance, must be read and construed as a whole, and on a parity of reasoning with that which I have used in discussing certain sections of the Succession Ordinance, I must hold that, even if Article 38 has the meaning which the Respondent contends that it has, yet it is qualified by Article 52.

Similarly Article 46 does not assist her argument since it merely details the laws which the Civil Courts shall apply, and does not affect the jurisdiction as laid down in Articles 38 and 52.

But Mr. Mogannam, with his customary skill and lucidity, has strongly urged that Article 57 of the Order-in-Council has validated Section 24(2) of the Succession Ordinance. I have listened with close attention to his arguments, but I think that they fail.

I do not think that the Order-in-Council can be varied by one subsection in a Ordinance of 27 sections which deals with many other matters, and which makes no reference to the Order-in-Council. I think that any Ordinance or Order which purports to vary the Order-in-Council must do so specifically and not merely by implication.

There is, finally, one further point which must be dealt with, and that is the effect, if any, of Article 4 of the Palestine (Amendment) Order-in-Council 1923. This reads as follows: —

"4. The Proclamations, Ordinances, Orders, Rules of Court, and other legislative acts which have been issued or done by the High Commissioner or by any Department

1937
29th May
Copland J.
Greene J.
and
Khaldi J.
CA 4/37
Budeiri
v.
Abu Dayeh.

of the Government of Palestine on or after the 1st September 1922, shall be deemed to be and always to have been valid and of full effect and all acts done thereunder and all prohibitions contained therein shall be deemed to be valid."

This provision came into force on the 29th May, 1923, that is after the date of promulgation of the Succession Ordinance, 1923, which was the 8th March 1923. This amending Order-in-Council therefore validated the Succession Ordinance. The question that arises is, Has it also the effect of validating any inconsistencies between the Succession Ordinance and the principal Order-in-Council of 1922? On the whole, I do not think that it has such an effect. There can be but little doubt that the intention of the legislator was to validate the enactment of the various Ordinances and other measures which had been issued between the 1st of September 1922 and the 29th of May 1923, regarding the regularity of which enactment doubts had arisen, but the main principles and limitations in the principal Order-in-Council remained unaffected.

To hold that this amendment validated any conflicts between the principal Order-in-Council and any Ordinance would lead to the curious and paradoxical result that between the 1st September 1922 and the 29th May 1923 the High Commissioner would have had unlimited power to enact any legislation disregarding any of the limitations laid down in the principal Order, whereas after the 29th May 1923, these limitations would have come into force again. I cannot adopt this view unless no other construction were possible. I think that the effect of Article 4 is to validate the enactment of Ordinances only and it does not render valid Section 24(2) of the Succession Ordinance in so far as that subsection purports to deal with questions of succession to the estates of deceased Moslems.

In the result: I think that this appeal should be allowed and the judgment of the District Court set aside and judgment entered for the Appellant.

No costs.

Greene J.: I concur.

Khaldi J.: I concur.

Civil Appeal No. 129 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J. and Khaldi J.

1937
25th May
Copland J.
and
Khaldi J.
CA 129/36
Shimon
v.
Maxudian

SHIMON JACOB SHIMON Appellant.
v.
STANKI MAXUDIAN Respondent.

Admissions — Admission by advocate on behalf of his client in judicial proceedings — Admissibility of such admission in other proceedings.

An admission made in judicial proceedings before a Court is conclusive of the facts contained in that admission, and it matters not for what purpose it was made, if made in Court. It is admissible in other judicial proceedings and such admission cannot be queried in such subsequent proceedings.

In view of the point of law on which the appeal turned the facts giving rise to the dispute are not relevant.

M. Levanon for appellant.

Ibrahim Kamal for respondent.

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

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

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

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

We hold that the District Court was wrong in its decision as an admission cannot be so lightly dismissed just because it

was made to prove that he was a merchant and to enable him to take the benefit of a shorter period of prescription. An admission is an admission and it matters nothing for what purpose it was made, if made in Court.

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

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

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

Civil Appeal No. 15 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J. and Khaldi J.

SHEHADEH SLIMAN Appellant.
v.
MICHAEL BORNESCU Respondent.

Appeal, Leave to — Arbitration — Application for enforcement of award — Refusal of application — Application for review — Refusal thereof — Appeal to Supreme Court — Appeal must be by leave.

An application for the enforcement of an award was refused by the District Court of Haifa. An application for review of the decision of the District Court refusing the application for the enforcement of the award was made and the District Court saw no reason to alter its previous decision. An appeal was made to the Supreme Court against the latter decision of the District Court. The point was taken that there was no appeal since no leave to appeal was given.

1937
25th May
Copland J.
and
Khaldi J.
CA 129/36
Shimon
v.
Maxudi

1937
25th May
Copland J.
and
Khaldi J.
CA 15/37
Sliman
v.
Bornescu

1937
25th May
Copland J.
and
Khaldi J.
CA 15/37
Sliman
v.
Bornescu

In dismissing the appeal, the Court of Appeal, HELD that as the matter was under the Arbitration Ordinance, in order to be able to appeal to the Supreme Court, it was necessary first to obtain leave to appeal either from the District Court or from the Court of Appeal, and it made no difference that the appeal was against a judgment given on a review, which judgment could be appealed only by leave.

Jacob S. Shapiro for appellant.
Dov Tovbin for respondent.

Judgment: The original application was for the enforcement of an award under the Arbitration Ordinance.

The application was refused for certain reasons which do not affect the point in issue.

An application to review its former judgment was then submitted to the District Court of Haifa. The Court, however, saw no reason to alter its previous judgment.

The appeal before us is against this judgment of the District Court.

This is a matter under the Arbitration Ordinance and in order to be able to appeal to the Supreme Court it is necessary first to obtain leave to appeal either from the District Court or from the Court of Appeal. It is admitted that no such leave has ever been asked for, much less given.

It has been argued before us with considerable ability by Mr. Shapiro that this being an appeal against a judgment given on review, it is not an appeal in a matter under the Arbitration Ordinance.

We do not agree with this argument.

The whole matter was an application under the Arbitration Ordinance. Supposing the District Court allowed the application for review and accepted the application for the enforcement of the award, an appeal to this Court against such a decision would have to be by leave under the Arbitration Ordinance.

We hold therefore that leave to appeal should have been obtained by Appellant, and in consequence of his having failed to do so there is no appeal before us.

The appeal must therefore be dismissed on this preliminary objection.

The appellant must pay the costs and LP. 4.-advocate's fees.

Civil Appeal No. 81 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

PERFORMING RIGHTS SOCIETY LTD. Appellants.

v.

CAFE & RESTAURANT VIENNA, JERUSALEM Respondents.

Contracts — Provision in contract that it may be terminated by notice sent by "Registered Post" — Personal service of notice — Whether such service a proper compliance with contract — *Mejelle*, Article 191.

One of the terms of an agreement between appellants and respondents was that the agreement between the parties might be terminated by notice sent by "registered post". The respondents, who desired to terminate the agreement, served the notice terminating the agreement on the appellants personally. The appellants thereupon brought an action in the Magistrate's Court, Jerusalem (Civil Case No. 50/35) in which they claimed a certain sum alleged to be due under the agreement. They failed in their action. They then appealed to the District Court of Jerusalem (Civil Appeal No. 74/36) but were unsuccessful in their appeal, and they were granted leave to appeal to the Supreme Court on the point of law quoted in the judgment of the Court of Appeal reported hereinafter. The main argument turned on the point that the notice terminating the agreement should have been sent by registered post.

In dismissing the appeal, the Court of Appeal, HELD that although notice by registered post was provided by the parties as a method of terminating the agreement, yet they did not mean to exclude personal service of the notice.

Approved: *Jarvis v. Hemmings*, (1912) 1 Chancery 462.

Walter v. Rumbal (1 Ld. Raym. 53).

I. Olshan for appellants.

A. Buxbaum for respondents.

Judgment: 1. The District Court of Jerusalem, having affirmed a judgment of the Chief Magistrate in favour of the Respondents, granted leave to appeal to this Court on the following point of law: —

1937
27th May
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 81/36
Performing Rights
Society Ltd.
v.
Cafe & Restaurant
Vienna

1937

27th May

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 81/36

Performing Rights Society Ltd.

v.

Cafe & Restaurant Vienna

“Where a contract contains an express provision prescribing that such contract may be terminated by notice sent by ‘Registered post’, does a notice sent in a manner different from the one stipulated by the parties constitute a valid termination of the contract?”.

2. This point is too broadly stated. It was alleged by the Respondents that the notice terminating the agreement was served personally on the Appellant. The point before us therefore is whether personal service of the notice was a compliance with the terms of the agreement.

3. Mr. Olshan, who argued the appeal on behalf of the Appellants, relied principally on the intention of the parties. He said it was clearly the intention of the parties that the notice, in order to be effective, should be sent by registered post, and that this method of communication was provided so that there should be no doubt about the date. He admitted that there was no provision in the Mejele covering the point, but referred to Article 191, which provides that rescission of a contract is carried out by offer and acceptance. His argument is that there was an offer of a particular method of rescission by the appellants and that this was accepted by the respondents, and that therefore no other method of rescission was open to the respondents.

4. Dr. Buxbaum, for the respondents, cited the case of *Jarvis v. Hemmings* (1912) 1 Chancery, 462. The point in that case was the interpretation of Section 6 of the Law of Distress Amendment Act, 1908. The relevant part of this Section is as follows: —

“In cases where the rent of the immediate tenant of the superior landlord is in arrear, it shall be lawful for such superior landlord to serve upon any under tenant or lodger a notice (by registered post addressed to such under tenant or lodger upon the premises) stating the amount of such arrears of rent and requiring all future payment of rent...”.

In that case the Court held that though the words “registered post” were mentioned in the Section, personal service was a compliance with its terms. Warrington J., (as he then was), in the course of his judgment, said:

“The plaintiff contends that the words in brackets are inserted only to enable him to effect service by registered post, if he wishes. Is that the true construction of the Section? Independently of authority, I should have thought it was. The Section gives the landlord liberty to serve the notice. No service can be better than personal service. The object of the Section is that the notice shall come to the knowledge of the person for whom it is intended, and there cannot be any reason why that should be secured by service by registered post rather than by personal service, which is a surer mode of service”.

5. The learned Judge then went on to consider the case of *Walter v. Rumbal* (1 Ld. Raym. 53). The statute under consideration there was 2 Wm. and M. C. 5, which prescribed in Section 1 that before a landlord could sell distrained goods, one of the conditions to be observed was that notice of the distress had to be left at a particular place. The notice was not left at the particular place but was given to the tenant himself. It was held that “the intent of the act was only that the party should have notice, which is performed by this means better than if it had been left ‘at the particular place’”. With regard to this decision, Warrington, J., said: “That is a very strong decision, the Act prescribed that certain consequences were to follow if a certain event happened — the leaving of a notice at a particular place. The precise event described in the Act had not happened, and yet the Court held that the consequences followed.”

6. The case of *Jarvis v. Hemmings* is not exactly in point, as I think the ratio decidendi was that the words “it shall be lawful to serve by registered post” did not exclude other recognized methods of service, but were merely meant to indicate that service by registered post was to be considered good service. The case of *Walter v. Rumbal* is, however, an authority for the proposition that when notice in writing of a fact has to be given to a person, personal service of that notice is sufficient even though the relevant statute lays down a particular method of service other than personal service. The intent of the statute is to be looked at, and that is that the matter should be effectually brought to the notice of the person concerned.

7. It must be admitted that the question is not altogether the same when the instrument to be construed is not a statute but an agreement in which the parties have fixed a definite method of bringing the agreement to a conclusion. After much consideration I find myself in disagreement with Mr. Olshan as to the intention of the parties. Notice by registered post was provided as a method of terminating the agreement, but I do not think they meant to exclude personal service of the notice.

8. This is the only point we have to decide and for the reasons given I think this appeal should be dismissed with costs to include LP. 5. - advocate’s fees.

1937

27th May

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 81/36

Performing Rights Society Ltd.

v.

Cafe & Restaurant Vienna

Land Appeal No. 54 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

1937

27th May

Trusted C.J.
Frumkin J.
and
Khayat J.

LA 54/36

Abu Dra'

v.

Abu Dra'

SALEH HUSSEIN ABU DRA' Appellant.

v.

SALEH MUSTAFA ABU DRA' Respondent.

Co-heirs — Co-owners — Prescription — Sale of land, invalid by operation of law, purporting to be made between co-heirs does not affect their relationship as co-heirs of the land — Possession by one co-heir or co-owner is possession by all — Land (Settlement of Title) Ordinance, Section 51.

The respondent, the nephew of the appellant, both of whom inherited in equal shares a certain land from a common ancestor prior to 1919, purported to sell in 1919 by an unregistered sale his share to his uncle, the appellant. In 1929, the nephew acquired registration in his name of the land so sold. By a proclamation of 1st November 1918, all dispositions in immovable property were prohibited and any disposition made would be invalid. The land so sold came under settlement and both parties claimed it, and the Settlement Officer, applying the provisions of Section 51 of the Land (Settlement of Title) Ordinance, decided in favour of the uncle, the appellant, by reason of his possession. On appeal to the Land Court of Jaffa (Settlement Appeal No. 25/30) that Court held that the Settlement Officer was wrong and returned the appellant to it, the nephew, as owner. The uncle appealed. The questions for decision were, first, what was the effect of the sale, which was invalid by operation of the law, on the relationship of the parties as co-heirs of the land, and, secondly, what was the effect of Section 51 of the Land (Settlement of Title) Ordinance when the person in whose name the land was registered and the person in possession were co-heirs.

In allowing the appeal and remitting the case to the Settlement Officer by majority (Khayat J. being of the view that the decision of the Settlement Officer should be confirmed) with an instruction that the nephew had not lost his right to his share and that the land must be settled accordingly, the Court of Appeal,

HELD *per Trusted C.J.:* (1) that the sale made by the nephew to the uncle in 1919, during the period when owners of immovable property had no power to make dispositions of immovable property, which was invalid by operation of law, did not affect the relationship between

the nephew and the uncle as co-heirs, and since between heirs and co-owners time does not run to bar a right of action, the uncle therefore was not entitled to the land by prescription.

(2) that the words of the proviso to Section 51 of the Land (Settlement of Title) Ordinance are wide enough to cover the case of a person making an application having become entitled as an heir and co-owner where the person in whose name the land is registered is also the heir of a common ancestor and a co-owner.

per Frumkin J.: that a disposition, which is in itself invalid, cannot change the status of a person as a co-heir into that of an independent owner, and thus alter the nature of his possession from that of a co-heir into adverse possession.

per Khayat J.: that the rule that no prescription runs between heirs who inherited land from a common ancestor is based on the assumption that an implied agency exists between the heirs, but if the possession of an heir for more than the prescriptive period was not as an heir, i.e. was not authorised by the other heirs, then the rule of prescription could not be excluded.

Approved: LA 56/24, 1 P.L.R. 41.

The facts are sufficiently set out in the headnote and the judgment.

Mustafa Irsheid for appellant.

M. Eliash for respondent.

Trusted, C.J.: This is an appeal from a decision of the Land Court, Jaffa, allowing an appeal from a decision of a Settlement Officer. The parties are a nephew (who was Plaintiff before the Settlement Officer, Appellant before the Land Court and is now Respondent before this Court) and his uncle, who were interested in certain land, the subject of this dispute, as co-heirs — of which land the uncle was at all material times in possession.

The facts are as follows: —

The parties inherited the land from a common ancestor in equal shares prior to 1919.

In 1919, by an unregistered sale, the uncle bought the nephew's share. It should be noted that at the time of this transaction, by reason of a proclamation of 1st November, 1918,

1937

27th May

Trusted C.J.
Frumkin J.
and
Khayat J.

LA 54/36

Abu Dra'

v.

Abu Dra'

1937
27th May
Trusted C.J.
Frumkin J.
and
Khayat J.
LA 54/36
Abu Dra'
v.
bu Dra'

owners of immovable property had no power to make dispositions of their property and any disposition made would be invalid.

In 1929 the nephew obtained registration in his name.

The Land Settlement Officer dealt with the question under the provisions of the law which is now Section 51 of the Land (Settlement of Title) Ordinance and decided in favour of the uncle by reason of his possession. The Land Court reversed that decision and the uncle appeals to this Court.

In my opinion the first question for decision is, Could a sale of land, invalid by operation of law, purporting to be made between co-heirs, affect their relationship as co-heirs of the land? I do not think that it could.

The second question therefore is, What is the true effect of Section 51 of the Land (Settlement of Title) Ordinance when the person in whose name the land is registered and the person in possession are co-heirs?

It is clearly established that as between heirs and co-owners time does not run to bar the right of action, possession by one heir or co-owner being possession by all. (See Land Appeal 56/24, 1 P.L.R. p. 41).

The material part of the Section is as follows:

“Provided that, where the person in whose name the land is registered opposes the application and the Settlement Officer is satisfied that the person making the application originally obtained possession from the registered owner as tenant or mortgagee, or otherwise than as owner, he shall not be bound to enter the name of the applicant in the schedule of rights as owner of the land, or he may enter it subject to such conditions as he thinks fit.”

In my opinion the words are wide enough to cover the case of the person making application having become entitled as an heir and co-owner where the person in whose name the land is registered is also the heir of a common ancestor and a co-owner.

In my opinion, therefore, this appeal on the main point should be dismissed.

The Land Court proceeded to return the Appellant before it as the owner of certain lands. I do not understand on what basis it did this, and the appeal must be allowed as to so much of the judgment as does so.

1937
27th May
Trusted C.J.
Frumkin J.
and
Khayat J.
LA 54/36
Abu Dra'
v.
Abu Dra'

Mr. Justice Frumkin agrees with me that in the result the case must go back to the Settlement Officer with an intimation that the present Respondent (the nephew) has not lost his right to his share and that the land must be settled accordingly.

Respondent to have the costs of this appeal. Advocate's fees LP. 4.

Frumkin J.: The two parties in this case have inherited certain land from a common ancestor in equal shares. The Appellant, who is the uncle of the Respondent, claimed before the Land Settlement Officer that he is entitled also to the one-half inherited by his nephew (the son of his late sister) which was registered in the nephew's name in 1929, on the ground that in 1919 he purchased the said half from him.

The Land Settlement Officer heard evidence as to the sale in 1919 and found as a fact that such a sale took place. He further held that since that date the possession of the Appellant was adverse possession and as more than ten years have elapsed since that date he gave judgment for the Respondent.

On appeal to the Land Court the judgment was set aside and judgment given for the Respondent for the reasons given by Mr. Eliash, counsel for the Respondent, then Appellant, which the Court stated to have adopted. In determining this appeal we had therefore to refer to the written grounds of appeal submitted by Mr. Eliash to the Land Court, and we find that among other grounds he has taken the objection to the Land Settlement Officer relying on the sale of 1919.

To my mind this appeal depends entirely on this sale. The Land Settlement Officer acted on the principle that there is no adverse possession between co-heirs and disregarded the possession of the Appellant up to 4.2.1919 considering him a co-heir until that date.

But what happened on that date was that the Respondent disposed of his rights by an unofficial contract in favour of the Appellant. The disposition took place in the prohibited period which started for the Sanjak of Jerusalem on the 1st December, 1917, and expired in September, 1920, by the promulgation of the Land Transfer Ordinance.

Article 2 of the Proclamation, dated 1st November, 1918, provides that:

“All persons concerned are warned that until it is possible to re-establish and re-organise the Land Registry Offices, owners of immovable property have no power to make dispositions of their immovable property, and that

1937
27th May
Trusted C.J.
Frumkin J.
and
Khayat J.
LA 54/36
Abu Dra'
v.
Abu Dra'

any disposition of immovable property which has taken place, or may hereafter take place, in contravention of this Proclamation is invalid."

The Land Settlement Officer was certainly aware of this prohibition and although he has found as a fact that such a disposition took place, he did not confer title on the Appellant on this ground, but on the ground of prescription. Yet he took as a starting point for the beginning of prescription the very date of the prohibited, and by law invalid, disposition.

I fail to see how a disposition in itself invalid could change the status of a person as a co-heir into that of an independent owner, and thus alter the nature of his possession from that of a co-heir into adverse possession. By law Respondent was entitled to regard the disposition as of no effect and to continue to look at the possession of his uncle as possession on his behalf. On this point alone, the Land Court was right in setting aside the judgment of the Settlement Officer, and the appeal on this point must fail.

The Land Court proceeded to distribute the land inherited from the common ancestor which, on settlement, became ten definite parcels. As the Appellant has disposed of certain parcels and only five parcels remained still registered in his name, the Land Court held that these remaining parcels represented the half of the inherited property and gave judgment for the Respondent for those five parcels.

The Appellant appealed also against this part of the judgment. This is not a point of law, but one of fact, but this fact was not tried by the Land Settlement Officer and the appeal before the Land Court was not heard in open Court, and under the circumstances I think it will be safer to give the parties an opportunity to have the matter of distribution and final allotment between the parties determined by the Land Settlement Officer. The appeal must therefore be allowed on this point alone and the case remitted to the Land Settlement Officer for completion.

Appellant to pay the costs of the appeal with LP. 4 advocate's fees.

Khayat J: In this action, the Plaintiff, Saleh Hussein Abu Dra', nephew of the Defendant, brought an action before the Settlement Officer, asking him to register half of the area of certain land in dispute in his name, in his capacity as heir of his mother.

The Defendant alleged that he bought the land from the Plaintiff's mother in 1919 by a private deed of sale which he had lost.

1937
27th May
Trusted C.J.
Frumkin J.
and
Khayat J.
LA 54/36
Abu Dra'
v.
Abu Dra'

The Plaintiff registered his share which he inherited in the Land Registry in 1929.

Evidence was tendered before the Settlement Officer and the existence of the sale was established, and the Settlement Officer thereupon dismissed the action on the ground of prescription.

Against the decision of the Settlement Officer an appeal was brought before the Land Court and that Court set aside the Settlement Officer's decision on the following grounds: —

- (a) that the verbal evidence of a sale not proved by the production of any document cannot defeat the right of inheritance.
- (b) that the alleged sale, having been made during the prohibited period, was invalid.
- (c) that the Settlement Officer was not right in holding that the registration of the land by Appellant in his own name and his obtaining kushans for it, which entailed Mukhtar's Certificates, the payment of taxes, fees, etc., was not a sufficiently assertive act by Appellant to interrupt prescription against him, if any.
- (d) that the Settlement Officer was not right in applying to this case Section 2 of the Registration of Land Ordinance, 1929, which is now Sections 51 *et seq* of the Land (Settlement of Title) Ordinance.

As regards the first ground, I do not think that this can be considered as verbal evidence. On the contrary, this is considered as documentary evidence as the deed is alleged to have been lost, and in such cases, verbal evidence was heard as to its disappearance in accordance with Article 82 of the Civil Procedure Code.

As regards the second ground, I do not see it necessary to go into the question as to whether the sale was a valid sale or not. If the sale was a valid one, then it would not have been necessary to rely on prescription. Accordingly, the validity of the sale does not affect this case.

As regards the third ground, that is the registration, I do not see it necessary to consider it and it has no effect, as it took place after the period of prescription which is ten years, according to Article 20 of the Land Code.

As regards the fourth ground, Section 2 of the Land Registration Ordinance, 1929, which is now Section 51 of the Land (Settlement of Title) Ordinance (Drayton Vol. II) contemplates that the person in possession should not be a lessee or be in a position analogous to a lessee, that is, should not be an owner or occupier independently.

1937
27th May
Trusted C.J.
Frumkin J.
and
Khayat J.
LA 54/36
Abu Dra'
v.
Abu Dra'

The rule that no prescription runs between the heirs who inherited land from a common testator is based on the assumption that an implied agency exists between the heirs, and that the heir in possession does not possess the land to the exclusion of the other heirs, as provided in Article 23 of the Land Code in the case of a lessee or borrower.

If the possession on behalf of the other heirs is not established, and it is proved that there was a sale, that is, it is proved that the possession of the Plaintiff for a period more than that of prescription was not as an heir, in other words, was not authorised by the other heirs to be in possession, I see no reason to exclude the rule of prescription.

The Appellant objected that the land Court did not state the grounds in its judgment, but this point is irrelevant.

For these reasons, I am of opinion that the judgment of the Land Court should be set aside and the decision of the Settlement Officer be affirmed.

Criminal Appeal No. 54 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Khayat J.

1937
28th May
Trusted C.J.
Greene J.
and
Khayat J.
CRA 54/37
Olstein
v.
Baum

SHMUEL OLSTEIN Appellant.

v.

ERICH BAUM Respondent.

Appeal, Leave to — Appeal to District Court from judgment of Magistrate's Court — Determination of appeal — Application for leave to appeal to Supreme Court — Grant of application not by the presiding judge of the Court that determined the appeal — Appeal not properly brought — Magistrates' Courts Jurisdiction Ordinance, 1935, Section 6.

Application for leave to appeal to the Supreme Court from judgments of District Courts, on appeal from judgments of Magistrates' Courts, must be determined by the Judge who presided at the appeal in the District Court and the words "the presiding judge of the Court" mean the judge who presided at the appeal in the District Court and not the President of the District Court.

In view of the point of law decided in this appeal, the facts are irrelevant.

J. Hermann for appellant.

L. Rabinovitch for respondent.

Judgment: The Appellant was convicted by the Chief Magistrate, Jaffa, of an offence against Article 241 of the Ottoman Penal Code and sentenced to the payment of a fine. He appealed to the District Court, Jaffa.

His appeal was dismissed on the ground that no legal point had been raised which would allow of the judgment being set aside or amended. The presiding judge who signed this judgment was His Honour Copland J.

The Appellant obtained leave to appeal to this Court by an order signed by his Honour Judge Shaw, Acting President of the District Court, Jaffa, dated 4th January, 1937.

The apparent delay is explained by the fact that the Appellant's application to this Court was filed on 29th April, 1937.

In these circumstances the question arises whether the appeal has been properly brought and can be heard by this Court.

The material provision of the law is section 6 of the Magistrates' Courts Jurisdiction Ordinance, No. 16 of 1935, which provides that an appeal from a Magistrate's Court to the District Court shall be final but that the presiding judge of the court may grant leave to appeal to this Court. Mr. Hermann for the Appellant contends that this means the President of the District Court and not the judge who presided at the appeal in the District Court. We do not agree with that contention and in our opinion the words "the presiding judge of the court" mean the judge who presided at the appeal in the District Court.

It is clear that this, which we consider the true interpretation, was the intention of the legislature as the old provision of the law, which this section replaces, — and which is found in the Magistrates' Courts (Jurisdiction) Ordinance, Chapter 87, Section 5 — provides that "the president of the court may" etc. which might have been open to the construction for which Mr. Hermann contends.

The appeal was not properly brought to this Court and is therefore dismissed.

1937
28th May
Trusted C.J.
Greene J.
and
Khayat J.
CRA 54/37
Olstein
v.
Baum

Criminal Appeal No. 174 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Khayat J.

1937
29th May
Manning S.P.J.
Greene J.
and
Khayat J.
CRA 174/36
Bannour
and others

- 1. YUSEF SHEHADEH BANNOUR
- 2. DIAB ABDUL KHALEK SAYDAM
- 2. YUSEF HUSSEIN SAYDAM Appellants.

v.

- 1. MARIAM YUSEF ABDULLAH
- 2. HEIRS OF HALIMEH EL-SHA'ER Respondents.

v.
Abdullah
and another

Diyet, Compensation in lieu of — Claim for compensation in lieu of diyet — Not necessary to serve notice of application on accused — Moslems may apply to a criminal court for the award of compensation in lieu of diyet — Civil and Religious Courts (Jurisdiction) Ordinance, Section 6.

The appellants, who were found guilty of wilful murder by the District Court of Jaffa, were ordered to pay compensation in lieu of diyet. They appealed against that order; the grounds urged on their behalf appear in the judgment reported hereinafter.

In dismissing the appeal, the Court of Appeal,

HELD (1) that no notice of the application for compensation in lieu of diyet was necessary to be served on the accused by the claimant of compensation.

(2) that Section 6(2) of the Civil and Religious Courts (Jurisdiction) Ordinance confers a jurisdiction on a Criminal Court to award compensation in lieu of diyet, no matter to what denomination the parties may belong, and the fact that the parties are Moslems does not oust the jurisdiction of the Criminal Court to award compensation.

(3) that although the appellants were only aiding and abetting in the commission of the wilful homicide, the fact remained that they were found guilty of wilful murder and therefore liable to pay compensation in lieu of diyet.

Mogannam E. Mogannam for appellants.

Hassan Sidqi Dajani for respondents.

Judgment: In this case the Appellants, having been convicted by the District Court of Jaffa of wilful murder, were ordered to pay compensation in lieu of diyet.

Mr. Mogannam has appealed to this Court on their behalf against this order and his first ground of appeal is that he was not served in the Court below with any notice of the application to claim diyet. As regards this we do not think any notice was necessary. The terms of Section 6(2) of the Civil and Religious Courts (Jurisdiction) Ordinance are quite clear, the sub-section speaks of compensation in lieu of diyet and gives a criminal court power to award such compensation at the request of a person entitled to diyet.

Mr. Mogannam had another ground of appeal, viz. that Section 6(2) refers to non-Moslems only and that the parties here concerned are Moslems. We do not agree. Section 6(2) is an additional provision to Section 6(1), which refers to Moslems only, and confers a jurisdiction on a criminal court no matter to what denomination the parties may belong.

A third ground of appeal was that the appellants did not themselves commit the homicide, but were only aiding and abetting. The answer to this is that they were found guilty of wilful murder.

The appeal is dismissed with costs to include LP. 3.- advocate's fees.

Civil Appeal No. 130 of 1936.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J. and Khaldi J.

BISHARA LIKO Appellant.

v.

- 1. HANIM ABOU KHADRA
- 2. RAISA ABOU KHADRA
- 3. AKIFA ABOU KHADRA Respondents.

Rules of Court — Chief Justice cannot make rules of court which alter the substantive law — Rule 4(4) and Rule 13 of Judgment by Default (District and Land Courts) Rules, 1926, ultra vires the powers of the Chief Justice — Ottoman Code of Civil Procedure, Article 159.

"Practice", Meaning of.

1937
29th May
Manning S.P.J.
Greene J.
and
Khayat J.
CRA 174/36
Bannour
and others
v.
Abdullah
and another

1937
31st May
Copland J.
and
Khaldi J.
CA 130/36
Liko
v.
Abou Khadra
and others

1937
31st May
Copland J.
and
Khaldi J.
CA 130/36
Liko
v.
Abou Khadra
and others

Judgment by default was given by the District Court of Jaffa (Civil Case 271/35) in favour of appellant against the respondents. An opposition was filed by respondents, which was heard in the absence of the appellant, and the original judgment was set aside and the claim was dismissed. Appellant entered an opposition against the judgment given against him in default, but the District Court dismissed the opposition on the ground that appellant was not entitled by law to oppose the judgment given against him in default setting aside the default judgment given in his favour. Hence this appeal. The only point in the appeal was whether Article 159 of the Ottoman Code of Civil Procedure had been amended by the Judgment by Default (District and Land Courts) Rules of 1926.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case to it to retry it, the Court of Appeal,

HELD that Rules 4(4) and 13 of the Judgment by Default (District and Land Courts) Rules, which were made by the Chief Justice under Section 20(1)(b) of the Courts Ordinance, were *ultra vires* the powers of the Chief Justice, because such rules purported to alter a right created by Article 159 of the Ottoman Code of Civil Procedure, which is substantive law.

Observations with regard to the meaning of the word "practice".

Approved: Poyser v. Minors, 7 Q.B.D. 329 at p. 333.

A.G. v. Sillem, 10 H.L. Ca. 704.

Kirby v. North British and Mercantile Insurance Company (1896) 2 Q.B. 99.

Mustafa Irsheid for appellant.

Jamal Budeiri for respondent.

Judgment: The facts that give rise to this appeal are as follows:

The present Appellant obtained judgment in the District Court of Jaffa against the Respondents in default on 20.1.36. The latter entered an opposition which was duly heard on 15.9.36 in the absence of the Appellant, when the original judgment was set aside and the case against the three Respondents was dismissed. On 3.10.36 the Appellant entered an opposition against the judgment given against him in default, and on 17.11.36 the District Court gave the following judgment:

"The Court finds that there is no suggestion in the law entitling the original plaintiff when he is opposed to oppose and therefore decided to dismiss the opposition and hold on the previous judgment of 15.9.36".

1937
31st May
Copland J.
and
Khaldi J.
CA 130/36
Liko
v.
Abou Khadra
and others

The Appellant has now appealed to this Court. As we see it, the only question in this appeal is whether Article 159 of the Civil Procedure Code has been amended by the Judgment by Default (District and Land Courts) Rules of 1926.

Article 159 of the Civil Procedure Code is in these terms:—

"... If the party against whom opposition is made fail to appear on the date fixed, and judgment be given against him by default, he shall have the right to make opposition against such judgment within the period and in the manner prescribed in articles (153) and (155)."

The relevant Rules are as follows:—

"Rule 4(4). If the plaintiff does not appear upon the hearing of the opposition, the court shall, if satisfied that he was duly cited, proceed to hear the opposition as if it were contested."

"Rule 13. Notwithstanding anything in Articles 151 to 160 and Article 188 of the Ottoman Code of Civil Procedure or in Article 25 of the Ottoman Law amending the Ottoman Code of Civil Procedure dated 8 Rabi Thani, 1329, the right of a plaintiff or defendant to make opposition to a judgment by default shall be limited to the cases and be subject to the conditions set forth in these rules."

There can be no doubt that if Article 159 has not been amended then clearly the Appellant had a right of opposition, but Rule 4(4) purports to take this right away. Rule 4(4) was made by the Chief Justice under the powers given to him by the Courts Ordinance (Cap. 28), Section 20(1)(b), which permits him to make rules "for regulating the pleadings, practice and procedure of the Supreme Court, District Courts and Land Courts...". Unless Rule 4(4) can be said to be a rule for regulating practice and procedure, there was no authority to make it.

In Poyser v. Minors (7 Q.B.D. p. 329 at p. 333) Lush L.J., in discussing the meaning of the word "practice", said:

"'Practice' in its larger sense . . . denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product. 'Practice', and 'procedure', as applied to this subject, I take to be convertible terms."

The "Practice" of a Court, when that word is used in its ordinary and common sense, denotes the rules that make or guide the course of a case, and regulate procedure within the walls or limits of the Court itself, and do not involve or

1937
31st May
Copland J.
and
Khaldi J.
CA 130/36
Liko
v.
Abou Khadra
and others

imply anything relating to the extent or nature of its jurisdiction; thus, an Act of Parliament, enabling the now abolished Barons of the Exchequer to frame rules for making "the process, practice and mode of pleading" on the Revenue side of the Court uniform with that on the Common Plea side did not give them the power, they assumed to exercise, of giving an appeal in Revenue cases. See A.G. v. Sillem (10 H.L. Ca. 704). And in Kirby v. North British and Mercantile Insurance Company (1896) 2 Q.B. p. 99, A.L. Smith L.J. said "In my judgment the Rule Committee have no power to repeal the provisions of an Act of Parliament. They have power to make rules as to practice and procedure, but, if an Act of Parliament provides that, in order that there may be a right of appeal . . . a certain notice must be given, I do not think the Rule Committee can repeal that provision by a rule."

It is true that the Civil Procedure Code, which is substantive law, contains many matters which are matters of practice and procedure. It is true that these Judgment by Default Rules were framed by a Chief Justice of great experience, and that they have been accepted and acted upon by all Courts for more than ten years, without any objection having been taken before, and any Court will always be strongly in favour of the validity of a rule, and will hesitate to declare it ultra vires, unless it is clear, beyond all argument, that the rule making power has been exceeded. But Article 159 of the Civil Procedure Code gives the Appellant, in the circumstances of this case, a right to enter an opposition. It is a right given by law. Rules 4(4) and 13 purport to take away this right. They alter Article 159 by saying that, in the circumstances of this case, he shall not have a right to enter an opposition. They have altered the law of the land.

Following the cases I have cited, I think that this was ultra vires, and that, therefore, this appeal must be allowed.

The judgment of the District Court must be set aside and the case remitted to them to retry on the footing that Rules 4(4) and 13 are ultra vires, and that Article 159 is the law to be applied.

Costs to await result of the retrial.

Civil Appeal No. 42 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

- 1. PHILIP MATTAR
- 2. NA'IM MATTAR
- 3. KAMAL MATTAR Appellants.

v.

ZAHDI KHOURY,
widow of the late Badie Mattar Respondent.

Personal status — Maintenance — Minors — Greek Catholic (Melkite) community — Law applicable to members of Greek Catholic (Melkite) community — Liability of uncles for maintenance of minor children of their deceased brother.



Copland J.
Frumkin J.
and
Khayat J.
CA 42/37
Mattar
and others
v.
Khoury

In this action for maintenance of herself and her minor child brought in the District Court of Haifa (Civil Case No. 10/37) against the appellants, the District Court awarded LP. 7.500 per month towards the maintenance of the respondent and her minor child. The respondent is the widow of the appellants' deceased brother. The appellants filed an appeal against the judgment of the District Court; their grounds of appeal appear in the judgment reported hereinafter.

In varying the judgment of the District Court to the effect that the sum of LP. 5.000 per month be paid by appellants towards the maintenance of the child — the widow held to be not entitled to maintenance — the Court of Appeal,

- HELD (1) that according to the evidence of the President of the Greek Catholic (Melkite) Religious Court, the Moslem Sharia Law was applicable to matters of personal status affecting members of the Greek Catholic (Melkite) community.
- (2) that the President of the Greek Catholic (Melkite) Religious Court was the most competent witness to prove the law which he applies in the Court of his community.
- (3) that the liability to pay maintenance must be limited to the child and the widow was not entitled to maintenance.

H. Atalla for appellants.

J. Sahyoun for respondent.

1937
3rd June
Copland J.
Frumkin J.
and
Khayat J.
CA 42/37
Mattar
and others
v.
Khoury

Judgment: Badie Mattar, brother of Appellants, died leaving Respondent and a child six years old.

Respondent claimed in the District Court of Haifa maintenance for herself and her child from her brothers-in-law, and the District Court gave judgment in her favour for the sum of LP. 7.500 per month.

The principal grounds of appeal put before us by Appellants' Counsel are: —

- (a) That the parties being Palestinians and members of the Greek Catholic Melkite Community one of the communities specified in the Order-in-Council, the law which should be applicable to them is the law of the Religious Community, and not the Sharia Law.
- (2) That if the Sharia Law is to be applied to this case, it must be proved by a competent witness and by reference to specific provisions.
- (3) That if any liability exists on the Appellants for maintenance, it must be limited to the child and should not be extended to the mother.
- (4) That the amount allotted by the District Court for maintenance is excessive having regard to the means and responsibilities of the Appellants.

With regard to the first ground, both parties admitted in the Court below that the law applicable to members of their community in matters of personal status is the Moslem Sharia Law. This fact was testified by the President of the Ecclesiastical Court of the Greek Catholic Community who, when giving evidence before the District Court, stated verbatim "we apply Moslem Sharia Law".

As to the second ground, we are of opinion that the President of an Ecclesiastical Court is the most competent witness to prove a law which he applies in the Court of his community and he has definitely stated in his evidence that Article 401 of the Moslem Family Law provides maintenance of minors by nearest relatives.

We agree with the third point raised by Appellants that the order for maintenance should be in respect of the child only, and the mother should not be entitled to such a claim.

We also agree that the amount allotted by the District Court is, in our opinion, rather too much, and we order that the following amounts should be paid by the respective Appellants for the maintenance of the child only: —

First Appellant to pay	LP. 2.750 per month
Second Appellant to pay	LP. 0.750 per month
Third Appellant to pay	LP. 1.500 per month
TOTAL:	LP. 5.000 per month

The appeal is therefore allowed and the judgment of the lower Court should be amended accordingly.

In the circumstances, we do not allow costs to either side.

Civil Appeal No. 52 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

- 1. ALI KHARBUTLY
- 2. KHADER KHARBUTLY
on behalf of their father's estate Appellants.

- 1. ISMAIL ATRAK
- 2. DARWISH ATRAK
- 3. HASSAN ATRAK Respondents.

Partnership — A court will not interfere with a partnership except for the purpose of its dissolution.

The English rule that a Court will not interfere with a partnership except for the purpose of its dissolution and a Court never deals with individual items of disputes in a partnership does not seem to be inconsistent with the express provisions of the Partnership Ordinance and must therefore be considered applicable in Palestine — So held by the Supreme Court sitting as a Court of Appeal.

The facts, in so far as they are relevant, appear from the judgment.

Raja Sa'ad for appellants.

M. Eliash for respondents.

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

1937
3rd June
Copland J.
Frumkin J.
and
Khayat J.
CA 42/37
Mattar
and others
v.
Khoury

1937
8th June
Copland J.
Khaldi J.
and
Abdulhadi J.
CA 52/37
Kharbutly
and another
v.
Atrak
and others

1937
8th June
Copland J.
Khalidi J.
and
Abdulhadi J.
CA 52/37
Kharbutly
and another
v.
Atrak
and others

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

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

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

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

The District Court was therefore correct in its judgment. It is the established English practice as evidenced in Lindley on Partnerships, page 568 *et seq.*, that a Court will not interfere with a partnership except for the purpose of its dissolution. The Court never deals with individual items of disputes in a partnership. It is provided in Section 2(2) of the Palestine Ordinance that it has to be interpreted by reference to the law of England relating to partnerships, and the English rules of equity and common law applicable to partnership shall apply in Palestine, save as far as they are inconsistent with the express provisions of the Ordinance.

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

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

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

Civil Appeal No. 65 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

ALBERTO FARRAN Appellant.

v.

JOSEPHINE ANKER Respondent.

Personal status — Children — Custody — Question of custody a matter within discretion of District Court.

Appellant, respondent and the Probation Officer were appointed by the District Court of Jerusalem as guardians over a child and the Court further ordered that the child should be kept in the custody of the respondent; appellant, the grandfather of the child, having been given reasonable access to visit the child. Appellant appealed against that part of the order granting custody of the child to the respondent.

In dismissing the appeal, the Court of Appeal, HELD that the question of custody of the child was a matter wholly within the discretion of the District Court.

Hanna Atalla for appellant.

H.C. Weston Sanders for respondent.

Judgment: The District Court of Jerusalem appointed the Appellant, Respondent and Mr. W.H. Chinn, the Probation Officer, guardians over the child Mary Tewfik. The Court further ordered that the child should be kept in the custody of the Respondent and granted the Appellant reasonable access to visit the child.

2. This appeal is directed against that part of the order granting custody of the child to the Respondent.

3. The question of custody is a matter wholly within the discretion of the District Court. The Respondent, to whom the custody of the child was given, is of the same religious belief; and the child's father, during his life-time, granted her the custody of the child.

4. The Appellant adduced no grounds to show that the District Court exercised this discretion unreasonably.

For the above reasons, the appeal is dismissed

No order is made as to costs.

1937
11th June
Copland J.
Frumkin J.
and
Khayat J.
CA 65/37
Farran
v.
Anker

Civil Appeal No. 87 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

1937
11th June
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 87/36
Baldwin
v.
Vester

FURMAN O. BALDWIN
in his capacity as guardian of
Ethel, Grace, and Edward Baldwin . . . Appellant.

v.

FREDERICK VESTER . . . Respondent.

Wills — Immovable property — Miri land — Will by a foreigner — Application for probate of will — No inventory necessary in respect of miri land.

Succession — Gifts — Disposition of succession by will — Will made some eight days before death — Mejelle, Article 879 inapplicable to wills, unless gifts to non-heirs are to take effect only after death.

Jurisdiction — District Court under Succession Ordinance not only invested with probate jurisdiction, but also with all matters relating to succession.

Renvoi, Doctrine of — Deceased a foreigner — Member of Church of England — Community not one of recognised communities — Deceased left a will — Disposition by will of movables subject to law of nationality of foreigner — Disposition by will of immovable property governed by law of nationality of foreigner.

Mrs. Henwood, an English lady living in Palestine, died on 26th March 1931. Eight days before her death she made a will leaving all her property to certain persons not named in the will but described therein as "the other members of the American Colony, equally, who, for the purposes of this my last will and testament, are understood to be the members of the 'Majority Group' referred to in the submission to the Arbitration of Charles Harold Perrott, of Cairo, made on the 23rd June, 1930." The deceased did not leave anything to her grandchildren by the will. Nothing was done until 6th June, 1935, when the guardian of the grandchildren applied to the District Court of Jerusalem for an order declaring the succession of Mrs. Henwood. The executor of the will was also idle and did not take any steps to obtain probate of the will. He opposed the application of the guardian, and on 10th January, 1936, applied for probate of the will. The District Court heard both applications at one and the same time

and granted both. The guardian appealed. The three main grounds urged on appellant's behalf appear in the judgment of the Court of Appeal.

In confirming the judgment of the District Court, but that a declaration should be added to that judgment to the effect that notwithstanding any testamentary disposition of the testatrix Henwood, the grandchildren are entitled to such part of her immovable property as was of the miri category, the Court of Appeal,

HELD (1) that it is not necessary for a petitioner for probate of a will to file any inventory with respect to miri land — he cannot claim such land as executor and it is for the Court to say who are entitled to such miri land.

(2) that Article 879 of the Mejelle, which refers to gifts to non-heirs made in mortal sickness and renders invalid all such gifts exceeding one third of the estate, does not apply to wills, unless there is an understanding that the gifts are to take effect only after death.

(3) that under the Succession Ordinance a District Court, in matters relating to wills, is invested not only with probate jurisdiction, but also with all matters relating to succession, and even if a will has been admitted to probate, a District Court has jurisdiction to declare that notwithstanding any testamentary disposition the property is to descend in a certain way.

(4) that the testatrix, who was an English national, had, since the Ottoman law recognised the English law as applicable to testamentary dispositions with regard to her movable as well as her mulk immovable property, an unrestricted capacity to dispose by will of her movable property and of such part of her immovable property as was of the mulk category, but she had no capacity to dispose of any part of her immovable property of the miri category.

Referred to: In re Ross — Ross v. Waterfield, (1930)
1 Ch. 377.

In re Askew — Marjoribanks v. Askew, (1930)
2 Ch. 259.

H. Cattar for appellant.

S. Horowitz for respondent.

Manning, S.P.J.: 1. Susanna Jane Henwood, an English lady living in Palestine, died on the 26th March, 1931. Eight days before her death she had made a will leaving all her property to certain persons not named, but described, therein, and appointing one Frederick Vester sole executor.

1937
11th June
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 87/36
Baldwin
v.
Vester

1937

11th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 87/36

Baldwin

v.

Vester

2. The deceased had at the time of her death three grandchildren. Nothing had been left to them by the will. Their guardian, one Furman Baldwin, did nothing in connection with the succession until the 6th June, 1935, on which date he applied to the District Court of Jerusalem for an order "declaring the succession of Susanna Jane Henwood".

3. Meanwhile the executor of the will had also been idle. He had taken no steps to obtain probate of the will. But, as soon as Baldwin applied for the declaration of succession, he entered an opposition to it in the Court, and on the 10th January, 1936, he applied for probate of the will. In his application he stated that the testatrix left movable property and also immovable property of the mulk category in Palestine. He did not, however, produce any inventory of either species of property, as he was required to do by rule 5 of the Succession Rules (Vol. III Laws of Palestine, page 2382); nor did the District Court insist on this provision being observed as it was bound to do under section 14 of the Succession Ordinance (Vol. II Laws of Palestine, page 1384). During the argument before us Mr. Horowitz, advocate for the executor, said in answer to the Court that no inventory had been filed for the simple reason that the testatrix had left no property. This was in strange contrast with the statement in the executor's application that the deceased had left movable and immovable property.

4. The District Court heard the opposition and the petition for probate at the same time. A number of witnesses were heard and there was a lengthened argument by the advocates on each side. The Court, in a very brief judgment, granted probate of the will to the executor and a certificate of succession to the grandchildren.

5. Baldwin has appealed to this Court, and Mr. Cattam, who argued the appeal on his behalf, based his opposition to the judgment on three grounds. His first was that the will was made in general terms without specifying what property was to be excluded. He alleges that some of the immovable property left by the deceased was miri land and that, as such land cannot be disposed of by will, it should have been specifically excluded from the dispositions of property made in the will. The answer to this is that, if the deceased left any miri land, such land is excluded by law from any disposition made by the deceased, and the certificate of succession granted by the Court entitles the grandchildren to succeed to such land. It is not necessary for a petitioner for probate to file any inventory with respect to

miri land, he cannot claim such land as executor and it is for the Court to say who are entitled. The Court has done so in this case.

6. The second ground of appeal is that the devises and bequests in the will were made to an unincorporated body which has ceased to exist. The devise is in the following words: "to the other members of the American Colony, equally, who, for the purposes of this my last will and testament, are understood to be the members of the 'Majority Group' referred to in the submission to the Arbitration of Charles Harold Perrott, of Cairo, made on the 23rd June 1930". This submission was in evidence and contains the names of forty-four persons, referred to as the 'Majority Group'. The will is clear, the testatrix wished her property to be divided equally among these forty-four persons. There is no question of an unincorporated company and there is no uncertainty as to the persons whom the testatrix intended to benefit.

7. The third ground of appeal is that the testatrix could not disinherit her heirs, but that if she could do so, she could do so with regard to one-third of her property only. This ground is based on certain provisions of the Ottoman Law, which are said to have been in force in Palestine on November 1st, 1914, and therefore to be still law here. Mr. Cattam also relied on article 879 of the Mejlle, which refers to gifts to non-heirs made in mortal sickness, and renders invalid all such gifts exceeding one third of the estate. It may be said at once that I do not think this article applies to wills, unless there is an understanding that the gifts are to take effect only after death.

8. Mr. Horowitz, for the executor, says that the local Succession Ordinance provides a complete code for determining questions such as this, and that under it there can be no doubt of the power of the testatrix to dispose of all her property by will. He cited the cases of *In re Ross* 1930, 1 Ch. 377 and *in re Askew* 1930, 2 Ch. 259, and relied on certain passages in Cheshire's Private International Law. He maintained that the Ottoman Law referred to is not in force in Palestine. He said that the will had been proved in solemn form and that it was not open to the appellant to attack it in any way.

9. I shall deal briefly with this last argument first. Under the Succession Ordinance I think a District Court, in matters relating to wills, is invested not only with probate jurisdiction, but also with all matters relating to succession. Even if a will has been admitted to probate, a District Court has jurisdiction

1937

11th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 87/36

Baldwin

v.

Vester

1937

11th June

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 87/36

Baldwin

v.

Vester

to declare that notwithstanding any testamentary disposition, the property is to descend in a certain way. That is, it combines the jurisdiction of the Probate, Divorce and Admiralty Division in England (so far as probate and administration are concerned) with that of the Chancery Division. As regards this part of the case the appellant is in effect seeking a declaration that, despite the dispositions in the will, the minor grandchildren of the testatrix are entitled to two-thirds of her property. A District Court exercising jurisdiction under the Succession Ordinance has jurisdiction to make such a declaration.

10. In considering the main question, I propose to consider the local legislation dealing with the point. It is curious that neither Mr. Cattan nor Mr. Horowitz referred to the provisions of the Palestine Order-in-Council 1922, (hereinafter referred to as the Order-in-Council) on the subject. The relevant article is article 64 (i) and (ii). It reads as follows: —

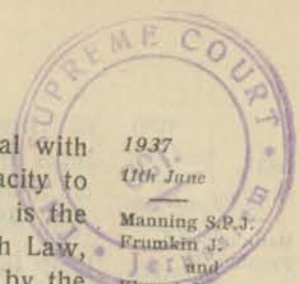
“(i) Matters of personal status affecting foreigners other than Moslems shall be decided by the District Court, which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner, provided always that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.

(ii) The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicile, in which case the latter shall be applied.”

11. Matters of personal status are defined in article 51 of the Order-in-Council and include suits regarding successions, wills and legacies. No regulations under the article appear to have been made by the High Commissioner.

12. There is no dispute as to the facts that the testatrix was a foreigner and that her nationality was English. There was no finding by the District Court on the question of domicile, in fact the District Court, despite a lengthened argument by Mr. Cattan, gave no decision at all on the point which I am now deciding. In the District Court Mr. Cattan asserted that the domicile of the testatrix was Palestine. Mr. Horowitz assented to this and before us he agreed that for the purposes of this case the domicile of the testatrix should be taken to be Palestine.

13. I assume that, as stated by the executor, the testatrix has left movable and immovable property in Palestine, and that we are not concerned with any property, movable or im-



1937

11th June

Manning S.P.J.

Frumkin J.

and

Khayat J.

CA 87/36

Baldwin

v.

Vester

movable, situated elsewhere than in Palestine. I shall deal with her will as regards the movable property first. Her capacity to dispose of this is regulated by her personal law, that is the law of her nationality, English Law. According to English Law, “the efficacy of testamentary dispositions is determined by the law of the country in which the testator was domiciled at death” (see Cheshire page 428). The English Law does therefore import the law of the domicile, and in accordance with article 64 (ii) of the Order-in-Council (supra) the law of the domicile is to be applied.

14. The problem is somewhat different with regard to immovables. Here English Law does not import the law of the domicile. The English Law is stated in Cheshire page 449 as follows: —

“With regard to wills of immovables the rule of the common law is that it is the *lex situs*, and the *lex situs* exclusively, which decides whether the testator has an unlimited or only a restricted power of disposition and whether the interest devised is essentially valid. The law of the testator’s domicile has no effect on these matters”

English Law has therefore to be applied, and English Law is the *lex situs*, that is the law of the place where the immovable property is situated, that is, the Law of Palestine.

15. The conclusion to be drawn then, from the application of article 64 (i and ii) of the Order-in-Council, is that the question whether the testatrix had an unlimited or restricted power of disposition is to be decided, as regards movables, by the law of her domicile at the time of her death, that is the Law of Palestine; and, as regards immovables, by the *lex situs*, also the Law of Palestine.

16. I now pass to consider the relevant provisions of the Succession Ordinance. They are set out in section 4 (iii) and are as follows: —

“(iii) Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the Religious communities, the following rules shall apply: —

(a) mulk land and movables of the deceased shall be distributed in accordance with the national law of the deceased;

(b) the validity in form of any will left by the deceased and his capacity to make the testamentary disposition shall be determined in accordance with his national law.

Provided that, if the will is made in civil form under this Ordinance, it shall, in all cases, be held valid;

1937
11th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 87/36
Baldwin
v.
Vester

(c) where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied:

Provided that, if the national law imports the law of the domicile and the latter provides no rules applicable to the person concerned, the law to be applied shall be his national law".

17. According to (b) the capacity to make testamentary disposition is regulated in accordance with the national law, that is, English Law. "Capacity" includes the question whether the testatrix had an unlimited or restricted power of disposition. With regard to (c) it has been seen that English Law imports the law of the domicile, in the case of movables, and the *lex situs*, in the case of immovables. Leaving the proviso aside for the moment, the same result is reached as was arrived at by the application of article 64 of the Order-in-Council, viz. that the issue is to be determined in the case of movables, by the law of the domicile, and in the case of immovables by the law of the *lex situs*, that is in both cases by the Law of Palestine.

18. Before dealing with the proviso I shall consider the authorities cited by Mr. Horowitz and certain provisions of the Ottoman Law.

19. In the case of *In re Ross — Ross v. Waterfield* (supra) the testatrix was a lady of English nationality domiciled in Italy and by her will she left nothing to her son. The son sought a declaration in the Chancery Division that, notwithstanding the testamentary dispositions of his mother, he was entitled to a certain share in her movable and immovable property. There was expert evidence that according to Italian Law the English Law as to movables was applicable and that Law was the Law which could be applicable to an English national domiciled in England. As regards the immovables there was expert evidence that the Italian Courts would decide the succession to it in the same manner as an English Court would determine it if such immovable property belonged to an Englishman and was situated in England. The Court accepted this evidence and the son's claim consequently failed. The Court applied the law of the domicile in the case of the movables and the *lex situs* in the case of the immovables, i.e. Italian Law in both cases; and the Italian Law was that the question at issue should be decided as if the testatrix was domiciled in England and as if the immovable property was situated in England.

20. In the second case cited by Mr. Horowitz, *In re Askew, Marjoribanks v. Askew* (supra), Askew had obtained a German domicile in 1911, and in the same year obtained from a German

Court a dissolution of his marriage with his then wife. In January 1911, he had become the father of an illegitimate child and he married the mother in 1912. According to English Law the illegitimate child could not become legitimate on the subsequent marriage of its parents as her parents could not have legally contracted a marriage at the date of her birth. There was, however, evidence before the Court that according to German Law she would become legitimate on the subsequent marriage of her parents, and the Court held that the *lex domicilii* must prevail. The case is only an authority for the proposition that in matters coming before English Courts and depending on foreign domicile the law of the domicile must prevail. It is difficult to see how it can apply to the circumstances of the present case.

21. The testatrix was a member of the established Church of England, and was consequently not a member of any of the religious communities whose Courts are given jurisdiction in matters of personal status by article 51 of the Order-in-Council. Her power of disposition by will must therefore be regulated according to the general law in force in Palestine. Since the British Occupation there has been no legislation dealing with this subject, and in accordance with the provisions of article 46 of the Order-in-Council, the question has therefore to be determined in accordance with the Ottoman Law in force in Palestine on November 1st, 1914. That law is stated as follows in Young's *Corps de Droit Ottoman*, Vol. I, page 307, as follows: —

"La capacité de tester est limitée au tiers des biens du de cujus . . ."

And in footnote 2 on the same page it is said: —

"Les biens 'mirié' et 'vakoufs' ne peuvent pas être légués par testament".

That is, a testator was not allowed to dispose of more than one-third of his property by will and could not dispose of his miri land by will at all. It remains now to be seen how the Ottoman Law applied these provisions to foreigners.

22. I shall deal first with the movable property. Young in the same volume, page 329, says: —

"Les biens meubles d'un sujet étranger établi en Turquie reviennent à ses parents, suivant la loi de son pays."

In footnote 1 the following words occur: —

"D'après un principe général de jurisprudence, la succession est régie par la loi du domicile du de cujus."

Ainsi un étranger établi en Turquie est censé garder son domicile d'origine."

1937
11th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 87/36
Baldwin
v.
Vester

1937

11th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 87/36

Baldwin

v.

Vester

The interpretation I place on these words is that in determining the succession to the movables of a foreigner the Ottoman Law applied the law of that foreigner's nationality, and that even though the foreigner were domiciled in Turkey, he was nationally regarded as being domiciled in his country of origin. Nothing is said about wills and I have not been able to find in Young any reference to wills of foreigners as regards movables. I presume, however, that the same principles apply. The result, therefore, as regards the capacity of the testatrix to dispose of her movable property works out as follows: We first go to the law of her nationality that is English Law. That law, as regards movables, imports the law of the domicile, that is, the law of Palestine, in the circumstances, Ottoman Law. Ottoman Law says the law of the nationality is to be applied, that is English Law. The same result is reached as was arrived at by the Chancery Division in the case of *In re Ross* (supra), but in that case the result depended on evidence while in this case it is a matter of judicial notice. The evidence in that case was that the Italian Courts would determine the case on the footing that the English Law applicable is that part of the law which would be applicable to an English national domiciled in England. From the passages cited above from Young an Ottoman Court would have decided in the same way, and would have held that the testatrix had an unrestricted power of disposition as regards her movable property.

23. With regard to the immovable property the Ottoman Law is set out in the same volume of Young at page 341. It is as follows: —

“Le sujet étranger a la faculté de disposer par donation ou testament de ceux de ses biens immeubles dont la disposition sous cette forme est permise par la loi. Quant aux immeubles dont il n'aura pas disposé ou dont la loi ne lui permet pas de disposer par donation ou testament, la succession en sera réglée conformément à la loi ottomane.”

24. I have consulted my brothers Frumkin and Khayat as regards the effect of this passage. They were both resident in Palestine before November 1st 1914 and were conversant with the manner in which the Ottoman Law dealt with the testamentary capacity of British subjects as regards immovable property. Were I left to my own interpretation I would construe the passage as restricting the capacity; that is, I would construe the words “la loi” to mean the Ottoman Law in its strict sense as already set out, prohibiting all dispositions of miri land, and restricting dispositions of mulk land to one-third. But my brethren inform me that this is not so, but “la loi” refers to the part of the Ottoman Law which conferred special

1937

11th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 87/36

Baldwin

v.

Vester

privileges on foreigners, and, *inter alia*, allowed the property of the deceased foreigners, including British subjects, to be administered by consular courts. They inform me that this privilege extended to immovable as well as to movable property, and that for the purposes of administration, and of determining capacity, the immovable property was regarded as if it was situated in the country of origin of the de cujus. That is, the Ottoman Law dealt with the matter in exactly the same way as it was proved that the Italian Law did in the case of *In re Ross* (supra.) There was only one exception, and that was the prohibition as to miri land, the dominion in that was vested in the State, and it could not be disposed of by will, even by a foreigner.

25. I naturally accept the opinions of my brethren on this subject, and turn now to consider the effect of the proviso at the end of section 4 (iii) of the Succession Ordinance (supra). It refers to movable property only as it is only in the case of movable property that English Law imports the law of the domicile; in the case of immovables, it imports the *lex situs*. The law of the domicile is in this case the Law of Palestine, and it has been seen that that law, i.e. the Ottoman Law in force on November 1st, 1914, did provide special rules as regards the movables of foreigners, including Englishmen. The application of these rules has already been considered.

26. The general result arrived at is therefore, with one exception, the same as that reached by the Chancery Division in the case of *In re Ross* (supra). Mrs. Henwood had, at the time of her death, an unrestricted capacity to dispose by will of her movable property and of such part of her immovable property as was of the mulk category but she had no capacity to dispose of any part of her immovable property of the miri category.

27. The wards of the appellant are entitled to a declaration that, notwithstanding any testamentary disposition of the testatrix Susanna Jane Henwood, they are entitled to succeed to such part of her immovable property as was of the miri category. The judgment of the District Court is confirmed but there should be added to it a declaration as above. The costs of all parties should be paid out of the estate. (to include LP. 15 advocates' fees for each advocate).

Frumkin J: I concur.

Khayat J: I concur.

Civil Appeal No. 70 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J., Khaldi J. and Abdulhadi J.

SULEIMAN ABU GHAZALEH Appellant.

v.

ELIAS BOUZO Respondent.

Jurisdiction — Claim for return of a promissory note of value of LP. 246 — Claim within jurisdiction of a Magistrate's Court — Magistrates' Courts Jurisdiction Ordinance, 1935, Section 2(1)(d)(i).

In an action brought in the District Court of Jaffa (Civil Case No. 26/37) in which the respondent asked for the return of a promissory note of the value of LP. 246 which was entrusted to the appellant, the point was taken that the District Court had no jurisdiction to hear the action, since the value of the note was less than LP. 250, but the Court held that it had jurisdiction and proceeded with the case. The defendant appealed. The only point in the appeal was whether the matter was within the jurisdiction of the District Court or within the jurisdiction of a Magistrate's Court presided over by a British Magistrate.

In allowing the appeal, setting aside the judgment of the District Court and dismissing the respondent's action, the Court of Appeal,

HELD that the District Court had no jurisdiction to entertain the action since the subject matter of the claim was a promissory note under the value of LP. 250.

Appellant in person.

A. Shehadeh for respondent.

Judgment: The respondent brought an action in the District Court Jaffa for the return of a promissory note which he has entrusted to the appellant. The value of the promissory note is LP. 246.

2. The only point in this appeal is whether the competent Court to deal with this claim is the District Court or the Chief Magistrate.

3. Section 2(1)(d)(i) of the Magistrates' Courts Jurisdiction Ordinance 1935 gives power to the Chief Magistrate to exercise

1937

14th June

Copland J.
Khaldi J.

and
Abdulhadi J.

CA 70/37

Abu Ghazaleh

v.

Bouzo

jurisdiction where the subject matter of the claim does not exceed LP. 250.

4. It is clear therefore that the District Court had no jurisdiction to entertain the present action since the subject matter of the claim was a promissory note under the value of LP. 250. For this reason the appeal is allowed, the judgment of the District Court set aside, and the respondent's claim dismissed with costs here and in the Court below. Costs of this Court to include LP. 1 appellant's travelling expenses.

Civil Appeal No. 74 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

1. HEBREW UNIVERSITY ASSOCIATION
2. KEREN KAYEMETH LEISRAEL LTD. . . . Appellants.

v.

MUHSINEH AREF DAJANI Respondent.

Immovable property — Expropriation — Experts differed as to value of land expropriated — Trial Court took average amount as being reasonable value — Correct course.

Certain land, the property of the respondent, was expropriated by the appellants. The parties did not come to an agreement as to the value, the dispute was brought before the Land Court, Jerusalem (Land Case No. 105/36), experts were nominated, the appellant's expert valued the land at 300 mils per square metre, while respondent's expert valued it at 550 mils per square metre. The Land Court considered that 450 mils was a reasonable price. The appellants appealed.

In dismissing the appeal, the Court of Appeal,

HELD that the Court of Appeal, where in expropriation proceedings experts differ as to the value of the land, will not interfere when the Court of trial accepted an average amount as being the reasonable value of the land expropriated.

Followed: LA 58/36, ante p. 150.

LA 59/36.

1937

14th June

Copland J.
Khaldi J.
and
Abdulhadi J.

CA 70/37

Abu Ghazaleh

v.

Bouzo

1937

14th June

Greene J.
Frumkin J.
and
Khayat J.

CA 74/37

Hebrew University
Association
and another

v.

Dajani

1937
14th June
Greene J.,
Frumkin J.
and
Khayat J.
CA 74/37
Hebrew University
Association
and another
v.
Dajani

A. Levin for appellants.

E.D. Goitein for respondent.

Judgment: This case is not distinguishable from LA 59/36 or LA 58/36, where it was held by this Court that where in expropriation proceedings experts differ as to the value of the land, this Court will not interfere when the Court of trial accepted an average amount as being the reasonable value of the land.

It was argued on behalf of the Appellants that the relevant date for assessment was the value when the Appellants were entitled to enter upon the land, in this case, July 1936. The Court heard evidence as to the value at that date, and we have to take it that it had it in mind in assessing the value.

We find no merits in the argument as regards the costs and for all these reasons the judgment of the Court below must be affirmed and the appeal dismissed with costs to include LP. 3.-advocate's fees.

Criminal Appeal No. 34 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Khayat J.

1937
22nd June
Manning S.P.J.
Greene J.
and
Khayat J.
CRA 34/37
Abu Sham
and another
v.
Attorney General

1. NAIM IBRAHIM ABU SHAM
2. SUBHI NAIM ABU SHAM *Appellants.*
v.
ATTORNEY GENERAL *Respondent.*

Perjury — Elements to be proved by prosecution in order to succeed in a prosecution for perjury — Perjury Ordinance, 1929, Sections 3 and 4.

Evidence — Court record — When inadmissible — Information — Charging accused with perjury must contain an allegation of materiality.

1937
22nd June
Manning S.P.J.
Greene J.
and
Khayat J.
CRA 34/37
Abu Sham
and another
v.
Attorney General

The two appellants, together with two others who were acquitted by the Court of trial on the ground of the insufficiency of evidence against them, were charged before the District Court of Haifa (Criminal Case No. 210/36) with perjury contrary to Sections 3 and 4 of the Perjury Ordinance, 1929, in that the first appellant, as accused in Criminal Case No. 7560/35 of the Magistrate's Court of Haifa of having contravened the provisions of the Town Planning Ordinances, 1921-1929, stated on oath: ". . . the three rooms which are mine in Wadi Rushmayya, I have built since eight years approximately . . .", and that the second appellant, as witness for the defence in the same case, stated on oath: "there is a building of three rooms in Wadi Rushmayya to my father, the accused, which rooms were built by Hussein El Natour and Hourani, labourers, who dug out the foundations and the said Hussein built them in 1928. . .", while both knew that their evidence was false as the building in question was erected in 1934. In order to prove the offence against the appellants, the prosecution called a clerk of the Magistrate's Court of Haifa, who stated that the criminal prosecution in the Magistrate's Court was against Naim Abu Sham for building without a licence, that Naim gave evidence on oath, that he (the court clerk) was not record clerk in the criminal case against Naim nor was he present at Naim's trial, that from the record in the file the evidence was taken by the record clerk but not signed by the Magistrate, and, as to the second appellant, the witness said that he (Subhi Abu Sham) gave evidence for the defence, and that his evidence was taken down by the record clerk but not signed by the Magistrate. On this evidence, the District Court convicted the appellants and sentenced each to six months' imprisonment. Both appealed.

In allowing the appeals and quashing the convictions and sentences, the Court of Appeal,

HELD (1) that in a case of perjury it is necessary for the prosecution to prove that the accused had been sworn and that his sworn evidence included the statement which is the subject matter of the charge.

(2) that in a case of perjury, the information charging the accused with the offence should allege materiality.

(3) that the record produced, which was taken down by the record clerk but not signed by the Magistrate, was inadmissible in evidence.

The facts sufficiently appear from the headnote.

N. Abcarius for first appellant.

Mogannam E. Mogannam and Mahmoud El Madi for second appellant.

Junior Government Advocate (Omar Wa'ri) for respondent.

1937
22nd June
Manning S.P.J.
Greene J.
and
Khayat J.
CRA 34/37
Abu Sham
and another
v.
Attorney General

Manning S.P.J.: 1. On January 5th, 1937, the appellants were convicted by the District Court of Haifa of perjury. Abcarius Bey, who argued the appeal for Naim Ibrahim Abu Sham, laid a great deal of stress on his opinion that the appellants had been unfairly prosecuted. This was irrelevant to any issue involved — if the prosecution succeeded in proving the offence according to law, then the conviction could not be interfered with.

2. The principal ground of appeal was that the information was defective in that there was no allegation of materiality. This allegation should, of course, have appeared in the information.

3. There was, however, another irregularity in the proceedings which was of graver import. In a case of perjury it is necessary for the prosecution to prove that the accused has been sworn and that his sworn evidence included the statement which was the subject-matter of the charge. In the present case the Court accepted as proof of these facts evidence which was entirely inadmissible. The evidence was that of a witness who was not present at the trial at which the statements were made. Yet he stated that the appellant Naim Ibrahim Abu Sham gave evidence on oath. He stated that the appellant Subhi Abu Sham gave evidence, but did not say if it was on oath. To prove the statements he produced a record made by a clerk and not signed by the Magistrate. It should be unnecessary to say that all this evidence was inadmissible. Apart from it there was nothing else in the evidence for the prosecution to show that the appellants had ever made the statements attributed to them. The District Court should have rejected the evidence tendered — this must have resulted in the acquittal of the appellants. In the circumstances the acceptance of the inadmissible evidence led to a miscarriage of justice.

4. In my opinion the appeals should be allowed and the convictions and sentences quashed.

Greene J.: I concur.

Khayat J.: I concur.

Civil Appeal No. 164 of 1935.

In the Supreme Court sitting as a Court of Appeal.

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

JACOB BLUVSTEIN,
and seven others Appellants.

v.

1. Y. GRAZOWSKY
2. J. MARSHAK
3. RABBI J.L. PINHAS
Executors of the will of
the late Issac Leib Bluvstein Respondents.

1937
25th June
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 164/35
Bluvstein
and others
v.
Grazowsky
and others

Wills — Will containing a disposition contrary to law — Confirmation of will by competent religious Court — Confirmation ineffective and a nullity — Succession Ordinance, Section 7.

Immovable property — Waqf — Dedication of miri land as waqf by will — Ineffective dedication — Disposition invalid.

— — — — — Dedication of income of mulk immovable property for charitable purposes — Dedication ineffective according to personal law of dedicator — Whole dedication invalid.

President District Court — Sitting under Section 9(1) of Succession Ordinance sits as a Court.

Issac Leib Bluvstein, hereinafter referred to as the testator, died on January 13, 1924, possessed of mulk and miri immovable properties. He left a will made by him in 1922 to which subsequent additions were made under which he dedicated for charitable purposes the income of his mulk immovable properties as well as the miri properties and appointed executors to carry out his wishes. The will was confirmed by the Rabbinical Court and by the Rabbinical Council on appeal, except that the latter disallowed the dedication of the income on the ground that according to Jewish Law the income was not yet in existence when dedicated and the dedication was therefore void and that the said income should be at the disposal of the heirs of the deceased. On July 13, 1932, on the application of one of the heirs of the deceased, the administration of the estate was transferred to the District Court,

1937

25th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 164/35

Bluvstein
and others

v.

Grazowsky
and others

and on January 10, 1934, an application was made by the heirs for the distribution of the estate; their contentions being that the testator had attempted in his will to create a waqf of miri lands, that that was contrary to the law of Palestine, that there was therefore an intestacy as regards the said miri lands and that they should be registered in the names of the heirs, and they further asked that the executors be ordered to render accounts. The District Court took the view that it had no jurisdiction to decide the question as it concerned waqf property.

In setting aside the judgment of the District Court and remitting the case to it with certain directions to be followed, the said directions appear in the judgment reported hereinafter, the Court of Appeal,

HELD (1) that the confirmation of the will by the Rabbinical Court, which will contained a disposition which was contrary to the law, namely a dedication as waqf of miri land, was ineffective and must be regarded as a nullity.

(2) that the President of a District Court exercising the powers conferred by Section 9(1) of the Succession Ordinance sits as a Court to give directions as to the administration and distribution of the estate, and this includes a jurisdiction to pronounce as to the validity or otherwise of any testamentary disposition, and to determine the succession should there be an intestacy as to any part of the testator's estate.

(3) that as the direction of the testator that the income of his mulk immovable property which he bequeathed to the executors should be devoted to charitable purposes was invalid because it was not recognised as such by his personal law, namely the Jewish law, on the ground that it was not yet in existence when so dedicated, the income remained undisposed of and the effect of the invalidity of this disposition was to render the whole bequest in-existent and the property itself, since the purpose for which it was tied up turned out to be contrary to law, remained undisposed of.

(4) that the dedication of the miri property by the will as waqf was invalid, because according to the law of Palestine miri land cannot be disposed of by will, and that miri property also remained undisposed of.

M. Smoira, I. Bar-Shira and L. Hoffman for most of appellants.

H. Ben-Ari for respondents.

Manning, S.P.J.: 1. Issac Leib Bluvstein, hereinafter referred to as the testator, died on January 13th, 1924. He left a will disposing of his property and appointed as executors the persons who

are the respondents to the present appeal. The will was confirmed by a Rabbinical Court at Tel Aviv and on appeal by the Supreme Rabbinical Court of Jerusalem, but the latter Court, in confirming the will, declared invalid certain dispositions of the testator.

2. On the 13th July 1932, on the application of Jacob Bluvstein, a son of the testator, the administration of the deceased's estate was transferred from the Rabbinical Courts to the jurisdiction of the District Court of Jaffa.

3. On the 10th January 1934 an application for distribution was made by five of the present appellants. In the application it is stated that the testator had attempted in his will to create a waqf of miri land, that this was contrary to the law of Palestine, that there was therefore an intestacy as regards such land and that it should be registered in the names of the heirs of the deceased. It was also asked that the executors render accounts with respect to this land. The other appellants subsequently joined in this application.

4. The District Court considered it had no jurisdiction to decide the question with respect to waqf. It refused to make an order for distribution of the estate on the ground that the time for distribution had not yet arrived.

5. The appellants have appealed. When the appeal came up for argument before us the appellant Jacob Bluvstein had died, but all parties agreed that the appeal should proceed although his estate was not represented. The appellant David Bluvstein did not appear, although he had been legally served with notice. The other appellants were represented by advocates and Mr. Ben Ari, who appeared for the respondents, took a preliminary objection that the relevant powers of attorney were not in order. They had been granted in Russia and Mr. Ben Ari said they had not been authenticated in accordance with section 18 of the Evidence Ordinance. I have examined these powers of attorney and I find that the provisions of the section have been substantially complied with. The preliminary objection should, in my opinion, be over-ruled.

6. Before dealing with the various grounds of appeal, it may be useful to refer to certain provisions of the law relating to succession. The testator was a Palestinian citizen and a member of the Jewish Community. Article 53(i) of the Palestine

1937

25th June

Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 164/35

Bluvstein
and others

v.

Grazowsky
and others

1937
25th June
Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 164/35
Bluvstein
and others
v.

Grazowsky
and others

Order in Council, 1922 confers upon the Rabbinical Courts exclusive jurisdiction in the matter of the confirmation of the wills of members of the Jewish Community other than foreigners. In the present case the Rabbinical Court had therefore exclusive jurisdiction so far as the confirmation of the will of the testator was concerned.

7. Section 7(2) of the Succession Ordinance reads as follows:

“(2) The certificate of the court of the community confirming a will shall be deemed to be conclusive evidence that the will is valid in form and that the testator had capacity to make the will and was not affected by mistake, fraud or undue influence, but confirmation by a court shall not make valid any disposition of property thereby which is contrary to law.”

In its judgment confirming the will of the testator the Rabbinical Court did declare valid, as will be seen later, a disposition which was contrary to law. In view of the above sub-section such a declaration was ineffective and it must be regarded as a nullity.

8. There is another exclusive jurisdiction conferred on a Rabbinical Court, by article 53 (iii) of the Order-in-Council, and that is an exclusive jurisdiction over any case as to the constitution or internal administration of a waqf or religious endowment constituted before the Rabbinical Court according to Jewish Law. The wording is important. The case must be one as to the constitution or internal administration of a waqf and that waqf must itself have been constituted before the Rabbinical Court. This part of the article can therefore have no reference to the case of a waqf purporting to have been created by a will, where the question arises whether it has been validly created. I am strengthened in this opinion by the fact that wills are expressly mentioned in article 53 (i), and that the exclusive jurisdiction of the Rabbinical Court is confined to confirming them.

9. I have already referred to the fact that in July, 1932, the administration of the testator's estate was transferred from the jurisdiction of the Rabbinical Court to that of the District Court. The relevant section is section 9(1) of the Succession Ordinance and is as follows: —

“The president of a district court may, upon the application of any person interested in the estate of a deceased

person and if he deems it just or convenient, make an order prohibiting the court of any of the religious communities from taking cognizance of, or from dealing further with, the succession of any deceased person, and from the date of such order the administration and distribution of the estate shall be within the exclusive jurisdiction of the civil courts, and any proceedings which may be pending shall be forthwith transferred to the district court.”

10. The words “the administration and distribution of the estate” are important, because they show that the District Court, as soon as the order of transfer has been made, has the jurisdiction to administer and distribute, i.e. a jurisdiction similar to that of the Chancery Division in England, as distinct from the jurisdiction of the Probate, Divorce and Admiralty Division. This consideration disposes of the ground on which the learned President of the District Court decided that he had no jurisdiction to determine the question with respect to the waqf. He said “This is a question which I, sitting as a Probate Court, cannot decide.” The learned President was not, however, sitting as a Probate Court; the will had already been confirmed; he was sitting as a Court to give directions as to the administration and distribution of the estate, and this included a jurisdiction to pronounce as to the validity or otherwise of any testamentary disposition, and should there be an intestacy as to any part of the testator's estate, to determine the succession.

11. With regard to the dispositions made by the testator of his immovable property, the matter has to be considered from two standpoints. At the time of his death he possessed immovable property of the mulk category in Lilienblum Street, Tel Aviv. This property yielded an income, and by his will he dedicated this income for a charitable purpose, i.e. he created a waqf with respect to it. This was an invalid disposition, it is not allowed by the Jewish Law, and the Chief Rabbinate for Palestine dealt with the matter correctly when it came before it. To quote the words of the judgment: “But the part of the waqf consisting of the income of the houses which the deceased has built during his lifetime for himself and the revenue of which he has dedicated, as this waqf is a thing which was not yet in existence when dedicated, it shall be void and is at the disposal of the heirs of the deceased.”

12. The testator bequeathed his mulk property to the executors directing that the income should be devoted to a charitable purpose. This direction being invalid, the income remains undisposed of. But the invalidity of this disposition

1937
25th June
Manning S.P.J.
Frumkin J.
and
Khayat J.

CA 164/35
Bluvstein
and others
v.

Grazowsky
and others

1937
25th June
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 164/35
Bluvstein
and others
v.
Grazowsky
and others

has a further effect. It is clear from the will that the testator had no intention of devoting the property itself to a charitable purpose. He made arrangements that his widow and his children should occupy the property, the children paying a rent; and the executors were empowered to let any part of the premises that might be vacant. The property itself was never to be sold — the testator tied it up so that the income might be available for a charitable purpose. This charitable intention has failed, and I do not see in the circumstances how the bequest can be made divisible. The testator in effect said: "I bequeath my property A. to my executors and their successors for ever, directing them to pay the income arising therefrom to X." The direction with regard to income being invalid, it follows that the whole bequest fails. The purpose for which the property was tied up has turned out to be contrary to law, and the property itself therefore remains undisposed of.

13. The testator possessed other immovable property in Mazeh Street, Tel Aviv. This property was registered in the name of one Levontin but there is no dispute as to the fact that it belonged to the testator. It was of the miri category and by the law of Palestine it could not be disposed of by will. In spite of this the testator created a waqf with respect to it. This disposition was therefore also invalid. In the judgment to which I have referred, the Chief Rabbinate declared this to be a valid waqf. I have already held that this declaration was a matter outside its jurisdiction, and that it must be regarded as a nullity. The disposition of the miri property was invalid, and this property also is at the disposal of the heirs of the deceased.

14. With regard to this miri land, the matter is a little complicated owing to the fact that the executors have already erected buildings on it, in order to carry out the charitable intention of the testator. According to the law these buildings also acquire the character of miri land and are at the disposal of the heirs of the deceased. But I do not think it fair that the executors should be out of pocket as regards any money they may have expended on these buildings, and in the order which I propose should be made I shall embody a provision for their protection.

15. There was a further sum of LP. 1600 which the testator dealt with, bequeathing it to the executors for the same charitable purpose as the other bequests, viz. the erection of a shelter for orphans in Tel Aviv. This was a valid bequest, but the land on which it was intended to erect the orphanage

1937
25th June
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 164/35
Bluvstein
and others
v.
Grazowsky
and others

and the buildings already erected are no longer available, owing to the failure of the devise already referred to. I do not think that this bequest of money should fail altogether and I shall make an order with regard to its disposal.

16. There has been an intestacy with respect to the property both in Lilienblum Street and in Mazeh Street. This being the case there is nothing in the contention of the executors that the time for distribution has not yet arrived.

17. One of the directions in the will was that the widow of the testator should be allowed to reside during her lifetime on the upper floor of the house described as No. 6, Lilienblum Street, and to let any rooms therein. An order to secure this will be embodied in the order which should, in my opinion, be made.

That order is as follows:

It is ordered:

- a) That, notwithstanding any testamentary disposition of the testator, his successors according to law are entitled to succeed to the testator's immovable property situated in Lilienblum Street and Mazeh Street, Tel Aviv.
- b) That, during the lifetime of Nechama Mushe, widow of the testator, the said Nechama Mushe has the right to occupy the upper floor of the house situated at Number 6, Lilienblum Street, Tel Aviv, and to let any rooms comprised in the said upper floor.
- c) That the executors are not to sell the said house situated at No. 6, Lilienblum Street, Tel Aviv, without seeing that the rights of the said Nechama Mushe to the upper floor during her lifetime are fully secured.
- d) That out of the estate of the testator an amount of sixteen hundred pounds be paid to the executors, to be used by them, under the supervision of the Chief Rabbinate of Tel Aviv, for providing shelter to orphans in Tel Aviv.
- e) That within three months from this date the executors do submit to the District Court of Jaffa accounts as follows:
 - i) An account of all revenue received by them arising out of the immovable property situated in Lilienblum Street and in Mazeh Street, Tel Aviv.

1937
25th June
Manning S.P.J.
Frumkin J.
and
Khayat J.
CA 164/35
Bluvstein
and others
v.
Grazowsky
and others

- ii) An account of all movable property, including cash and securities, belonging to the testator, other than the revenue referred to in (i), which has come into the hands of the executors since the death of the testator.
- iii) An account of all sums owing to the testator at the time of his death and in particular of all sums owing by any of the appellants in this case.
- iv) An account of all disbursements made by the executors out of the estate since the death of the testator.
- v) An account of all moneys borrowed by the executors for the purpose of carrying out any ostensible intention (whether valid or otherwise) of the testator, showing repayments and payment of interest, if any.
- vi) Any further accounts that may be ordered by the District Court.
- f) That if out of any moneys borrowed by the executors as mentioned in (e)(v) above there remain any sums due to the lenders, such sums shall be repaid out of the estate to the executors in trust for the said lenders.
- g) That the judgment of the District Court be set aside and that the matter be remitted to it:
 - i) to determine the succession to such part of the testator's estate as has not been disposed of by will.
 - ii) to deal with the accounts submitted by the executors and to make any consequential orders thereon.
 - iii) to make any orders necessary to give effect to this order.

Liberty to all parties to apply.

18. The costs of all parties, here and below, will be paid out of that part of the estate which has not been disposed of by will — such costs in this Court to include an advocate's fee of LP. 15 for each advocate who appeared before us.

Frumkin J: I concur.
Khayat J: I concur.

Civil Appeal No. 97 of 1937.
In the Supreme Court sitting as a Court of Appeal.
Before: The Senior Puisne Judge, Frumkin J. and Abdulhadi J.

ABDUL FATTAH HAJ DAOUD JAYYOUSI *Appellant.*
v.
GENERAL MANAGER, PALESTINE
RAILWAYS *Respondent.*

1937
29th June
Manning S.P.J.
Frumkin J.
and
Abdulhadi J.
CA 97/37
Jayyousi
v.
General Manager,
Palestine Railways

Actions — Date which must be deemed to be the date on which an action is commenced against Government — Crown Actions Ordinance, Section 4.

An action against Government or any department thereof is commenced by filing a petition in Court, which means the filing of a petition to the High Commissioner for his consent — So laid down by the Supreme Court sitting as a Court of Appeal.

Issa Hazou for appellant.

Assistant Government Advocate (Fawzi Ghussein) for respondent.

Judgment: The Appellant desired to sue the General Manager of the Railways for damage to his crops by fire. The cause of action arose on the 10th June, 1935. Section 42(4) of the Railways Ordinance — (Laws of Palestine, Vol. II, page 1289) — which was the relevant law at the time, provided that actions must be commenced within six months of the cause of action. Section 4 of the Crown Actions Ordinance (which applies to such proceedings) provides that an action is commenced by the filing of a petition in Court. This clearly means the filing of a petition to the High Commissioner for his consent.

In the present case, this petition was filed on November 26th, 1935, in the District Court, Nablus. This date must, therefore, be taken as the commencement of the action; and it was within the prescribed period of six months.

1937
 29th June
 Manning S.P.J.
 Frumkin J.
 and
 Abdulhadi J.
 CA 97/37
 Jayyousi
 v.
 General Manager,
 Palestine Railways
 Gra:
 and

The District Court erred in holding that the suit was barred by limitation.

We therefore order that the judgment of the District Court be set aside and the case be remitted to it for a new trial.

Costs to abide the event.

General Manager, Palestine Railways
 v.
 Jayyousi
 The District Court erred in holding that the suit was barred by limitation. We therefore order that the judgment of the District Court be set aside and the case be remitted to it for a new trial. Costs to abide the event.



High Court No. 33 of 1937.

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

Before: The Chief Justice and Copland J.

REUBEN SHEINZWIT Petitioner.

v.

INSPECTOR GENERAL OF POLICE Respondent.

Statements to Police — When an accused person is entitled to have access to previous statements in writing by witnesses.

Witnesses, Expert — Reports by — Accused entitled to have access to the exhibits upon which a prosecution's expert based his opinion.

1937
 2nd July
 Trusted C.J.
 and
 Copland J.
 HC 33/37
 Sheinzwit
 v.
 Inspector General
 of Police

Sheinzwit was committed for trial before the Court of Criminal Assize on a charge of murder. His advocate applied to the Inspector General of Police for access to be granted to the defence to the statements made to the police by certain witnesses who also made statements before the Examining Magistrate, and to the report of a certain expert. Access was refused and Sheinzwit applied for and obtained an order nisi calling upon the Inspector General of Police to show cause why the petitioner and/or his advocates should not have access to the statements of the witnesses made to the Police at such times and places as they may reasonably demand. The contentions of both sides appear in the order of the High Court reported hereinafter.

In making absolute the rule nisi, the High Court,

- HELD (1) that the defence are entitled to access to previous statements in writing by witnesses whose names appear on the back of an information, but the defence are not entitled to decide whether they wish to have the statements put in evidence, and if the statements are used for cross-examination they can clearly be used in re-examination and they become one of the matters to be considered by the Court under Section 12 of the Evidence Ordinance.
- (2) that the defence are entitled, under proper safeguards, to have access to the exhibits upon which an expert for the prosecution based his opinion.

Not followed: CRA 162/28, 1 P.L.R. 348.
 CRA 7/33.
 Approved: Mahadeo v. The King (1936) 2 All E.R. 813.

1937

2nd July

Trusted C.J.
and
Copland J.

HC 33/37

Sheinzwit

v.
Inspector General
of Police

N. Abcarius for petitioner.

Solicitor General (Alan Rose) for respondent.

Order: This is a return to a rule nisi and our decision involves several important points of evidence and practice.

No comprehensive evidence ordinance has yet been passed by the legislature and as a result the Courts have been guided by some requirements of the Ottoman Law, the Evidence Ordinance, now Cap. 54, and certain English rules and principles.

Where it has been sought to cross-examine a witness as to a previous statement made by him in writing the principles laid down in the English Criminal Procedure Act 1865 (28 and 29 Vic. c. 18) relating to such cross-examinations have in effect been applied by the Courts and this would seem to be a convenient practice.

The question with which we are concerned is, What steps may properly be taken by a defendant in a criminal matter to obtain copies of, or access to, previous written statements by prospective adverse witnesses?

It is contended by Abcarius Bey in support of the rule that in criminal cases where a witness has appeared before a magistrate, the practice of the Courts and justice require that the accused person should have access to any statement in writing made by a witness whose name appears on the back of the information. He does not contend, and we do not think he could do so, that an accused person has any right of access to the police file.

The Solicitor General argues that what is sought is in effect discovery, and that as a general rule there is no discovery in criminal cases; that there is an inherent right in the Crown, exercisable by the Chief Secretary, to object to the production of documents on the grounds of public interest, but this principle, which so far as I know is not disputed, does not directly arise as the Chief Secretary has put forward no objection either generally or to the particular documents — if any — to which this rule applies; and, no doubt following the principles of the English Act to which I have referred, he says the proper time to deal with the matter is at the trial.

Our attention is directed to Criminal Appeal No. 162 of 1928, Palestine Law Reports, page 348. The substance of that decision is as follows: —

"If, however, a complainant or a witness for the prosecution has made a statement to the Police which is inconsistent with his deposition or evidence, or which goes to support the case for the defence, it would clearly be a denial of justice that the existence or nature of such statement should be withheld from the defence. They are entitled, if they so desire, to have such statement put in evidence and to use it as a ground for cross-examination of the person by whom it was made.

It follows that an opportunity must be given to the defence to peruse such statements before the trial, if they so desire, for the purpose of deciding whether they wish to have the statements put in evidence."

This decision has been followed, and in one instance, Criminal Appeal No. 7/33 where the Court held that the defence must be allowed to peruse statements to the police before the trial, enlarged.

The only English decision to which our attention has been called which would seem to be directly in point is a recent one of the Privy Council in an appeal from Fiji, Mahadeo v. The King (Privy Council Appeal No. 79 of 1935) which, for all material purposes, fell to be decided according to the English common law. It appears that a witness, Sukraj, had made earlier statements and that the defence asked for their production, and in the Privy Council their Lordships held —

"In the result the statements of Sukraj were not produced but they were available on the hearing of this appeal before their Lordships. The refusal of these documents is the subject of the first comment which their Lordships feel bound to make upon the conduct of this trial. There is no question but that they ought to have been produced, and their Lordships can find no impropriety in the letter asking for their production. It is true that upon cross-examination without the statements Sukraj admitted that he had at first put forward a story of suicide. But it is obvious that counsel defending the appellant was entitled to the benefit of whatever points he could make out of a comparison of the two documents *in extenso* with the oral evidence given and an examination of the circumstances under which the statements of the witnesses changed their purport."

It is not clear if the defence applied for the production to them of these statements before the trial or for their production at the trial. From an earlier passage in their judgment where their Lordships state: "These statements were not admitted at the trial in circumstances to which it will be necessary to refer later" it would seem that their Lordships' criticism was chiefly directed against their non-production at the trial.

1937

2nd July

Trusted C.J.
and
Copland J.

HC 33/37

Sheinzwit

v.
Inspector General
of Police

1937
2nd July
Trusted C.J.
and
Copland J.
HC 33/37
Sheinzwit
v.
Inspector General
of Police

Primarily a court of trial must decide the matter on the evidence adduced before it but clearly it is open to the defence to seek to show, by cross-examination, that some or all of a witness's evidence should not be accepted, and for this purposes a previous statement by the witness may be of use.

We are of opinion, therefore, that the defence are entitled to have access to previous statements in writing by witnesses whose names appear on the back of an information, and having regard to the difficulties caused by the conditions in this country, particularly the need for translation, we think that the balance of convenience decrees that such access should be given before, rather than at, the trial.

We do not agree with so much of the judgment in Criminal Appeal No. 162/1928 which lays down that the defence are entitled to decide whether they wish to have the statements put in evidence.

If they are used for cross-examination they can clearly be used in re-examination, and they become one of the matters to be considered by the Court under Section 12 of the Evidence Ordinance. It would not, in our opinion, be right that they should be put in evidence until the witness concerned has had an opportunity of explaining or otherwise dealing with them.

In so far as the judgment in Criminal Appeal No. 7/33 may be taken to apply to statements made by persons whose names are not upon the information we do not agree with it.

When application is made for access to statements we see no objection to the accused person or his advocate being furnished with a certified copy thereof, the originals being available for the Court of trial should they be required.

A further and somewhat different point was raised by Abcarius Bey that the accused is entitled to access to reports furnished to the police by expert witnesses, in this case a hand-writing expert, and in his affidavit he says "The petitioner must be given an opportunity of showing the said Report, before the trial, to independent experts for if he be unable so to do the presentation of his defence will be seriously prejudiced."

In argument Abcarius Bey stated that the evidence given by this witness at the preliminary hearing before the Magistrate was not sufficient to enable him to prepare his defence on that part of the case. We have seen the deposition and it seems to us clearly to indicate the matters upon which the expert based his opinion.

1937
2nd July
Trusted C.J.
and
Copland J.
HC 33/37
Sheinzwit
v.
Inspector General
of Police

The accused or his advocate or expert is entitled, under proper safeguards, to have access to the exhibits upon which the prosecution's expert based his opinion, and the expert for the defence can then form his opinion, and with that assistance the defence will be able to cross-examine if they wish.

Abcarius Bey stated that he had tried to get a copy of the expert's report in this case from the expert himself and that he had been asked LP. 20 for it. As this is an ex parte statement we make no comments upon it. The police will, no doubt, enquire if one of their witnesses was prepared to sell a copy of his report — if he made one — to the defence for this large, or any, sum.

The rule will therefore be made absolute with regard to statements in writing, if any, in the possession of the police, made by persons whose names appear upon the information, in the case of the Attorney-General v. Reuben Sheinzwit, subject to the police being at liberty to furnish certified copies of such statements if they wish instead of giving access thereto.

High Court No. 17 of 1937.

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

Before: Copland J. and Frumkin J.

MICHAEL BINIA Petitioner,
v.

1. CHIEF EXECUTION OFFICER, JERUSALEM
2. ESTATE OF THE LATE NICOLA AKEL,
through his widow as heir
and administratrix, Shafiqa Akel Respondents.

Execution proceedings — Right of execution of judgment renounced — Party renouncing cannot ask for enforcement of subsidiary part of judgment which is incidental thereto.

A party who renounces his right to the execution of a judgment given in his favour cannot ask for the enforcement of the subsidiary part of the judgment which is incidental thereto — So laid down by the Supreme Court sitting as a High Court of Justice.

1937
9th July
Copland J.
and
Frumkin J.
HC 17/37
Binia
v.
C.E.O. Jerusalem
and another

1937
9th July
Copland J.
and
Frumkin J.
HC 17/37
Binia
v.
C.E.O. Jerusalem
and another

The facts, in so far as they are relevant, appear from the order.

M. Goldberg for petitioner.

Order: This is an application for an order to be directed to the Chief Execution Officer of Jerusalem to order him to execute that part of the judgment of the District Court of Jerusalem relating to the costs awarded by it in case No. 338/28.

The mortgage-deed, which Petitioner received from the late Nicola Akel in security for the loan, did not provide for interest on the money lent, but separate bills were made to provide for the interest on the loan.

The amount of the bills not having been paid on date of maturity, the Petitioner brought an action in the District Court of Jerusalem and obtained judgment on the amount of the bills and costs.

Before the execution of this judgment, the mortgage fell due and Petitioner obtained an order from the Chief Execution Officer for the foreclosure and sale of the mortgaged property to settle the amount of the loan and interest.

Having received an order for the payment of interest on the mortgage-deed, the Petitioner has given up his claim to the execution of the judgment of the District Court regarding the interest and asked the Chief Execution Officer to order the execution of the second part of the judgment regarding the costs of the case.

The Chief Execution Officer rightly refused this application and we cannot see any reason to interfere with his decision. If a party renounces his right to the execution of a judgment, he cannot ask for the enforcement of that subsidiary part which is only incidental thereto.

Moreover, the alleged order which the Petitioner seeks to set aside is dated 19th June, 1936. He has thus slept over his alleged right for a year.

For the above mentioned reasons, we are not inclined to give him the order he seeks.

Civil Appeal No. 117 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Frumkin J.

ITZCHAK YOSEF ROTTERMUND Appellant.
v.
EFRAIM SAFRAI Respondent.

Injunction — Jurisdiction — Right of way — Not denied, simply extent of — District Court seized with jurisdiction.

1937
15th July
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 117/37
Rottermund
v.
Safrai

The jurisdiction in an action for an injunction restraining a defendant from interfering with a right of way, where that right of way is not, but the extent thereof is, denied, is within the jurisdiction of a District Court — So held by the Supreme Court sitting as a Court of Appeal.

A. Brevdo for appellant.
Respondent in person.

Judgment: The Appellant brought an action in the District Court of Jaffa for an injunction to restrain the respondent from interfering with a right of way. The District Court held that it had no jurisdiction because there was a dispute as to the existence of a right of way and its extent.

We think the District Court was wrong. It has been freely admitted here by the respondent that there is no dispute as to the existence of a right of way. As far as the extent is concerned, the documents disclose a right of way on foot, and it was within the jurisdiction of the District Court to decide whether the right was being interfered with so as to justify the issue of an injunction.

In the circumstances we see no necessity to remit the case. The dispute can be settled by an order declaring that the extent of the right of way in width is to be one metre and a further order prohibiting the respondent or his servants or agents from interfering with the said right of way.

The judgment of the District Court is set aside and for it an order substituted as above.

Each party will pay his own costs.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Frumkin J.

1937

19th July

Trusted C.J.
Greene J.

and

Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

- 1. ISRAEL BLUMENFELD
- 2. MOSHE BLUMENFELD Appellants.

v.

IMPERIAL CHEMICAL INDUSTRIES
(LEVANT) Ltd. Respondent.

Evidence, Oral — Extent to which oral evidence admissible to contradict the contents of a document — Ottoman Code of Civil Procedure, Article 80.

Bills of exchange — Promissory notes — Consideration — Oral evidence admissible to show, for example, fraud, duress, or want of consideration.

The respondent sued upon a promissory note in the Magistrate's Court at Tel Aviv. The note was made by the first appellant and signed *bon pour aval* by the second appellant. The defence was that the maker received no consideration and that the bill was endorsed by the payee to the respondent in breach of faith. The point that the note had not been presented within a reasonable time after endorsement was not taken, and the respondent, instead of relying upon Section 29 of the Bills of Exchange Ordinance, assumed the burden and anticipated the defence which might be made against the indorser. The respondent called its accountant as a witness and closed its case. The appellants gave evidence which was to the effect that the note, together with ten other similar notes, was given as security for the honesty of the first appellant. The British Magistrate, in view of the relationship that existed between the respondent and the indorser of the note, held that the respondent was a holder with notice and any defence which the appellants may bring against the indorser may be brought against the company. The respondent failed in the Magistrate's Court, but on appeal to the District Court at Tel Aviv, the judgment of the trial Court was set aside and judgment was entered for the respondent. The appellants appealed by leave.

In allowing the appeal and remitting the case to the Magistrate's Court for completion, the Court of Appeal,

HELD (1) (*per Trusted C.J. and Greene J.*) that certain contracts as set out in Article 80 of the Ottoman Code of Civil Procedure must be evidenced by writing, and where a contract of these classes, even if the value does not exceed P.T. 1000,

has been reduced into writing, parol evidence of the parties and any other witnesses is admissible as to the circumstances in which the document came into existence, and if a bill of exchange was negotiated, parol evidence is admissible to show, for example, fraud, duress, or want of consideration.

- (2) that whether a promissory note expresses that value has been given or not, extrinsic parol evidence is admissible between immediate parties and those in privity with them to impeach the consideration and show its absence, failure or illegality.

per Frumkin J.: that the first part of Article 80 of the Ottoman Code of Civil Procedure describes the nature of the transactions which must necessarily be proved by documentary evidence and no parol evidence would be admissible to prove the existence of such transactions. Any defence set up against such transactions, even if the value of the defence would be less than P.T. 1000, must also be proved by documentary evidence to the exclusion of parol evidence, or by the admission of the opponent (i.e. the plaintiff) or by his books. In this particular case, the only remedy open to the appellants, failing production of any written evidence to support their defence, is the admission or the books of their opponent.

- Referred to:* CA 84/22.
CA 82/25, 1 P.L.R. 69
CA 77/32, 1 P.L.R. 739
CA 106/32.
CA 106/33, 2 P.L.R. 94
CA 149/35, ante p. 2
CA 80/36, ante p. 154

Approved: Fitch and Jones (1855) 5 E. and B. 238.

Followed: Abbott v. Hendricks (1840) 133 E.R. 551.

M. Seligman for appellants.

A. Levin and I. Pevsner for respondent.

Trusted, C.J.: This case was argued before us at considerable length and it raises a number of interesting and important points.

The Plaintiffs, the Imperial Chemical Industries (Levant) Ltd., sued upon a promissory note given by the first Defendant to a company known as the Levant Agencies, Ltd., with which the Imperial Chemical Industries was closely associated, and endorsed by that company to the Plaintiffs and signed *bon pour aval* by the second Defendant, the father of the first. The note in question was one of ten given in similar circumstances.

1937

19th July

Trusted C.J.
Greene J.

and

Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

1937

19th July

Trusted C.J.
Greene J.

and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

The case came in the first instance before the learned Chief Magistrate, Tel-Aviv, and in consequence there were no pleadings.

At the beginning of the hearing the learned Magistrate asked the grounds of defence and he was told, so far as the first Defendant was concerned — no consideration; note given for a special purpose which had not arisen, and for the second Defendant, note given as a guarantee only for certain purposes which had not arisen. Neither Defendant took the point that the note had not been presented within a reasonable time after endorsement.

Thereupon it was open to the Plaintiffs to rely upon Section 29 of the Bills of Exchange Ordinance under which a holder is deemed to be a holder in due course — and merely put in the note, formally reserving their right to rebut any defence which might be made against them or to assume the burden and to anticipate the defence which might be made.

They chose the latter course and called their accountant as a witness who stated: —

“Promissory note given to Levant Agencies in connection with purchases by defendants. We have dealings with Levant Agencies. We received P. N. to their credit in our account with them. Endorsers all entitled to endorse for their companies. Consideration given”.

In cross-examination he said: —

“We have 10 exactly similar. This was presented in October, 1936: presented about two years after making. Don't know how many promissory notes sent to bank. We sometimes keep promissory notes in our safe. We credited Levant Agencies in our books with amount. If we do not succeed we shall lose the full amount. We have not paid cash for promissory notes. We received promissory note; don't know when; don't know approximately.”

He was also asked about the relationship which existed between Levant Agencies and Plaintiff company.

This closed the case for the Plaintiffs.

The second Defendant gave evidence to the effect that the notes were given as security for his son's honesty, and he had not heard such honesty challenged.

The first Defendant said, “I gave promissory notes as security for my being manager of Plaintiffs' taxi office”. He

also said they were given for fidelity as he might send cars out of Palestine which might not come back.

In cross-examination he said, “They said we should get back promissory notes after work ended”.

He complained generally of his treatment and said that the correspondence which confirmed his story had been taken from the office, and although the police had searched they had found nothing. He also said, “Clerk told me he gave them (i.e. documents) to I.C.I. manager. They refused to deliver them to me. They said office and documents theirs”, and as to these latter allegations he was not cross-examined.

The Defendant apparently offered further evidence, but we do not know of what nature, as the Court held it was not necessary.

The Plaintiffs' advocate addressed the Court but made no application to call further evidence.

On this the learned Magistrate held: —

“Question here is whether consideration was given for the promissory note. Plaintiff has dealt with whole case on grounds that Plaintiffs were promisee in promissory note and not merely holder in due course. In any event, in the circumstances Plaintiff was a holder with notice.

There was evidence to support that view and it was the true position.

The Plaintiffs merely gave book credit for LP. 200 on promissory note to their own assd. Co. — though that may be a separate legal entity.

The Plaintiff was told the defence was no consideration and proved nothing as to that. He relies on the legal presumption which can be rebutted.

Defendants have rebutted this presumption completely.

Judgment for Defendants with costs and advocate's fees LP. 2”

It is not easy to follow the findings of the learned Magistrate. He appears to have founded his judgment on the basis that no consideration was given, on the assumption that the onus was upon the Plaintiffs to show that they gave consideration, as the Defendants had rebutted any presumption in the Plaintiffs' favour.

The rule applicable in such cases is no doubt accurately set out in Chalmers Bills of Exchange, 10th Edition, p. 116, as follows: —

1937

19th July

Trusted C.J.
Greene J.

and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

1937

19th July

Trusted C.J.
Greene J.

and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

“ Mere absence of consideration, total or partial, is matter of defence against an immediate party or a remote party, who is not a holder for value, but it is not a defence against a remote party who is a holder for value ”.

and in Bullen & Leake's, 9th Edition, p. 616 —

“ Absence of consideration is a good defence to an action on the bill between immediate parties, and also between remote parties, where the bill has passed without consideration through the intermediate parties; but the want of consideration throughout must be stated in the defence, and must be proved if denied ”.

The rule when so stated may leave some doubt upon whom the onus of proof lies but it was held in Fitch and Jones (1855) 5 E. and B. 238, that although proof of fraud or illegality shifted the onus to a holder in due course, lack of consideration between the original parties did not do so — the onus therefore of showing lack of consideration throughout remains upon the Defendant.

I cannot be certain that the learned Magistrate intended to find that consideration was at no time given for the bill.

It is not for us to draw inferences of fact but I think that upon the evidence adduced it is at least a matter of argument whether the true position was not that the notes were given in accordance with the terms of an agreement whereby the first Defendant was to be given certain employment, and that in consequence there might have been consideration for them.

This possibility brings one to the other, and in my opinion, equally important defence with which the learned Magistrate did not deal at all, i.e. that the note was negotiated in breach of faith.

The matter went on appeal to the District Court and under the present unfortunate practice was not argued. The District Court held —

“ The action was based on a promissory note signed by the two respondents, the first as a maker and the second as guarantor.

The respondents pleaded lack of consideration and upon the hearing of the respondents' evidence the learned Magistrate dismissed the appellants' action.

In our view the evidence of the two Respondents is legally insufficient to contradict a written document, viz. a promissory note. There was no corroboration whatsoever of their evidence.

The appeal is therefore allowed and judgment entered for appellants ”.

Against that judgment appeal was by leave brought to this Court.

Despite the efforts which have been made by this Court to make clear the provisions of Section 6 of the Magistrates' Courts Jurisdiction Ordinance, leave to appeal was granted on certain points of law which were set out.

As I have said before, in my opinion, when application is made for leave to appeal the presiding judge (not President of the Court) must satisfy himself that the case involves a point of law of sufficient novelty or complexity to warrant an appeal, and if it does, leave should be granted and this Court will then deal with the rights of the parties.

This Court cannot be bound by a number of questions, some possibly theoretical, often the fruits of the ingenuity of counsel, the answer to which, or to some of which, may not decide the rights of the parties. The law does not provide in this instance for an appeal by way of case stated.

The District Court dealt with the case on the basis of evidence only.

I have already indicated the matters which I think should have been considered by the learned Magistrate and it is clearly desirable that there should be no doubt as to the admissibility and legal sufficiency of the evidence necessary for such consideration.

Article 80 of the Code of Civil Procedure, according to Mr. Hooper's translation, provides —

“ All claims relating to agreements and contracts which, according to local custom are reduced to writing and all claims relating to partnership, farming out and the granting of loans must be proved by documentary evidence, if the value of such claim exceeds one thousand piastres.

Any action brought in respect to any of the matters mentioned above and which have been reduced to writing, even though they do not exceed one thousand piastres in value, must be proved either by documentary evidence, or by the admission of the defendant, or by entries in a register ”.

(and see Chapter III, paragraph (3) — “Matters which must be evidenced by writing” of his Law of Civil Procedure for Iraq and Palestine, 9. 48). When so translated it appears to present no difficulty, but it is not the usually accepted meaning. The Bagdad translation is —

1937

19th July

Trusted C.J.
Greene J.

and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

1937

19th July

Trusted C.J.
Greene J.

and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

and my brother Frumkin has translated it thus:

“Claims relating to all sorts of undertakings and contracts which are customarily reduced to writing, and to partnerships, farming out and loans which exceed Pt. 1000 must be proved by a document.

A defence set up against such documents even if it does not exceed Pt. 1000 must be proved by a document or by the admission of the opponent or by his books”.

and a further translation which I have had prepared is as follows: —

“All claims relating to undertakings and contracts which, according to Common Use and Custom, are reduced to writing and all claims relating to partnership, farming out and granting of loans, the value of which exceeds one thousand piastres, must be proved by Sanad. Any Da’wa (action, here rather defence) adduced against a Sanad regarding any of the matters mentioned above, even though it does not exceed a thousand piastres, must be proved by Sanad; or by admission or book of defendant (opponent or other party)”.

Again, Young’s Corps de Droit reads —

“Toutes obligations et conventions qu’il est d’usage de stipuler par écrit et les demandes relatives à une association, entreprise ou emprunt, doivent être prouvées par titres, lorsque le chiffre dépasse Ps. 5000. Toute prétention opposée à un titre concernant ces sortes de demandes doit être établie soit par titre, soit par l’aveu, soit par la présentation des livres du défendeur, lors même qu’il s’agirait d’une réclamation inférieure à Ps. 5000 (C. fr. art. 1341)”.

It is clear therefore that the provisions of this article are not free from obscurity. The difficulty being created by several words being open to alternative English meanings.

In order to ascertain the effect of this section upon an action based upon a promissory note, it is necessary to go in some detail into the history of its application.

It is not easy to discover the early decisions of these Courts in the absence of reports, but it seems that in Civil Appeal No. 84/1922 it was held that the maker of a note could not raise the defence of lack of consideration or that the instrument was delivered to the payee for a special purpose when it stated that value had been received, nor could he tender the oath to his opponent as to the truth of such statement contained in the instrument.

On any view of the true meaning of the article, this seems to me to be too formalistic an interpretation and may have resulted in some of the difficulties which have arisen.

In 1924 the Law of Evidence Amendment Ordinance (now Chapter 54) was passed. For present purposes it had three important provisions. Section 2 (now 3) dealt with competency of witnesses; Section 5 (now 6) dealt with sufficiency of evidence; and Section 12 (now 14) provided that civil parties might give evidence.

The passing of this Ordinance was followed by a number of authorities which show considerable divergence of judicial opinion.

In Civil Appeal No. 77/1932 the Court held —

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

This was followed by Civil Appeal No. 106/32, where it was held (Frumkin J. differing) —

“This is an appeal against a judgment of the Jerusalem District Court of the 4th July, 1932. The action was upon a promissory note and the District Court at the request of the Respondent heard the evidence of the two Respondents and Plaintiff in order to contradict the contents of the promissory note. The Plaintiff denied the allegation against the truth of the document set up by Defendants. The Court, however, in their judgment stated they did not believe the Plaintiff and gave judgment in Respondent’s favour.

Now, the Law of Evidence Amendment Ordinance, 1924, Section 12, enables either party to give evidence on his own behalf or be summoned to give evidence for the other

1937

19th July

Trusted C.J.
Greene J.

and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

1937
19th July
Trusted C.J.
Greene J.
and
Frumkin J.
CA 87/37
Blumenfeld
and another
v.
Imperial Chemical
Industries Ltd.

party: and this Court has previously decided that such evidence may be called by Defendant even in case where a written document within the meaning of Section 80 of the Civil Procedure Code is the subject matter of the action — See Civil Appeal 77/32.

It is, however, clear that a document of this nature can only be contradicted by the evidence of the person who is setting the document up and suing upon it and not by the evidence of the person being sued on the document.

Defendants may give evidence contradicting a written document of the nature set out in Article 80 of the Civil Procedure Code, but such evidence cannot be of any avail unless the same is materially corroborated by the evidence of the other party.

The appeal is allowed with costs".

Civil Appeal No. 106/1933 produced three long divergent judgments on the point, which can be conveniently found in Mr. Shems' Manual on Bills of Exchange, pp. 45-49. These decisions seem to go to the "contradiction" of a document, but it is not altogether clear what was meant by contradiction.

Civil Appeal No. 82/1925 would appear to be an authority for the general proposition that evidence of surrounding circumstances is admissible if it does not seek to vary or alter a written document.

The matter was carried considerably further in Civil Appeal No. 149/35, when this Court, consisting of the Acting Chief Justice and Frumkin J., held —

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

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

Costs to abide the event.

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

1937
19th July
Trusted C.J.
Greene J.
and
Frumkin J.
CA 87/37
Blumenfeld
and another
v.
Imperial Chemical
Industries Ltd.

In this case it seems clear that the Court held that the parties and their witnesses may give oral evidence as to the circumstances under which a cheque was made and negotiated when the document itself is not contradicted.

With this latter view I agree, whether on the ground that it follows from the true interpretation of the obscure Article 80, or on the ground, which in my opinion is firmer, that it is impossible to say to what the provision of the Ottoman Law in question (i.e. the second paragraph of Article 80 of the O.C.C.P.) extends and applies and that jurisdiction should therefore be exercised in accordance with the substance of the common law and the doctrine of equity in force in England save as modified, amended or replaced by other provisions.

I think therefore the following principles emerge — Certain contracts as set out in Article 80 of the Ottoman Code of Civil Procedure as set out above must be evidenced by writing. Where a contract of these classes — even if the value does not exceed P.T. 1000 — has been reduced into writing, parol evidence of the parties and any other witnesses is admissible as to the circumstances in which the document came into existence — and if a bill of exchange was negotiated — for example to show fraud, duress or want of consideration.

Having regard to the decisions to which I have referred, I may add that in my opinion Section 14 of the Evidence Ordinance does not and was not intended to enlarge or limit the scope of Section 3 of that Ordinance, but was enacted expressly to contradict Article 1703 of the Mejelle which provides that a person cannot be both a plaintiff and a witness.

The value of oral evidence and the credibility of witnesses are questions for the Court to decide according to the demeanour of the witnesses, the circumstances of the case and such indication of the truth as may appear during the trial (see Section 12 Evidence Ordinance).

No judgment can be given in any case on the evidence of a single witness unless such evidence is uncontradicted or is corroborated by some other material evidence which, in the opinion of the Court, is sufficient to establish the truth of it. (Section 6 Evidence Ordinance).

To apply these principles to the present case, I think that it is clear that whether a note expresses that value has been given or not, extrinsic parol evidence is admissible between

1937

19th July

Trusted C.J.
Greene J.
and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

immediate parties and those in privity with them to impeach the consideration and show its absence, failure or irregularity — c.f. *Abbott v. Hendricks* (1840), 133 E.R. 551 and *Chalmers Bills of Exchange*, 10th Edition, at pp. 17 and 66, and *Byles on Bills*, 19th Edition, pp. 104 and 105.

I am of opinion, therefore, that in the present case the Defendants might call parol evidence to show that no consideration was given by the Plaintiffs or by the payees from whom the Plaintiffs took the note.

I do not think there can be any doubt that parol evidence is admissible to show that a bill was negotiated in breach of faith (c.f. *Chalmers* p. 204) and in this case it was open to the Defendants to call parol evidence with that object if they so desired.

I do not think that it can be argued (for the purpose of Sec. 6 of the Evidence Ordinance) that persons who are jointly and severally liable are not, as individuals, separate witnesses. In my opinion, in the present case, if the Defendants had been sued separately each could have given evidence on behalf of the other. The weight which is to be attached to such evidence is a matter for the Court of trial.

No question has been raised as to the liability of an indorser of a note signed *bon pour aval*.

In my judgment this appeal should be allowed and the case sent back to the learned Magistrate to deal with it in accordance with the opinions I have expressed.

Costs to abide the event.

Advocate's fee LP. 5.

Greene J: I concur

Frumkin J: The law governing the admissibility or otherwise of parol evidence in this country is laid down in Article 80 of the Ottoman Code of Civil Procedure as amended.

2. There being certain discrepancies in the two published English translations of that article, some of them affecting its true meaning, I have prepared what I consider to be an accurate translation of this article from the Turkish which reads as follows: —

“80. Claims relating to all sorts of undertakings and contracts which are customarily reduced to writing, and to partnerships, farming out and loans which exceed Pt. 1000 must be proved by a document.

A defence set up against such documents even if it does not exceed Pt. 1000 must be proved by a document or by the admission of the opponent or by his books”.

3. The first part of this article describes the nature of the transactions which must necessarily be proved by documentary evidence and hence no parol evidence would be admissible. The second part of the article provides that any defence against any such transaction, even if the value of that defence would be less than Pt. 1000, must also be proved by documentary evidence to the exclusion of parol evidence.

4. It is to be noted that the provision of this law is much narrower than the corresponding provision in English law where parol evidence is inadmissible only to contradict a document or to vary its terms as appear on its face. Here any defence of whatever nature, even if not contradicting the document or varying its terms, would not be admissible. So for instance when a defence of payment is set up against a deed English law would allow parol evidence to prove it but it has been the invariable practice of the Ottoman Courts supported by numerous decisions of the Court of Cassation that payment set up against a document cannot be proved by oral evidence even if the amount of such alleged payment were less than Pt. 5000 as the article stood before its amendment and Pt. 1000 as it now stands. This practice has always been followed by this Court.

5. I realize the harshness of the strict application of this rule, as there are many cases such as fraud and mistake where parol evidence could not be adduced, and it is far from me to advocate the propriety of this rule. But we have to apply the law as it is until it is altered. Meanwhile a certain measure of latitude must be allowed when not inconsistent with the plain wording of the law. In fact in *Agassi v. Abutbul* — Civil Appeal No. 149/35 — where, in addition to want of consideration, fraud and duress was alleged, this Court directed that oral evidence be allowed to prove the circumstances under which a cheque was made and negotiated.

6. There is of course this much to be said in favour of the Ottoman Law in this respect, namely: that it was intended to apply, and is in fact applicable in places where a vast

1937

19th July

Trusted C.J.
Greene J.
and
Frumkin J.

CA 87/37

Blumenfeld
and another

v.

Imperial Chemical
Industries Ltd.

1937
19th July
Trusted C.J.
Greene J.
and
Frumkin J.
CA 87/37
Blumenfeld
and another
v.
Imperial Chemical
Industries Ltd.

number of witnesses, sometimes subconsciously, fail to distinguish between fact and fiction, truth and imagination. It is no good relying too much on the discretion of a Court in considering the weight of evidence. Judges and Magistrates are after all human beings, and some of them, in the early period of their experience in this country, may be swept away by the smartness or apparent innocence of a skilled or trained witness.

7. The Law of Evidence Amendment Ordinance now embodied in the Evidence Ordinance has not altered the law in this respect. Its object was not to widen the scope of the admissibility of oral evidence but to increase the category of persons who may be heard as witnesses. Prior to the promulgation of this Ordinance certain persons, including parties, were not allowed to be heard as witnesses, now they may be so heard, but their evidence would have no more value than the evidence of any other witness; that means that it will be accepted and acted upon only in cases where oral evidence is admissible but will not be so where oral evidence is not admissible.

8. In this respect the number of witnesses is not material at all. If a party is composed of two or more individuals and if they all join in giving evidence on a certain point, if that point is such that could not be proved by oral evidence the point will still remain unproved.

9. All this does not mean that a defence against a document can only be proved by documentary evidence. Article 80 in its second part provides for two other means to prove such defences, namely: the admission of the opponent and his books.

10. I would like at this stage to point out that the actual words used in the Turkish text are "Da'wa" and "Mudda'i ale", technically meaning "action" or "claim" and "defendant", but in the Turkish legislation the word "Da'wa" is often used also for "defi' da'wa" meaning counterclaim or defence. It has been previously held by this Court and recently supported in *Shlank v. Bahloul* — Civil Appeal No. 80/36 — that "defendant" in this section has a wider meaning and extends to such person against whom a counterclaim is brought even if he were a Plaintiff in the nomenclature of the case. So for instance if 'A' as plaintiff brings an action against 'B' as defendant, 'B' sets up some defence, he is regarded as claimant or counterclaimant in relation to that defence and his defendant or opponent is 'A' the plaintiff in the

1937
19th July
Trusted C.J.
Greene J.
and
Frumkin J.
CA 87/37
Blumenfeld
and another
v.
Imperial Chemical
Industries Ltd.

action. It follows that when a defence is put up against a deed which defence could not be proved by oral evidence and written evidence is not available, the party putting up this defence may prove it by the admission of the other side or its books. We are not now concerned with the books of the opponent and I shall deal only with the point as to admission.

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

12. Having now stated the law as to the admissibility or otherwise of oral evidence as it appears to me to be the law of the country, I will turn to the present action.

13. The respondent company sued under a promissory note endorsed to them by the Levant Agencies Ltd., and signed by the first Appellant as promisor and by the second as guarantor par aval. The appellants set up a defence of a twofold nature (a) that the promisor received no consideration, and (b) that the promisee endorsed it to the respondent company in breach of faith.

14. On the point whether any defence against the respondent company could be brought at all, I concur in the view of the learned Chief Justice that in view of the fact that the respondent, not having relied upon Section 29 of the Bills of Exchange Ordinance, assumed the burden to anticipate the defence which might be made against the indorser, and in view of the relationship between the indorser and the indorsee, the Magistrate was right in holding that the respondent company was to be regarded as holder by notice and consequently any defence which the appellants may bring against the Levant Agencies Ltd., may be brought against the respondent company.

15. Endorsement in breach of faith is a defence which, by analogy to fraud and duress, might be proved by oral evidence, this being a matter which could never have been foreseen by the parties and there could be no possibility of

1937
19th July
Trusted C.J.
Greene J.
and
Frumkin J.
CA 87/37
Blumenfeld
and another
v.
Imperial Chemical
Industries Ltd.

proving it by written evidence. But this defence in the present case lost its relevance the moment we came to the conclusion that the respondent company stands in the shoes of the Levant Agencies Ltd. Because even if the endorsement was not made in breach of faith the appellants could still set up against the indorsee any legal defence they may be able to set up against the indorser. The only defence they are relying upon against the indorser is want of consideration, and the only question is, How could they prove this defence?

16. The appellants, before the Magistrate, wanted to prove it by their own evidence. This, as stated before, they cannot do. This case is distinguishable from Civil Appeal No. 149/35 referred to above, as here there is no clear or even implied allegation of fraud or duress.

17. The only remedy, therefore, open to the appellants, failing production of any written evidence to support their defence, is the admission or the books of their opponent. In the light of the broader interpretation of the technical meaning of "defendant" and in view of the fact that in the present case the respondent company stands in the shoes of the Levant Agencies Ltd., I am of opinion that the appellants should be given an opportunity to call the managers or responsible members of the staff both of the Levant Agencies and the I.C.I. (Levant) Ltd., who were directly concerned with the transaction and endorsement, and only if the appellants' defence as to the failure of consideration is admitted they will have to succeed in their case.

18. For these reasons I am of opinion that both the judgment of the District Court and that of the Magistrate's Court must be set aside and the case remitted to the learned Magistrate to complete the case as above and to give a fresh judgment accordingly. Costs to abide the event.

Civil Appeal No. 118 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Frumkin J.

- 1. RABBI MORDECHAI AHARON FISCHMANN
 - 2. RABBI DAWID WEINGARTEN
 - 3. ITZCHAK RECHMANN Appellants.
- v.
- 1. BISHOP METHODIOS,
in his capacity as supervising
guardian of minor heirs
of the late Salim Salfity.
 - 2. FOUMIYAH, WIDOW OF SALIM Salfity Respondents.

1937
20th July
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 118/37
Fischmann
and others
v.
Bishop Methodios
and another

Contracts — Date of completion stipulated in contract happened to be a day of rest of one of parties — Notice to other party to appear on a day before the day fixed for completion and not being a day of rest of both parties — Other party appeared on day following day of rest of the party sending the notice — No reply made to notice — Action for damages for breach of contract.

By an agreement for the sale of land, the respondents were to transfer to the appellants certain land within six months from the agreement. The last day for completion happened to be a Sunday, the day of rest of the respondents, and as the day immediately preceding that day was a Saturday, the day of rest of the appellants, the respondents sent a notice to appellants fixing the Friday preceding the date of completion for the transfer, but the appellants, who received the notice, did not reply nor did they appear on the Friday fixed for the carrying out of the transfer, but appeared on the day following the day of rest of the respondents. The respondents thereupon sued the appellants in the District Court, Jerusalem (Civil Case No. 45/36) for damages for breach of contract. Judgment was given in respondents' favour. Appellants appealed.

In dismissing the appeal, the Court of Appeal,
HELD that from the facts that appellants made no reply to the notice of the respondents and gave no notice to the

1937
20th July

Manning S.P.J.
Greene J.
and
Frumkin J.

CA 118/37
Fischmann
and others

v.
Bishop Methodios
and another

respondents of their intention to be present on the day following the day of rest of the respondents the inference was that appellants were not willing to complete.

Ch. Schmeterling for appellants.

Hanna Atalla for respondents.

Judgment: In this case there was an agreement between the parties, under which the Respondents agreed to transfer certain land to the Appellants. The date of the agreement was August 9th, 1935, and it was provided that the transaction should be completed within six months. The last day for completion was therefore February 9th, 1936. This day happened to be a Sunday. As the 8th February was a Saturday and a day of rest for the Appellants, the Respondents sent a notice to the Appellants fixing Friday, February 7th, as the date for the completion of the transaction in the Land Registry. The Appellants received this notice, but made no reply to it, and failed to meet the Respondents at the Land Registry on February 7th.

The Appellants, without giving to the Respondents the slightest intimation of their intention, turned up at the Land Registry on February 10th, but of course the Respondents were not there.

From the facts that the Appellants made no reply to the notice of the Respondents and that the Appellants gave no notice to the Respondents of their intention to be present at the Registry on February 10th, we infer that the Appellants were not willing to complete. We are in agreement with the Court below, but for somewhat different reasons, that the Appellants committed a breach of contract.

No question was raised in the Court below as to damages and no ground has been urged here that the damages awarded were excessive.

The appeal is dismissed with costs to include LP. 5. - advocate's fees.

Civil Appeal No. 121 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

ABRAHAM HAIM YADGAROFF Appellant.

v.

1. ABRAHAM HAIM KHOJAINOFF
2. FARHA KHOJAINOFF
3. HANNA KHOJAINOFF Respondents.

Immovable property — Partition — Agreement by co-owners on persons to partition jointly owned immovable property — Carrying out of partition — Partition a matter of a judicial nature — Co-owners cannot go back.

Where the co-owners of jointly owned immovable property have agreed on certain persons to carry out the partition of the immovable property and have agreed to abide by the decision of such persons, and the partition had been carried out and each co-owner received his share, the co-owners or some of them cannot take partition proceedings in the appropriate court for the partition of the property that was jointly co-owned, because partition is a matter of a judicial nature and in such cases there had been a submission, followed by an award.

H. Ben Ari for appellant.

M. Kehaty for respondents.

Judgment: The parties, who were joint owners of an orange grove, decided to have a partition. They entered into an agreement by which certain named persons were to decide the four portions into which the grove should be divided and they agreed to abide by the decision of these persons. The grove was divided and the parties, including the Appellant, are satisfied with their share. In spite of this, the Appellant took partition proceedings in a Magistrate's Court. That Court held that, in the circumstances, such proceedings could not be brought, and its decision was upheld by the Land Court.

1937
22nd July
Manning S.P.J.
Copland J.
and
Frumkin J.
CA 121/37
Yadgaroff
v.
Khojainoff
and others

1937

22nd July

Manning S.P.J.
Copland J.
and
Frumkin J.

CA 121/37

Yadgaroff

v.

Khojainoff
and others

We think the Land Court was right. The agreement referred differences for decision to certain persons, and partition is certainly a matter of a judicial nature. There was therefore a submission, followed by an award, and the Appellant cannot now take proceedings for partition in Court.

The appeal is dismissed with costs, to include LP. 5.- advocate's fees.

High Court No. 40 of 1937.

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

Before: Copland J. and Frumkin J.

GEORGE GERSON Petitioner.

v.

CHIEF EXECUTION OFFICER, JERUSALEM,
and four others Respondents.

Debt, Privileged — Rent privileged in respect of proceeds of sale of goods kept in leased premises — Ottoman Law of Execution, Article 127.

A judgment for arrears of rent has special preference over the proceeds of the sale of the goods kept in the leased property; the second part of Article 127 of the Ottoman Law of Execution only applies to goods which were in the leased premises — it cannot apply to property found in any other house leased to the judgment debtor.

H. Krongold for petitioner.

H. Rakove for respondents other than 1st respondent.

Judgment: 1. The facts giving rise to this application are as follows: The Petitioner and the Respondents, other than the first Respondent, are judgment creditors of a certain lady by name of Mrs. Bertha Friedman. Petitioner obtained a judgment from the Magistrate's Court, Jerusalem, for house rent against the said judgment debtor and obtained an attachment

1937

23rd July

Copland J.
and
Frumkin J.

HC 40/37

Gerson

v.

C.E.O. Jerusalem
and others

on certain goods which were found in the house which was leased by Petitioner to the said judgment debtor. The Respondents also obtained judgments against the same judgment debtor and also attached certain goods which were found in some other place. The Chief Execution Officer ordered that the proceeds of the sale of the attached goods be distributed in proportion to the claims of all the judgment creditors.

2. Petitioner applied to this Court for an order to issue to the first Respondent ordering him to pay the proceeds of the sale of the attached goods which were found in the house which was leased by Petitioner to the judgment-debtor contending that he has a special privilege in respect of the goods of the tenant kept in the leased premises.

3. The second part of Article 127 of the Ottoman Execution Law provides that the rent has special preference over the proceeds of the sale of the goods kept in the leased property; but it only applies to goods which were in the leased premises — it cannot apply to property found in any other house leased by the judgment debtor.

4. For the above reason, the rule must be made absolute with costs to include LP. 3. - advocate's fees.

Criminal Appeal No. 76 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Frumkin J.

ATTORNEY GENERAL Appellant.

v.

MOUSA ELIAS ABOUD Respondent.

Meaning to be given to the word "order" in sub-section (8) of section 35 of the Town Planning Ordinance, 1936.

The interpretation to be given to the word "order" appearing in sub-section (8) of section 35 of the Town Planning Ordinance, 1936, must be such as to include any penalty imposed, whether by way of fine or imprisonment, and also orders for certain things to be done.

1937

23rd July

Copland J.
and
Frumkin J.

HC 40/37

Gerson

v.

C.E.O. Jerusalem
and others

1937

28th July

Trusted C.J.
Greene J.
and
Frumkin J.

CRA 76/37

Attorney General

v.

Aboud

1937
28th July
Trusted C.J.
Greene J.
and
Frumkin J.
CRA 76/37
Attorney General
v.
Abboud

The two points of law on which leave to appeal was granted were: —

1. Whether against a conviction under Section 35 of the Town Planning Ordinance, 1936, a sentence and order to pay a fine of LP. 1.-and to fill up the basement of a building, the convict may appeal as of right under Section 5 (1) of the Magistrates' Courts Jurisdiction Ordinance, 1935 — having regard to the terms of Section 35 (8) of the Town Planning Ordinance, 1936 — or must first apply for leave to appeal under Section 5 (5) of the Magistrates' Courts Jurisdiction Ordinances, 1935?
2. Whether having regard to the omission by the present respondent (the appellant to the District Court) to comply with Rule 9 (2) of the Magistrates' Courts Procedure Rules, the District Court should have rejected the appeal upon the ground that the appeal had not been properly lodged — bearing in mind the decisions in Civil Appeal 89/36 and 92/36?

Junior Government Advocate (E. Salant) for appellant.

J. Maman for respondent.

Judgment: This is an appeal which is brought before us by the Attorney-General from the judgment of the District Court of Haifa in its appellate capacity dated the 26th April, 1937, in which the Government desires to have an opinion as to the proper interpretation of the law. A number of technical points were raised before us on both sides, but we do not purpose to deal with them. The matter to be interpreted is the provision of sub-section 8 of section 35 of the Town Planning Ordinance, 1936, which provides as follows: —

“Any person aggrieved by any order of a Magistrate's Court or Municipal Court under this section, or by any refusal or failure to make such order, may appeal against such order, or against such refusal or failure, as the case may be, to the District Court and the District Court may allow or reject the appeal, or may return the case to the Court from which the appeal was made, or may make any order that such Court could have made under the provisions of this section. For the purposes of this section the District Court shall consist of a President or Relieving President, and one Judge.”

This section is a long and rather complicated section, and it is quite clear why it came into existence.

Offences against Town Planning are peculiar and in very many cases cannot be adequately dealt with by penalty. This section was presumably passed by the legislature to give power

to the Courts, which before its passing they did not fully possess, to order persons to do certain things. The powers are vested in Magistrates' Courts. Sub-section 4 of section 35 expressly lays down these powers as follows: —

“Notwithstanding anything contained in the Magistrates' Courts Jurisdiction Ordinance, 1935, or the Municipal Courts Ordinance, 1928, Magistrates' Courts and Municipal Courts shall respectively exercise jurisdiction in cases under this section, and such Courts shall have all the powers set out in this section, save in the case of an appeal as provided for in sub-section (7) (sic) hereof.”

It seems to us that the real point in this case and a point which is desirable in the public interest should be decided is: “Does sub-section 8, when it speaks of an “order”, include a fine or imprisonment which may be imposed under this section?” The section gives the Magistrate power to impose a fine, and in certain questions imprisonment, and also to make orders for certain things to be done. If the word “order” does not include these penalties it might be that a penalty might be imposed and an order for, say, demolition made upon the same facts — the order for demolition being appealable, the penalty not appealable.

It does not seem to us that the legislature intended this anomalous position and it seems to us that it is the meaning and intention of the Ordinance that “order” should include any penalty imposed.

The appeal will therefore be dismissed.

Civil Appeal No. 62 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Khaldi J.

MARY HADDAD Appellant.

v.

AMIN MICHAEL HADDAD Respondent.

Personal status — Husband and wife — Alimony — Maintenance — Claim for maintenance on ground of desertion — Defence that claimant no more wife of defendant owing to

1937
28th July
Trusted C.J.
Greene J.
and
Frumkin J.
CRA 76/37
Attorney General
v.
Abboud

1937
29th July
Manning S.P.J.
Greene J.
and
Khaldi J.
CA 62/37
Haddad
v.
Haddad

1937
29th July
Manning S.P.J.
Greene J.
and
Khaldi J.
CA 62/37
Haddad
v.
Haddad

dissolution of marriage by Religious Court — District Court declined jurisdiction on ground that claimant was suing for alimony — Palestine Order in Council, 1922, Article 51.

In Civil Case No. 125/36 of the District Court of Haifa the appellant claimed from the respondent, her husband, maintenance for herself and her child on the ground that the respondent had deserted her and had neglected to support her. The main defence of the respondent was that he was no longer appellant's husband, since the marriage had been dissolved by a decree of the Greek Orthodox Religious Court, to which defence appellant replied that she had no notice whatever of any proceedings for the dissolution of the marriage, and that any such decree, if it existed, was void and of no effect. The District Court dismissed the action on the ground of absence of jurisdiction, it apparently took the view that the claim was one for alimony and therefore within the exclusive jurisdiction of the Religious Court. The wife appealed.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case to it with directions to hear evidence as to means and to enter judgment for the appellant for such arrears of maintenance for herself and her child as may appear reasonable, the Court of Appeal,

HELD (1) that the claim made by the appellant was one for maintenance, because by alleging that the respondent had deserted her and had neglected to support her she framed her statement of claim correctly for a claim for maintenance.

(2) that the word "alimony" as used in the Order in Council, which must be given the same meaning as it has in English law relating to "Husband and Wife", is applicable to the allowance secured to a wife when the parties have separated by mutual consent, or the amount ordered by the Court when there has been a judicial decree for separation. The allowance granted when there is a matrimonial suit pending is called *alimony pendente lite*.

(3) that the word "maintenance" is always used to describe the allowance ordered to be paid to a wife by a husband who has deserted her.

Approved: Shaw v. Attorney General, 23 L.T.R. 322.

Hassan Hawa for appellant.

Hanna Atalla for respondent.

Judgment: 1. The appellant brought an action in the District Court of Haifa against the respondent, alleging that he was her husband and that he had deserted her and neglected

1937
29th July
Manning S.P.J.
Greene J.
and
Khaldi J.
CA 62/37
Haddad
v.
Haddad

to maintain her and her child. The action was tried by the President of the District Court sitting alone. He dismissed the action so far as it related to maintenance for the appellant herself but ordered the respondent to pay LP. 1. a month for the maintenance of the child. The appellant has appealed.

2. The principal defence of the respondent was that he was no longer the husband of the appellant, the marriage having been dissolved by a decree of the Court of the Eastern (Orthodox) Community at Acre. The appellant's reply to this was that she had no notice whatever of any proceedings for the dissolution of the marriage, and that consequently any such decree was void and of no effect. The respondent does not deny that the appellant received no notice of the proceedings.

3. The law of the Eastern (Orthodox) Community does not sanction the *ex parte* granting of decrees for the dissolution of marriage. The Courts of the Community are granted an exclusive jurisdiction with respect to divorce — but that does not prevent the Civil Courts of Palestine from refusing to recognise any decree which is contrary to natural justice. Some systems of law may allow marriages to be dissolved on the mere *ex parte* application of a party or without any application at all, but the Eastern (Orthodox) Community has no such provisions in its law. If one spouse desires a dissolution of marriage, then the other spouse has to have notice of the proceedings and an opportunity of resisting them, if he or she thinks fit. If this cardinal element in procedure is omitted then any subsequent decree is null and void. In the case of *Shaw v. the Attorney General*, 23 L.T.R. 322, Lord Penzance said: —

"A judgment so obtained has, therefore, in addition to the want of jurisdiction, the incurable vice of being contrary to natural justice, because the proceedings are *ex parte* and in the absence of the party affected by them."

The decree of the Eastern (Orthodox) Court cannot be recognised as valid, and for the purposes of this case the parties are still husband and wife.

4. The learned judge did not deal with this point in his judgment — he dismissed the appellant's claim on the ground that he had no jurisdiction. If I follow him correctly his reasoning was that what the appellant was really suing for was "alimony", not "maintenance", and that "alimony" was a matter within the exclusive jurisdiction of the Court of the Community.

1937
29th July
Manning S.P.J.
Greene J.
and
Khalidi J.
CA 62/37
Haddad
v.
Haddad

5. There was a great deal of argument in the Court below and before us as to the meanings of "alimony" and "maintenance" in Article 51 of the Palestine Order-in-Council, 1922. The distinction is important, as the Religious Courts have exclusive jurisdiction in matters of alimony, while in matters of maintenance they have jurisdiction only if all the parties consent. (Article 54 of the Order-in-Council). I assume that the Order-in-Council was drafted by English lawyers and that the words have the same meaning as they have in the English Law relating to "Husband and Wife". The word "alimony" has a restricted meaning. It is applicable to the allowance secured to a wife when the parties have separated by mutual consent, or the amount ordered by the Court when there has been a judicial decree for separation. The wife may also be granted an allowance when a matrimonial suit is pending, and this is called alimony *pendente lite*. From this it may be deduced that the word "alimony" is applicable when the relation of husband and wife is still subsisting, but the parties are separated either by consent or in consequence of a judicial order, or because a suit for separation or dissolution is pending.

6. On the other hand the word "maintenance" is always used to describe the allowance ordered to be paid to a wife by a husband who has deserted her. This is clear from the wording of the Summary Jurisdiction (Married Women) Act, 1895, where the charge against a husband is that he wilfully neglected to provide reasonable maintenance for his wife and children. The order given by the Court is always called a "maintenance order", and the legislature uses the word in the same sense in the Maintenance Orders (Facilities for Enforcement) Act, 1920. Further, when a marriage has been dissolved by a Court decree, and the former wife wishes an order for payment of a monthly or weekly sum, her application is called an application for maintenance and not an application for alimony.

7. There can be no doubt that in the present case, where the appellant alleged that the respondent had deserted her and had neglected to support her, she framed her statement of claim correctly when she sued for maintenance. A suit for maintenance is within the jurisdiction of the District Court, and the learned judge erred in declining jurisdiction.

8. The law of the Eastern (Orthodox) Community requires that a husband should provide reasonable maintenance for his wife if he deserts her without just cause. The respondent in this case does not deny the desertion; he does not allege

any just cause save the invalid decree of dissolution already referred to.

9. I cannot find in the proceedings below that there was any admission or proof of the means of the respondent, and the case will have to go back. The judgment of the Court below should be set aside and the action should be remitted with directions to hear evidence as to means and to enter judgment for the appellant for such arrears of maintenance for herself and her child, and such future maintenance for herself and her child, as may appear reasonable.

The appellant will have her costs of this appeal to include LP. 9 advocate's fees.

Civil Appeal No. 127 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

Haj ISMAIL NAJJAR Appellant.

v.

DAVID AMOS Respondent.

Evidence, Documentary — Bailee (Trustee) — Oral evidence inadmissible in rebuttal of documentary evidence — Ottoman Code of Civil Procedure, Article 80 — Mejelle, Article 1774.

Where a trustee who has given a receipt for the property deposited with him on trust alleges that he has returned the trust to its owner, he must prove that by written evidence; he cannot rely on Article 1774 of the Mejelle; and Article 80 of the Ottoman Code of Civil Procedure applies to such cases — So laid down by the Supreme Court sitting as a Court of Appeal.

M. Kehaty for appellant.

S. Yehuda for respondent.

Judgment: This case raises an interesting but simple point. The appellant some years ago accepted LP. 100 from the Respondent as a deposit and gave a receipt in which it was

1937
29th July
Manning S.P.J.
Greene J.
and
Khalidi J.
CA 62/37
Haddad
v.
Haddad

1937
30th July
Copland J.
Greene J.
and
Frumkin J.
CA 127/37
Najjar
v.
Amos

1937
30th July
Copland J.
Greene J.
and
Frumkin J.
CA 127/37
Najjar
v.
Amos

stated that the money was held on trust. Later the respondent sued for the return of the LP. 100, and the appellant alleged that he had already repaid it, and claimed that by Article 1774 of the Mejlle he was discharged by his oath.

The District Court held on appeal that since the appellant had given a written acknowledgment of the amount any repayment thereof must be proved in writing, and that the oath was insufficient to disprove a written document. The appellant has appealed by leave to this Court.

It has been argued that by Article 54 of the Civil Procedure Code and Article 1774 of the Mejlle the oath of a trustee is sufficient even when the deposit on trust is proved by means of a written receipt. We do not agree. The Civil Procedure Code must be read as a whole, and there is nothing in this case to take it out of the provisions of Article 80 of the Civil Procedure Code. Where a trustee gives a written acknowledgment of the amount deposited with him repayment must be proved in writing; his oath is insufficient.

The appeal is dismissed with costs and LP. 5 advocate fees.

Criminal Appeal No. 78 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

ALI SAID WAWI Appellant.

v.

ATTORNEY GENERAL Respondent.

Evidence — Corroboration — Evidence of one eye-witness requires corroboration — Repetition by witnesses of statements made to them by another witness not material evidence to corroborate that other witness's evidence — Evidence Ordinance, Sections 6 and 7.

Wawi was charged before the District Court of Haifa in Criminal Case No. 96/37 together with two other persons, who were acquitted in the course of the trial, with attempted murder contra Sections 222 (a) and 23 of the Criminal Code Ordinance,

1937
30th July
Manning S.P.J.
Copland J.
and
Frumkin J.
CRA 78/37
Wawi
v.
Attorney General

1937
30th July
Manning S.P.J.
Copland J.
and
Frumkin J.
CRA 78/37
Wawi
v.
Attorney General

1936. The evidence against him was that of the complainant and of four other persons who did not see Wawi assault the complainant, but said that the complainant, on being questioned as to who were his assailants, told them that Wawi had fired at him and that two other men had also been present. On this evidence the District Court convicted Wawi and sentenced him to ten years imprisonment, Wawi appealed.

In allowing the appeal, quashing the conviction and discharging the appellant, the Court of Appeal,

HELD that the mere repetition by witnesses of statements made to them by another witness cannot be treated as that material evidence sufficient for corroboration as required by Section 6 of the Evidence Ordinance. In this particular case, the repetition by the four witnesses of the statement made to them by the complainant that appellant and two others had attacked him was not material evidence corroborating his evidence.

Wrongly decided: CRA 30/27, 1 P.L.R. 150.

Approved: AA 9/28, 1 P.L.R. 281.

R. v. Christie (1914) A.C. 595.

The judgment of the Court was delivered by Copland J.

H.C. Weston Sanders for appellant.

Assistant Government Advocate (Fawzi Ghussein) for respondent.

Judgment: 1. We have already intimated that in our opinion this conviction cannot stand, and this is now the considered judgment of the Court giving our reasons for this opinion.

2. The appellant was convicted by the District Court, Haifa, of attempted murder, contrary to Sections 222(a) and 23 of the Criminal Code Ordinance, of Younis Salim Nurjerini and was sentenced to ten years imprisonment. Apart from the evidence of Younis, who said that the Appellant, whom he said he definitely recognised, fired at him with a rifle at close range at night outside his (Younis') home, the bullet just grazing his left thigh, the principal prosecution witness was Younis' wife, Hanifeh. Hanifeh said that she was in their house, where she heard a shot from close at hand — that she then opened the door, saw her husband outside and asked him who had fired at him, and in reply, Younis gave the name of the Appellant, and of two other men, who were acquitted in the course of

1937
30th July
Manning S.P.J.
Copland J.
and
Frumkin J.
CRA 78/37
Wawi
v.
Attorney General

the trial, as the assailants. Hanifeh never saw the appellant, nor the other two men, who were said to be present. The other evidence against the appellant was given by three men. Muhammad Sheikh Mustafa Abu Saleh, Muhammad Ali Ahmad, and Eissa Husein Mushemesh, who all say that when they went to Younis' house after the shooting, and questioned Younis about it, the latter told them that the appellant had fired at him and that two other men had also been present. Only the first named, Muhammad Sheikh Mustafa, would seem actually to have heard the shot, which he said seemed to come from the direction of Younis' house.

3. This was all the evidence for the prosecution, and it will be seen that it consists of the statement of Younis, who was the only person who actually saw the appellant, and the statements of four persons who all say that Younis told them that the person who had fired at him was the appellant. The defence was a denial of the charge, and an alibi which was not very convincing.

4. The principal ground of appeal is that there is no corroboration of Younis' evidence as required by Section 6 of the Evidence Ordinance (Laws of Palestine, Cap. 54).

5. The Sections of the Law which we have to consider are Sections 6 and 7 of the Evidence Ordinance which are as follows: —

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

"7. Evidence of a statement made at the time when, or shortly before, or after, an offence is alleged to have been committed and directly relating to a fact or facts relevant in the case is admissible if made by a person who is himself also a witness".

6. It may be convenient to summarise here the provisions of Section 30 of the Children Act 1908, to which reference will be made later in the course of this judgment. This Section provides that where a child of tender years has given unsworn evidence in support of a charge in respect of any offence mentioned in the First Schedule to the Act, no person "shall be liable to be convicted of the offence unless the testimony

1937
30th July
Manning S.P.J.
Copland J.
and
Frumkin J.
CRA 78/37
Wawi
v.
Attorney General

admitted by virtue of this Section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused".

7. In England, corroboration is only required in certain classes of cases, one of them being offences of a sexual nature committed on children. In Palestine, corroboration of the evidence of a single witness is required in all cases except certain contraventions under the Road Traffic Ordinance.

8. The point which we have to consider is whether a statement given by a witness can be corroborated by evidence of statements made by this witness to other persons, not in the presence of the accused but implicating the accused.

9. Unfortunately, in previous judgments given by this Court, there has been a conflict in the rulings given in different cases. In Abdul Rahman Daoud el Rahal v. The Attorney General (Criminal Appeal No. 30 of 1927 — 1 P.L.R. 150), the Court held that a statement made at the time when or shortly before or shortly after an offence is alleged to have been committed, if admissible under Section 6 (now Section 7) of the Evidence Ordinance, can be taken to be material evidence in corroboration of other evidence as required by Section 5 (now Section 6) of the same Ordinance. The Court went on to say that "the Court below was of opinion that the early statement of complainant was material evidence sufficient to corroborate the evidence in the witness box of the complainant, and this Court will not go behind that finding".

10. On the other hand in Abdul Rahim Jamil el Haj Saleh v. The Attorney General (Criminal Assize Appeal No. 9 of 1928 — 1 P.L.R. 281) the Court gave this opinion: —

"The conviction, however, was based on the assumption that the evidence of the deceased was corroborated. Her statement in the village was testified to by two witnesses and supported by her statement to the Magistrate in hospital in the absence of the accused, but we hold that such repetitions of the evidence of a single witness are not the corroboration by some material evidence which Section 5 (now Section 6) of the Evidence Ordinance requires"

11. The first cited case has been followed also in recent years.

12. If one turns to the English Law the position is quite clear. The point came before the House of Lords in R. v.

1937
30th July
Manning S.P.J.
Copland J.
and
Frumkin J.
CRA 78/37
Wawi
v.
Attorney General

Christie, (L.R. (1914) A.C. 595). It is true that the principal point in this case was on another matter, but the present point before us is dealt with at the end of the judgment of Lord Atkinson, where he says: —

“Again, he (that is the presiding Judge) treated the evidence of the mother of the boy and the constable, as to what the boy said and did on the occasion of the identification, as corroboration of his testimony at the trial, within the meaning of the 30th Section of the Children Act of 1908. This is, of course, wholly erroneous. If the boy himself had been examined, either in chief or on cross-examination, and had detailed what took place at the identification, this portion of his evidence could not be treated as corroboration of the other portion proving the charge. He could not be his own corroborator. It can make no possible difference when others tell what he did and said on that occasion. Their evidence is no more material corroborative evidence in support of his evidence at the trial implicating the accused than his would be.”

And Lord Reading, dealing with this point in the same case, said: —

“Assuming that your Lordships were of opinion that the boy's statement was admissible, this conviction, for other reasons, could not stand, and was properly quashed.. By virtue of Section 30 of the Children Act 1908 (8 Edw. 7, c. 67), Christie could not be convicted unless the boy's testimony was ‘corroborated by some other material evidence in support thereof implicating the accused’. There was no sufficient direction, and there was misdirection to the jury of the requisites of corroboration under this Statute. Such direction as was given by the deputy chairman was erroneous, inasmuch as it treated the statement by the boy, given in evidence by the mother and the constable as corroboration of the boy's evidence implicating the accused. This is manifestly wrong”.

13. Following this reasoning, Abdul Rahman Daoud el Rahal v. The Attorney General (supra) and the cases in which it was followed must be taken to have been wrongly decided and we hold that mere repetition by witnesses of statements made to them by another witness cannot be treated as that material evidence sufficient for corroboration as required by Section 6 of the Evidence Ordinance.

14. For these reasons, the District Court erred in convicting the Appellant, and the appeal must be allowed, the conviction quashed, and the appellant discharged.

High Court No. 39 of 1937.
In the Supreme Court sitting as a High Court of Justice.

Before: The Senior Puisne Judge and Abdulhadi J.

- 1. MUSA ES-SAYEGH
- 2. TEWFIK ABU GHAZALEH Petitioners.

v.

MUNICIPAL COUNCIL OF JAFFA Respondent.

Trades and Industries — Licences, Trade — Police may refuse their approval on strong grounds of suspicion that the place may be used for unlawful purposes.

It is not necessary, where the police wish to refuse to grant their approval to the issue of a trade licence, that they (the police) should have available sufficient evidence to constitute a *prima facie* case in a criminal charge; they may base their disapproval to the issue of a licence on strong grounds of suspicion that the place for which the licence is required will be used for unlawful purposes — So held by the Supreme Court sitting as a High Court of Justice.

The facts, in so far as they are relevant to this report, appear from the order.

Issa Hazou for petitioners.

Amin Akel for respondent.

Order: This is an application for an order to the Municipal Council, Jaffa, to issue a hotel licence to the first Petitioner. The Council refused the licence on the ground that a petition by certain prominent residents represented that the proposed hotel was being conducted and had been conducted in an immoral manner.

The Petitioner had, in accordance with the law, obtained the approval of the Police. This Court, having certain doubts as to the significance of this approval, called Mr. Miller, a Deputy Superintendent of Police, as a witness. His evidence supported the action of the Municipal Council in refusing the licence. He said that the Police had to give their approval as the Petitioner had no criminal record. My brother and I think that in adopting this course, the Police were taking a narrow view of their responsibilities.

1937
31st July
Manning S.P.J.
and
Abdulhadi J.
HC 39/37
Sayegh
and another
v.
Municipal Council,
Jaffa

1937

31st July

Manning S.P.J.
and
Abdulhadi J.

HC 39/37

Sayegh
and another

v.

Municipal Council,
Jaffa

It is not necessary that the Police should have available sufficient evidence to constitute a *prima facie* case in a criminal charge — in a case like this, we think they may base their disapproval on strong grounds of suspicion.

We think that the Council might have conducted their inquiry in a more judicial manner, but we are convinced that their decision to refuse the licence was right.

The rule will be discharged with costs, to include LP. 10. - advocate's fees.

Criminal Appeal No. 96 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Frumkin J.

- 1. NECHAMA ZWANGER
- 2. GUARDIANS OF THE FOUR DAUGHTERS OF THE LATE JACOB ZWANGER Applicants.

v.

REUBEN SHEINZWIT Respondent.

Attachment, Provisional — May be ordered by Supreme Court sitting as a Court of Appeal.

The Supreme Court, sitting as a Court of Appeal, in a proper case coming before it, is vested with the power to order provisional attachment — So laid down by the Supreme Court sitting as a Court of Appeal.

Henry E. Baker for appellants.

N. Abcarius for respondent.

Judgment: The Respondent in this case was convicted of the manslaughter of a man named Zwanger. After the conviction there was an application made to the presiding Judge for compensation in lieu of diyet. From the application before us, it appears that a sum of LP. 1990. - was asked for as compensation. The presiding Judge made an award of LP. 250. -, and the persons concerned have lodged an appeal against that order on the ground that the compensation should have been larger. That appeal has not yet come on for hearing and we say nothing, at the moment, as regards its merits.

Meanwhile the applicants have made an application to this Court for provisional attachment of the property of the Respondent as security for the increased damages which they anticipate will be awarded by this Court on the appeal.

We have no doubt that in a proper case coming before us this Court is invested with the power to order provisional attachment. we do not think that the present case is a case in



1937
9th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CRA 96/37
Zwanger
and another
v.
Sheinzwit

which such an order should be made. The applicants have only a problematical case with respect to the increase of compensation. No grounds have been urged to show that the compensation awarded was so small that it could not have been awarded by a reasonable Judge. We think that that is the proper way in which to decide the matter. Some arguments should have been urged to show that the compensation which was awarded was unreasonable.

For these reasons the application is refused but without costs; as advocate for the Respondent does not apply for costs.

Criminal Appeal No. 88 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Khaldi J.

1937
16th September
Manning S.P.J.
Greene J.
and
Khaldi J.
CRA 88/37
Ahmad
and others
v.
Attorney General

1. SHOBASH YOUSEF AHMAD
2. AQEL IBRAHIM KHALIL
3. AQLEH IBRAHIM KHALIL
4. MUEIQEL IBRAHIM KHALIL Appellants.

v.
ATTORNEY GENERAL Respondent.

Information — Signature of information by X. "for Government Advocate" — Person signing authorised to sign — Whether information properly filed — Whether an information may contain a charge other than that on which the accused was committed — Criminal Procedure (Trial Upon Information) Ordinance, Section 28.

Charge — Original charge for murder — Examining Magistrate committed for manslaughter — Criminal Procedure (Trial Upon Information) Ordinance, Section 18(2)

Criminal Code Ordinance, 1936 — Whether ultra vires Palestine Order in Council, 1922, Article 46.

Ottoman Law — Legislature of Palestine entitled to amend or repeal the Ottoman Law — Palestine Order in Council 1922, Article 18.

1937
16th September
Manning S.P.J.
Greene J.
and
Khaldi J.
CRA 88/37
Ahmad
and others
v.
Attorney General

The appellants were charged before the District Court of Jerusalem in Criminal Case No. 116/37 with manslaughter, contrary to Sections 212, 213 and 23 of the Criminal Code Ordinance, 1936. They were convicted of the offence as laid and the first appellant was sentenced to fifteen years imprisonment and each of the other three appellants to six years imprisonment. They appealed and the grounds of appeal urged on their behalf appear in the judgment of the Court of Appeal reported hereinafter.

In dismissing the appeals, the Court of Appeal,

HELD (1) that the information that was signed by one Issa Aqel "for Government Advocate", who was entitled to sign informations on behalf of the Attorney General, was properly filed, as required by Section 28 of the Criminal Procedure (Trial Upon Information) Ordinance. Further, an information may contain a charge for an offence other than that on which an Examining Magistrate has committed an accused, provision for which is to be found in Sub-Sections (4) and (5) of Section 28 of the Criminal Procedure (Trial Upon Information) Ordinance.

(2) that an Examining Magistrate holding a preliminary enquiry, who has before him a charge of murder, can, as he did in this case, commit on a charge of manslaughter, in virtue of the power given him by Section 18 (2) of the Criminal Procedure (Trial Upon Information) Ordinance.

(3) that the Criminal Code Ordinance, 1936 is not ultra vires the Palestine Order in Council, 1922.

(4) that Article 18 of the Palestine Order in Council gives the legislative authority in Palestine the power to promulgate Ordinances for the "peace, order and good government" of Palestine and that such words empower the legislature to amend or repeal the Ottoman Law, whenever such a course seems necessary for the peace, order and good government of Palestine.

Wrongly decided: MA 9/32, 1 P.L.R. 740

Approved: Riel v. The Queen, 12 App. Cases 675

Hassan Sidqi Dajani for first appellant.

Salomon Yehuda for the other three appellants.

Solicitor Gennral (Alan Rose) and Junior Government Advocate (Omar Wa'ri) for respondent.

Manning, S.P.J: 1. The appellants were convicted of manslaughter by the District Court of Jerusalem. The first ground raised in this appeal by Hassan Sidqi Dajani, advocate for the appellant Shobash, is that the information was irregular. It was

1937
16th September
Manning S.P.J.
Greene J.
and
Khaldi J.
CRA 88/37
Ahmad
and others

v.
Attorney General

signed by one Issa Aqel, "for Government Advocate", and Section 28 of Cap. 36 enacts that an information should be "filed" by or on behalf of the Attorney-General. Omar Wa'ri, who appeared for the Respondent, made it quite clear that Issa Aqel was entitled to sign informations on behalf of the Attorney-General. The word used is "filed", not "signed", and there can be no doubt that this information was filed on behalf of the Attorney-General. This ground of appeal fails.

2. If I understand correctly Hassan Sidqi's second ground of appeal it is that the learned Magistrate holding the preliminary investigation had before him a charge of murder, whereas he committed on a charge of manslaughter. Section 18 (2) of Cap. 36 makes it clear that the learned Magistrate had power to do this. This ground of appeal also fails.

3. Hassan Sidqi's third ground of appeal is that there was no reasonable evidence to justify the finding of the Court below. He says there were discrepancies in the evidence of certain witnesses and variations between their evidence in Court and the statements which they had made to the Police. I have no doubt that the Court below took all these matters into consideration. The record shows that the evidence was sufficient in law to justify the conviction of his client. This ground of appeal also fails.

4. Mr. Yehuda, who appeared for the other three Appellants, raised a novel point to the effect that the Criminal Code Ordinance of 1936 is *ultra vires*. To understand his argument it is necessary to refer to Article 46 of the Palestine Order-in-Council, 1922. The Order-in-Council came into force on September 1st., 1922, and Article 46 prescribes the law to be administered by the Civil Courts from that date. The relevant part of the Article is as follows: —

"46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted;"

5. Mr. Yehuda says that these words must be interpreted to mean that His Majesty in Council intended that the Ottoman Law in force on November 1st., 1914, was to be a fixed and

1937
16th September
Manning S.P.J.
Greene J.
and
Khaldi J.
CRA 88/37
Ahmad
and others

v.
Attorney General

invariable law for Palestine, subject to alteration, amendment or repeal only by another Order-in-Council. Ordinances and regulations subsequently enacted were to be merely for the purpose of filling in gaps not covered by the Ottoman Law.

6. The Article is undoubtedly open to this interpretation. To support his argument Mr. Yehuda laid stress on the wording of Articles 39 and 52. Article 39 refers to the jurisdiction of Magistrates' Courts and says such Courts shall have the jurisdiction assigned to them by the Ottoman Magistrates' Law of 1913, as amended by any subsequent law, ordinance or rules. Mr. Yehuda points to the words "as amended" and says they do not occur in Article 46; the word used there is "and". Article 52 deals with the jurisdiction of the Moslem Religious Courts which is to be exercised in accordance with an Ottoman Law of 1333 (A.H.), "as amended by any Ordinance or Rules." It may be freely admitted that the words "as amended" in these Articles, and their absence in Article 46, lend support to Mr. Yehuda's contention. But, as the Solicitor-General points out, the Order-in-Council has to be looked at as a whole and Article 18 gave the legislative authority in Palestine the power to promulgate ordinances for the "peace, order and good government" of Palestine. These words, to quote from the judgment of the Judicial Committee in the case of *Riel v. The Queen*, 12 App. Cases 675, "are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to." There can be no doubt that they empower the legislature in this case to amend or repeal the Ottoman Law, whenever such a course seems necessary for the peace, order or good government of Palestine. The Solicitor-General has also drawn our attention to the telling fact that under Article 18 the power to promulgate ordinances is granted subject to certain specified restrictions — but that there is no restriction as to modifying or repealing the Ottoman Law. I agree with the arguments of the Solicitor-General and I think that Mr. Yehuda's interpretation of Article 46 is unreasonable.

7. Mr. Yehuda's second ground was that the information contained a charge for an offence other than that on which the learned Magistrate had committed the accused and that this vitiated the conviction. He says that this cannot be done without a special order of the Attorney-General. In support of his argument he cited a decision of this Court, *Mottes v. The Attorney-General*, reported in the Law Reports of Palestine, 1920-33, at p. 740. In that case a Magistrate had committed on a charge of fraud and one of the counts in the information

1937
16th September
Manning S.P.J.
Greene J.
and
Khaldi J.
CRA 88/37
Almad
and others
v.
Attorney General

was attempting to incite another to commit a fraud. This Court held that in these circumstances there should have been a special order of committal by the Attorney-General and that the count was not properly before the Court of Trial. It based its decision on the wording of Section 28, Sub-Section 5 of Cap. 36 (Laws of Palestine, Vol. I, p. 486). This reads as follows: —

“(5) Where a magistrate has committed or refused to commit an accused person, either for the offence with which he has been charged or for any other offence, the Attorney General may, notwithstanding such committal or refusal, —

(a) within three months thereof, make an order committing the accused person for trial summarily or upon information on any charge arising out of the evidence taken at the proceedings for committal;

(b) at any time within the period for prescription of the offence, make an order that further evidence shall be taken before a magistrate with a view to committal.”

The ground upon which the Court proceeded was that the Sub-Section did not originally refer to cases in which the Magistrate had committed for trial but only to cases in which he had refused to commit. An amendment was made in 1929 which included in the discretion of the Attorney-General cases in which the Magistrate had committed as well as cases of refusal to commit. The Court said with regard to this: —

“The object of this amendment is clear. Where it is intended to over-ride the decision of the Magistrate, the authority of the Attorney-General himself is required, and the matter is not to be left to the discretion of a Junior Government Advocate.”

8. I have always thought that this case was wrongly decided. The Sub-Section which precedes Sub-Section 5 (Sub-Section 4) reads as follows: —

“(4) Any offence may be charged in an information which is supported by evidence taken at the preliminary enquiry”.

The two Sub-Sections must be read together. If the Attorney-General wishes to include in an information a charge arising out of the evidence different from that on which a Magistrate has committed, he may himself within three months make an order for committal, but he is not compelled to do so. Sub-Section 4 allows him to include such a charge in the information, but there might be cases in which the Attorney-General considered it more consonant with justice to adopt the more elaborate

procedure of Sub-Section 5. I do not think that Sub-Section 4 is qualified by Sub-Section 5, and the ruling of the Court in the Mottes case (supra) would render Sub-Section 4 superfluous.

9. However this may be, the decision cannot help Mr. Yehuda's clients. He says his clients were committed on Sections 212, 213, and 24 of the Criminal Code, and that they were charged under Sections 212, 213, and 23. Sections 212 and 213 deal with the offence of manslaughter; Section 24 deals with the question of common purpose; Section 23 defines “principal offenders.” There was no difference between the offence charged and that for which Appellants were committed, viz. manslaughter. They cannot complain that they were given more information in the charge than they were entitled to. There are no merits in this ground of Appeal.

10. Mr. Yehuda's other grounds of appeal cover the same ground as the last of Hassan Sidqi Dajani's, that there was no reasonable evidence to justify the findings of the Court below. There was clear and sufficient evidence that Mr. Yehuda's clients were present for the purpose of assisting and ensuring the carrying out of the offence.

11. I do not think the sentences were excessive. In my opinion these appeals should be dismissed and the convictions and sentences affirmed.

Greene J: I concur.

Khaldi J: I concur.

Civil Appeal No. 122 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khaldi J. and Abdulhadi J.

SAID AWAD EL KHOURY Appellant.

v.

SALIM RAJI FARAH Respondent.

Bills of exchange — Promissory notes — A promissory note, besides the essentials required for it, contained an undertaking to pay damage, loss, costs and interest — Whether such additions took the document out of the class of promissory notes — Ottoman Commercial Code, Articles 145 and 146.

1937
16th September
Manning S.P.J.
Greene J.
and
Khaldi J.
CRA 88/37
Almad
and others
v.
Attorney General

1937
16th September
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 122/37
Khoury
v.
Farah

1937
16th September
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 122/37
Khoury
v.
Farah

A promissory note, the text whereof appears in the judgment of the Court of Appeal reported hereinafter, was made by respondent to appellant. It was not paid at maturity and an action was brought on it in the Magistrate's Court of Nazareth. It was pleaded that the promissory note was barred under Article 146 of the Ottoman Commercial Code, but the Magistrate rejected that plea on the ground that the document sued upon was not a promissory note since, in addition to the essentials required for a promissory note, it contained an undertaking to pay damage, loss, costs and interest, and in the result he gave judgment for the appellant. On appeal to the District Court, Nablus, the case was sent back to the Magistrate for a retrial, the District Court being of the view that the nature of the document was not affected by words elucidating or defining, but not conflicting with, the terms of the law governing it. The appellant appealed to the Supreme Court.

In dismissing the appeal, the Court of Appeal,

HELD that the nature of a document of the kind of the present one is not affected by words elucidating or defining, but not conflicting with, the terms of the law governing the document. In this particular case, the addition of the words "and, if I make default of payment on maturity or thereafter, I shall be liable for every damage and loss together with the costs and the legal interest..." did not alter the nature of the document to take it out of the class of promissory notes.

Distinguished: CA 177/23.

Roussos v. Theophanides, 4 Cyprus Law Reports 12.

Imperial Ottoman Bank v. Limbouri and another, 4 Cyprus Law Reports, at p. 48.

E.D. Goitein for appellant.

Hanna Atalla for respondent.

Manning, S.P.J.: The appellant sued the respondent in the Magistrate's Court of Nazareth for LP. 33.846, due on a promissory note. The terms of the note were as follows: —

"LE. 33 (Thirty-three Pounds Egyptian only).

After the elapse of thirty days from the date hereunder I will pay to the order of Mr. Is'eed (sic) Awwaad el Khoury the above mentioned sum, namely thirty-three Pounds Egyptian only, value received by me by counting and in cash, and, if I make default of payment on maturity or thereafter, I shall be liable for every damage and loss together with the costs and the legal interest, without requiring him to send an official notice

(Sgd) Salim R. Farah
(in English and Arabic)

Date: 20th January, 1923."

1937
16th September
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 122/37
Khoury
v.
Farah

2. The date of the note was January 20th, 1923, and the action was commenced on the 1st July, 1936. The defendant pleaded that the action was barred under Article 146 of the Ottoman Commercial Code the relevant part of which runs as follows: —

"All actions relating to bills of exchange, and to promissory notes signed by traders, merchants and bankers or made for commercial purposes, are barred after five years from the date of the protest or from the last judicial proceeding, if judgment has not been obtained or the debt has not been acknowledged by a separate document."

3. The learned Magistrate rejected this plea, holding that the document was not a promissory note as, besides the essentials required for a promissory note, it contained an undertaking to pay damage, loss, costs and interest. He held, therefore, that the ordinary period of limitation, viz. 15 years, applied; and that the action was not barred. He found that the respondent had failed to prove that the amount had been paid, and as he refused to tender the oath to the appellant, he gave judgment for the appellant for the amount claimed with interest from the date of maturity and costs.

4. The respondent appealed to the District Court of Nablus. There the learned Judges held that the additional words did not prevent the document from taking effect as a promissory note, and they referred the case back to the learned Magistrate for a re-trial.

5. Against this decision the appellant has appealed. I think it convenient to deal at once with a point raised by Hanna Eff. Atalla, advocate for the respondent. He argued that Article 146 of the Ottoman Commercial Code was repealed by the Bills of Exchange Ordinance (Cap. 10) and that the relevant provision with respect to limitation is now Section 96 of that Ordinance. This section fixes the period of limitation, in the case of the maker of a promissory note, at five years, and differs only from Article 146 as regards the period from which time begins to run. I do not see how this argument can affect the issue which we have to decide, which is, whether the document is a promissory note. As, however, the point has been raised, and as it might be convenient to decide what law is applicable, I will say that I am against the contention of Hanna Eff. Atalla. He based his argument on the ground that all procedural laws are retrospective in effect. But the Bills of Exchange Ordinance, when originally promulgated in 1929, contained a section (then Section 96) which expressly saved any remedy in respect of any right acquired before the coming into force of

1937
16th September
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 122/37
Khoury
v.
Farah

the ordinance. If the appellant had a remedy by action in 1929, before the Ordinance took effect, he did not lose it when the Ordinance came into force.

6. Mr. Goitein, who argued the case for the appellant, relied on three authorities — one from Palestine and two from Cyprus. The Palestine case is *Daher v. Kudha*, Civil Appeal No. 177 of 1923, unreported. I have been through the record in that case, and I find that this Court held that a certain note for 568 piastres was not a negotiable instrument, because it contained a condition — but the judgment is silent as to what the condition was, and the proceedings do not disclose it or that there was any argument on the point. I cannot see how this case helps the appellant.

7. The first Cyprus case is *Roussos v. Theophanides*, Vol. IV, Cyprus Law Reports, page 12. There the note, in addition to the obligation to pay a certain sum, contained an agreement to pay the costs of any litigation arising out of the note and also the amount of any fees paid by the payee to advocates. One ground of defence was that the action was prescribed under Art. 146 of the Commercial Code. The Court rejected this plea on the ground that the insertion of words importing an obligation to pay costs and advocates' fees took the note out of the category of promissory notes as defined in Article 145 of the Commercial Code, and that it was impossible to say that the obligation to pay costs and advocates' fees could be passed by indorsement.

8. The second Cyprus case is also reported in Vol. IV of the Reports, at page 48, *Imperial Ottoman Bank v. Limbouri* and another. There the note, in addition to the obligation to pay a sum certain, contained a declaration of a mortgage as security, and an undertaking to pay interest and all costs in case of legal proceedings. The Court held that the document was not a promissory note within the meaning of the Commercial Code, as it contained an agreement to mortgage immovable property and to pay costs.

9. I think these two Cyprus cases can be distinguished from the present case. In the *Roussos* case there was an undertaking not only to pay the costs of litigation arising out of the note, but also to pay any fees which might be paid to advocates by the payee. In the *Ottoman Bank* case the document contained a declaration of mortgage. In the present case the wording of the document has to be carefully considered and also the nature of a promissory note. Article 145 of the Commercial Code is as follows: —

“A promissory note shall be dated. It shall specify the amount to be paid, the name of the person to whose order it is payable, the time when it must be paid, and whether the value thereof has been received in cash, in goods, in account, or by the transfer of a debt”.

10. It will be seen that the document in this case, up to the word “cash”, fulfils all the requisites laid down. If the document had ended there and if the maker had failed to pay at maturity, the holder might bring an action for damages, and the measure of these damages would be the amount of the note, together with any interest due and any expenses incurred for protest. The question of costs would be one for the Court, but in the vast majority of cases they would be awarded to the holder. The result in this case is that you have a promissory note with certain words added which do not alter the obligations incurred by the note. I am in complete agreement with the following passage in the judgment of the District Court: —

“The nature of a document of this kind is not affected by words elucidating or defining, but not conflicting with, the terms of the law governing the document.”

11. In my opinion the appeal should be dismissed and the order of the District Court should be affirmed. The respondent to have the costs of this appeal to include LP. 10 advocate's fees.

Khaldi J.: I concur.

Abdulhadi J.: I concur.

Civil Appeal No. 138 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Frumkin J.

“PALWOODMA” (PALESTINE WOODWORK
MACHINERY TRADING AND MANUFAC-
TURING COMPANY), HAIFA Appellant.

v.

TEWFIC MAJDALANI Respondent.

Landlord and tenant — Rent — Lease of premises —
Lessee derived no benefit from premises not because of any fault
in premises but because of status of lessee — Rescission of
contract by lessee — Liability of lessee to pay the rent — *Mejelle*,
Article 443.

1937
16th September
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 122/37
Khoury
v.
Farah

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
“Palwoodma”
v.
Majdalani

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

By a contract of lease made in December, 1935, between the appellant and the respondent, certain premises, the property of the respondent, were leased to the appellant for a term of two years to begin from 1st April, 1936. In April 1936 the Arabs started a general strike, and the appellant, being a Jewish firm and most of its employees being Jews, took the view that it was unsafe for it to carry on its business in the premisses and decided that it was impossible to make any further use of the premises. After the exchange of some correspondence between the parties, the appellant's advocate wrote a letter to the respondent cancelling the contract of lease on the ground that it had enjoyed no benefit from the premises and asked for the return of the rent already paid in advance and of three promissory notes given for the balance. The respondent's advocate replied to the effect that there were no grounds for terminating the contract and that he held the appellant liable to the terms of the contract and to the payment of the agreed rent. The appellant did not pay the first note when it fell due, and the respondent commenced proceedings in the Magistrate's Court of Haifa (Civil Case No. 68/36) claiming the value thereof. The British Magistrate gave judgment in favour of the respondent on the ground that, if the company was disabled from using the premises, the cause of this prevention did not arise from the premises themselves but from the status of their occupants. The appellant appealed to the District Court of Haifa (Civil Appeal No. 95/37), and the appeal was dismissed. Appellant appealed by leave to the Supreme Court on two points of law, both of which appear in the judgment reported hereinafter, but the only point for the determination of the Court of Appeal was whether the appellant was entitled to rescind the contract of lease.

In dismissing the appeal, the Court of Appeal,

HELD that the appellant, even assuming it was impossible for it to derive any benefit from the lease after the 19th April, 1936, the date on which the general strike of the Arabs broke out, was not entitled to put an end to the contract and to refuse to pay any further rent, because to relieve the appellant from payment of the rent there must be a "valid impediment" as contemplated by Article 443 of the Mejelle, which expression means that both parties, when making the contract, contemplated the continued existence of certain persons or things, and if these persons or things ceased to exist, the contract was at an end, in other words, if the impossibility to do business arises from some external cause which has no connection whatever with the leased premises or with anything necessary to their use, then rent continues to be payable and the tenant must bear the loss, unless there is some condition in the tenancy agreement to the contrary.

Distinguished: CA 43/33.

CA 77/37.

Approved: Whitehall Court Ltd. v. Ettlinger, (1920) 1 K.B. 680
Matthey v. Curling (1922) 2 A.C. 180

D. Geiger for appellant.
H.C. Weston Sanders for respondent.

Manning, S.P.J.: 1. The Appellant company (hereinafter called the company) on the 10th December, 1935, entered into an agreement with the Respondent. Under the agreement the Respondent was to lease to the company certain premises in Nazareth Street, Haifa. The term of the lease was to be from April 1st, 1936, to March 31st, 1938. The rent was to be LP. 450. - for the two years: of this LP. 25. - was paid on the date of the agreement, and the payment of the balance was secured by four promissory notes, one for LP. 87.500 mils payable on April 1st, 1936, and three each for LP. 112.500 mils payable respectively on October 1st, 1936, April 1st, 1937, and October 1st, 1937.

2. In April, 1936, the Arabs in Palestine started a general strike, and a number of them became active rebels and resorted to violence. Their principal grievance was the Mandate, and as a consequence, the lives and property of Jews were in jeopardy in many parts of the country. The company was a Jewish company and most of its employees belonged to the Jewish community. It took the view that Nazareth Street, Haifa, was an unsafe place in which to carry on business and it decided that it was impossible to make any further use of the leased premises. There was a certain amount of correspondence between the parties which culminated in a letter from the company's advocate dated September 15th, 1936, cancelling the contract of lease on the ground that it had enjoyed no benefit therefrom and asking for the return of the rent already paid in advance and of the three promissory notes in the possession of the Respondent. The Respondent's advocate replied on September 30th, to the effect that there were no grounds for terminating the contract of lease and that he held the company liable to its terms and to the payment of the agreed rent.

3. The company failed to pay the promissory note for LP. 112.500 mils due on the 1st October, 1936, and in consequence the Respondent started an action on the note before the Chief Magistrate, Haifa. The hearing commenced on the 24th December, 1936. The following two issues were framed by the learned Chief Magistrate: —

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Ma dalani

- (a) Was defendant deprived of benefits contemplated by lease and if so to what extent?
- (b) Did that entitle him to cancel the lease?

4. The company called a large number of witnesses to show that, owing to danger from hostile Arabs, it was disabled from using the premises for the purposes of its business. Instead of allowing the Respondent to call evidence on this issue, which he was prepared to do, the learned Chief Magistrate decided to hear argument on the second issue. He then gave judgment for the Respondent on the ground that, if the company was disabled from using the premises, the cause of this prevention did not arise from the premises themselves but from the status of their occupants.

5. The company appealed to the District Court. There is a curious system in Palestine which allows a District Court to deal with an appeal from a Magistrate without hearing the parties or their advocates. The Judges read the proceedings in Chambers together with the grounds of appeal and any written reply thereto and then pronounce a decision. This was done in the present case. There is a certain amount of confusion in the judgment which may be due to this practice. The judgment states that "the Appellant does not raise the defence of lack of consideration but contends that he is not liable for rent after he has cancelled the lease". In spite of this, it states later "the defence of lack of consideration is misconceived", and again "he cannot avail himself of the defence of lack of consideration". The Court thought that the company might have a counterclaim because of the failure of consideration due to its rescission of the contract, but on the ground that the consideration for the note was the execution of the contract of lease by the Respondent it dismissed the appeal.

6. The District Court did not deal with the company's case as it was presented to the learned Chief Magistrate. That case was that the company was in the circumstances entitled to cancel the lease, and that consequently no further rent was payable. The promissory note having been admittedly made to cover rent in advance from a period subsequent to the cancellation, the company was not liable, as the lease was no longer in existence.

7. The presiding Judge granted leave to appeal to this Court, and formulated two points of law on which leave was granted. One of these was whether in the circumstances alleged a lessee is entitled to cancel a lease — a point on which he

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

himself had given no decision whatever. The other was whether a defendant may plead to an action on a promissory note the same defences as he might plead to an action for rent, if the promissory note was made to cover rent. This point did not arise before the learned Chief Magistrate, nor was any decision given on it by the presiding Judge of the District Court.

8. The only issue before us is whether the company was entitled to rescind, and in order to determine it, it is necessary to assume that, owing to the disturbances which broke out in April, 1936, it was impossible for the company to derive any further benefit from the lease.

9. The Court is indebted to Mr. Geiger for an able presentation of the case on behalf of the company. He relied on two decisions of this Court. The first case was Civil Appeal No. 43 of 1933, Yeshivath Hebron Kneseth Israel v. Khatib. In that case a Jewish Educational Institution rented from a man named Khatib a house in Hebron for two years, Muharram 1929 to Muharram 1931. The Institution paid the two years' rent in advance, LP. 170.- in cash and LP. 100.- in two promissory notes of LP. 50.- each. In August, 1929, riots broke out in Hebron and a number of Jews were massacred. It then became impossible for the Institution to continue to make any use of the premises. It sued Khatib before the District Court of Jerusalem for the refund of LP. 142.-, a proportionate part of the rent calculated from August, 1929, to Muharram 1931, and for the return of the two promissory notes. The District Court found that there were two separate contracts of lease, one for each year. It decided that, owing to the disturbances at Hebron, the Institution was entitled to rescind the first contract as from the date the disturbances broke out. As there were no disturbances during the second year, it held the contract for that year to be of full effect. It gave judgment in favour of the Institution, but for LP. 88.340 mils only, the proportionate part of the rent from the outbreak of the disturbances to Muharram, 1930.

10. The Institution appealed. This Court dismissed the appeal, holding that the finding of the District Court that there were no circumstances operating in the second year to enable the Institution to avoid the contract was a finding of fact which it would not interfere with. Khatib did not appeal, and there was consequently no decision on the point whether the disturbances at Hebron in 1929 afforded a ground for rescission of the first year's lease by the Institution.

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

11. The second case relied on by Mr. Geiger was Civil Appeal No. 77 of 1937, Blum v. Estate of Sursok and another. Blum had rented certain premises at Jaffa during the year 1936 and had paid LP. 78.- rent in advance with four promissory notes. Owing to the outbreak of the disturbances in April, 1936, to which I have already referred, Blum, who was a Jew, was unable to occupy the premises. He sued the lessors in the Magistrate's Court at Tel-Aviv for the return of the promissory notes, or their equivalent in value, LP. 78. The learned Magistrate found that the circumstances justified Blum in cancelling the lease and gave judgment in his favour for the return of the promissory notes or their value, less LP. 5.632 mils, rent due before the outbreak of the disturbances on the 19th April, 1936.

12. The lessors appealed to the District Court. That Court held that Blum was entitled to cancel the lease, but decided that rent was due to the lessors up to the date on which they received notice of the rescission. This decision altered that of the learned Magistrate by substituting LP. 27.732 mils for LP. 5.632 mils, as rent due to the lessors.

13. From this decision Blum appealed. This Court seems to have been under a misapprehension as to what was actually decided in the Yeshivath Israel case (supra). I quote from the judgment: —

"It was decided by this Court in Civil Appeal 43/33 in which the facts would appear to have been similar to these in this case, that in such circumstances the provisions of the Mejelle apply and the tenant is relieved of his obligations to pay rent".

14. This was clearly not so. This Court must have been misinformed as to what the actual decision was, but, in spite of this, it showed some uneasiness and went on to say that it expressed no opinion on the point. It reversed the finding of the District Court and restored that of the learned Magistrate.

15. It has been necessary to deal with these two cases at some length in order to show that neither of them is an authority for the proposition for which Mr. Geiger contends, as far as the judgments of this Court are concerned.

16. Mr. Geiger relies on certain Articles of the Mejelle. In a recent case before this Court, the Attorney General remarked that everything in Palestine is paradoxical. Certainly, nothing is more paradoxical than that, though there are three official

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

languages in Palestine, a large and important part of the written law is in a language which is not one of the three, namely, Turkish. There are, of course, translations from the Turkish into the official languages, but, as there are various versions, difficulties continually arise as to the correct translation of certain passages.

17. The Articles on which Mr. Geiger relies are Articles 404, 405, 420, 443, 470, 478, 513, 514, 515, 518. I am using Tyser's translation. Articles 404, 405 and 420 deal with the nature of the contract of hire, which includes the letting of houses, and the subject-matter of the contract is said to be "the benefit from a thing". Article 470 lays it down that rent becomes payable simultaneously with the power to receive the benefit, and the example given is that if a man hires a house, he must pay the rent, even if he does not live in it. The other articles are as follows: —

"Article 443 — When a valid impediment has appeared, which is an obstacle to the carrying out of the object of the contract, the letting is set aside.

For example — When a cook has been hired for a marriage festival, if one of the parties, going to be married, dies, the contract of hiring is annulled.

And in the same way, if a man, who is suffering from toothache, make a contract with a dentist to pull it out for so many piastres, and afterwards the pain goes away, the hiring is annulled.

Likewise by the death of the person, who seeks for a wet nurse, the hiring is not annulled, but by the death of the child or of the milk mother, the hiring is annulled.

Article 478 — If the benefit from the thing hired ceases to exist, then the rent becomes no longer payable.

For example — If there is need for the repair of a bath, if it remains unused during that time, the share of the hire for that time is not payable.

Likewise, if there is an idle time, consequent on the water of a mill being cut, the rent is considered not to be payable from the time of the cutting of the water.

1937

16th September

Manning S.P.J.
Greene J.

and
Frumkin J.

CA 138/37

"Palwoodma"

v.
Majdalani

But the lessee, if he has not made flour, if he has in any way used the house of that mill, he must pay that part of the sum payable for rent, which is attributable to it.

Article 513 — As in sale, there is also an option for defect in hiring.

Article 514 — In hiring a defect, which gives an option, is a thing which causes the putting an end to, or loss of, the intended benefit.

For example — By a house being wholly destroyed and by the cutting of the water of a mill, by reason of there being a putting an end to the desired benefit, or, by the settling of the frame of the roof of a house, or the falling down of a part of a place which is detrimental to habitation, or the back of a hired horse being galled, by reason of all these causing damage to the intended use, these, as regards a contract of hiring, are defects giving a right of option. But defects which do not interfere with the use, like the mane or tail of a horse being cut, or the falling of the plaster in a house to an extent that the rain and cold do not come inside, in a hiring, are not a cause of option.

Article 515 — If there occur a recent defect in the hired thing, before taking the benefit of it, it is as though it had existed at the time of the contract.

Article 518 — If the hirer wishes to annul a hiring before the removal of a recent defect which interferes with the benefit, he can do so in the presence of the letter, but he cannot do so in his absence.

And if, in the absence of the letter, that is to say, without giving him notice, he rescinds the hiring, the rescission is not held good, and the rent of the hired thing is paid as before.

But in case of the complete destruction of the desired benefit, in the absence of the letter, he can annul it.

And whether he annuls it, or whether he does not, in accordance with what is said in Article 478, the rent cannot be enforced.

For example — if part of a house falls down and damages the benefit from a house

1937

16th September

Manning S.P.J.
Greene J.

and
Frumkin J.

CA 138/37

"Palwoodma"

v.
Majdalani

which is let, the hirer can rescind the hiring, but it is necessary that the rescission should be made in the presence of the letter. If he leaves the house without giving him notice, the payment of the rent is necessary, as if he had not left.

But if the house has altogether tumbled down, the hirer can annul the letting, without there being any necessity for the presence of the letter. And in any case the rent is not payable.

18. The meaning of the words "valid impediment" in Article 443 can be gathered from the examples given. Two of these examples deal with cases where the deaths of persons rendered impossible the fulfilment of the contract. The case of the toothache has always struck me as one of those flashes of humour which occasionally illuminate the pages of the *Mejelle*, but it may be explained on the ground that the whole basis of the contract was that the tooth should continue to ache. The principle to be gathered is that the words "valid impediment" mean that both parties, when making the contract, contemplated the continued existence of certain persons or things, and if these persons or things ceased to exist, the contract was at an end.

19. These considerations show that Article 443 does not apply to the circumstances of this case. The continued existence of peace in Palestine was not a matter within the contemplation of the parties when they made the agreement in December, 1935. When peace ceased to exist in April, 1936, and, as the company contends, it became dangerous for it to occupy the leased premises, this did not constitute a "valid impediment" to the fulfilment of the contract.

20. Article 478 is expressed in very general terms, but taken with the examples, the same principle can be gathered from it as from Article 443. When a bath is hired, both parties understand that it is a bath, and if, owing to need of repair, it cannot be used as a bath, the hirer is excused from paying rent until it is repaired. Mr. Geiger laid great stress on the example of the mill and argued that the cutting off of the water was analogous to the circumstances of this case. But this is clearly not so. The mill is a mill the machinery of which is worked by water, and, when it is leased, both parties contemplate that the water will continue to flow. The mill was not let as a mere building, it was let because it was situated near running water,

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

and with the understanding of both parties that no benefit could arise unless the water continued to run. The examples given also illustrate a useful point, namely, that the ceasing of the benefit must be due to something defective in the thing hired, or to the absence of something without which the thing hired loses its character and is no longer available for the purpose for which it was hired. If the benefit in the present case ceased to exist, it was because the lessees were members of the Jewish community — there was no defect in the premises hired and there was nothing to prevent the premises from being used for the purpose for which they were let.

21. Articles 513 and 514 set out the law which regulates the rescission of a contract of hire on account of a defect. They cover much the same ground as the Articles I have already dealt with. A defect is something which puts an end to, or causes the loss of, the benefit. The cutting of the water of the mill is again given as an example. The other examples show that the defect must be a defect in the thing hired.

22. Articles 515 and 518 deal with the case of a defect arising between the making of the contract and the commencement of the lessee's use. The term "defect" meaning a defect in the thing hired or in something appurtenant and necessary thereto, these articles do not apply to the circumstances of this case.

23. From what I have said it is clear that I do not agree with Mr. Geiger when he argues that these Articles of the Mejele support his contention. I agree with Mr. Sanders, advocate for the Respondent, that the Article of the Mejele which most nearly applies to the facts is Article 479, which is as follows: —

"Article 479 — A person by alleging that, after he had rented and taken possession of a shop, there was a time when it was impossible to do business, by reason of the occurrence of a stagnation in the business for selling and buying, and that the shop remained closed, cannot refuse to pay the rent for that time."

The company alleges that it was impossible to do business. The stagnation was not due to ordinary causes such as a slump in trade, but to the hostility of the Arab population. This, however, makes no difference to the principle to be gathered, which is that if the impossibility to do business

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

arises from some external cause which has no connection whatever with the leased premises or with anything necessary to their use, then rent continues to be payable and the tenant must bear the loss.

24. References have been made to English Law and there is little difference in principle between it and the Ottoman Law. The following passages in Halsbury's Laws of England, 2nd Edition, Vol. 7, pp. 208 and 210, show that under English Law the company is not entitled to any relief: —

"Impossibility, as an excuse for non-performance, must as a general rule be a physical or legal impossibility, and not merely an impossibility with reference to the ability and circumstances of the promisor."

"The ordinary rule is that, where the law creates a duty, and the person on whom it is imposed is disabled from performing it, without any default of his own, by the act of God or the King's enemies, the law will excuse him; but when a person by his own contract unconditionally undertakes a duty he is bound to perform it or take the consequences, notwithstanding any accident by inevitable necessity".

25. The company alleges impossibility, but it is not a physical or legal impossibility, the impossibility is due to the fact that the company belongs to the Jewish community. The company says it is disabled from performing its promise by the act of the King's enemies, but the duty was not created by law, it was a duty unconditionally undertaken by the company.

26. The other aspect of the matter is treated in the same volume of Halsbury at p. 213: —

"Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing, without which the contract cannot be fulfilled, will continue to exist . . . , the contract, though in terms absolute, is to be construed as subject to an implied condition, that if before breach performance becomes impossible without default of either party and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance".

The specified thing in this case which ceased to exist was peace in Palestine and there is nothing in the contract or its surrounding circumstances to indicate that it was an implied condition of the agreement that this should continue.

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

27. Recent English decisions indicate a tendency to restrict the doctrine of frustration, and the doctrine has never, as far as I am aware, been applied to a contract for the lease of premises. *Whitehall Court Ltd. v. Ettliger*, 1920, 1 K.B. 680, was a case somewhat similar to the present one. Two flats had been leased to Ettliger for the three years, 1915 to 1918. In 1917 the military requisitioned the flats and were still in possession when the leases expired in 1918. Ettliger had had to vacate the flats in 1917 when the military took possession, and contended that he need not pay rent from the time he vacated them. The Court held him liable on the ground that the tenancy had not been determined by the requisitioning of the flats and that the doctrine of frustration did not apply to a contract which created an estate by demise. This case was cited with approval in the House of Lords in the case of *Matthey v. Curling*, 1922, 2 A.C. 180.

28. I am fully in agreement with the learned Chief Magistrate in his decision that, assuming it was impossible for the company to derive any benefit from the lease after the 19th April, 1936, the company was not entitled to put an end to the contract and to refuse to pay any further rent. The lease commenced on April 1st, 1936, and it was after this date that the circumstances arose which, in the opinion of the company, made it impossible to derive the benefit. The Ottoman Law on the subject, in my interpretation of it, does not contain any provision entitling the company to relief. If the Ottoman Law is considered too vague and general to extend and apply to the circumstances of the case, the principles of English Law may be resorted to, and these are fatal to the company's case. The appeal should, in my opinion, be dismissed with costs, to include LP. 15. - advocate's fees.

Greene J.: The facts giving rise to this appeal are as follows: —

On or about March, 1936, Appellants obtained a lease from Respondent for two showrooms and a store situated in Nazareth Street, Haifa. The lease was for a period of two years commencing 1st April, 1936. Under the terms of the lease, the rent was payable every six months in advance, and Appellants paid the sum of LP. 25. - in cash on the date of the execution of the lease in respect of the first six months, and delivered to Respondent four promissory notes, one for LP. 87.500 and three for LP. 112.500 each for the due payment of the balance of rent.

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

Appellants occupied the premises in the early part of April, 1936, and shortly after they had entered into occupation the disturbances broke out.

Appellants took the view that the street where the premises were situated was an unsafe place for Jews to carry on business in, and decided that it was impossible to make any further use of the leased premises. There was some correspondence between the parties, and Appellants through their advocate sent a letter to Respondent dated 15th September, 1936, cancelling the contract of lease on the grounds that they had been deprived of the benefits contemplated by the lease, and asking for return of the rent already paid in advance and of the three promissory notes in the possession of the Respondent.

The Respondent's advocate replied on the 30th September to the effect that there were no grounds for terminating the contract of lease and that he held the Appellants liable to its terms and to the payment of rent due.

Appellants refused to pay the secured instalment of rent due on the first October, 1936, and an action was lodged by Respondent against Appellants for the amount of LP. 112.500 mils, representing the rent in respect of the period 1st October, 1936, to 31st March, 1937.

The learned Chief Magistrate divided this case into two issues: —

- (1) Were Appellants deprived of benefits contemplated by the lease, and if so, to what extent?
- (2) Did that deprivation of benefit entitle them to cancel the lease?

Appellants called thirteen witnesses to establish the fact that, owing to the danger from hostile crowds in the street where the premises leased were situated, the Appellants had to quit the premises as soon as the disturbances broke out, owing to considerable danger from hostile crowds of Arabs.

The Respondent was not called upon to give evidence on this issue.

The learned Chief Magistrate decided to hear arguments on the second issue. He then gave judgment for the Respondent, on the grounds that, if Appellants were prevented from using the premises, the cause did not arise from the premises themselves, but from some external cause, namely, the disturbances in the streets. Appellants appealed to the District Court.

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

The District Court in giving judgment decided that the claim of the Respondent is upon a promissory note and not upon the consideration for which it was alleged to be given, viz. rent.

On the ground that the consideration for the note was the execution of the contract of lease by the Respondent, the Court dismissed the appeal.

The District Court did not deal with the Appellants' case as it was presented to the learned Chief Magistrate.

The only issue before us is whether the Appellants were entitled to cancel the lease and, in order to determine it, it is necessary to assume that, owing to the revolt which broke out in April, 1936, it was impossible for the Appellants to derive any benefit from the lease.

I have had the privilege of reading the judgment of the learned Senior Puisne Judge, who deals very fully with the cases cited by Mr. Geiger, and I entirely agree with the learned Judge's finding on the cases cited.

Mr. Geiger for appellants relies on Articles 404, 405, 420, 443, 470, 478, 513, 514, 515 and 518 of the Mejelle.

The learned Senior Puisne Judge has dealt very fully with the articles of the Mejelle quoted, and I need only say I am in complete agreement with him on all points raised.

Article 479 is significant. I am using Hooper's translation: If a person takes a shop on hire and is given delivery thereof and alleges that on account of slackness of business his trade has stopped and his shop has been shut, such person cannot refuse to pay rent for that period.

Article 513 deals with defect in the case of a contract of hire, as in a contract of sale.

Defect must be something inherent in the subject-matter, something internal. The meaning of the word "defect" can be gathered from the examples given in Article 514 — A house is entirely destroyed; the utility of a mill is negatived by the water being cut off; the frame of the roof of a house sinks; a place is knocked down so as to be unsuitable for habitation. In all these cases there is an option for defect, if they are taken on hire, on account of the benefits sought to be obtained being destroyed.

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

If the benefit in the present case ceased to exist, it was because the lessees were afraid to carry on business, owing to the disturbances in the district where the premises were situated. There was no defect in the premises hired and there was nothing to prevent the premises from being used for the purpose for which they were let. It is clear in this case that the impossibility to do business alleged by the Appellants was not due to ordinary causes, but to the hostility of the Arab people, in the district. This was due to some external cause which has no connection whatever with the leased premises or anything necessary to their use, the rent continued payable and the tenant must bear the loss.

For the above reasons, I am in agreement with the judgment of the learned Chief Magistrate that the faults or defects or deficiencies which do not spring from the premises themselves but only arise from the status of their occupants give no right to cancel the lease. The obligations incurred by the Appellants to pay the rent continued, and there was no failure of consideration.

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

Frumkin J: The legal point involved in this case depends upon the proper construction of Article 443 of the Mejelle, as this article is the only authority under which the Appellant could possibly succeed.

2. I need not go over again the grounds so masterfully covered by my learned brother Manning in his very instructive judgment. Before dealing with the point I want however to say a few words as regards the two cases referred to all through the proceedings in this trial as precedents for the present case, so much so as I happened to be a member of the Bench on the two occasions.

3. In the so called Hebron case the point did not come up for decision. There was no appeal by the landlord who was deprived from rent for a certain period during which the disturbances took place but there was an appeal by the tenant who wanted to be exempted from payment of rent for another period during which it was found that no disturbances took place.

4. In the second case (C.A. 77/37) again the tenant succeeded in his case in the lower Courts on the main issue that he is not to pay rent during the disturbances and the point on

1937
16th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CA 138/37
"Palwoodma"
v.
Majdalani

appeal was as from what date exactly the exemption begins. He was not satisfied with the commencing date and he appealed. But there was no appeal by the other side, i.e. the landlord, on the main point of exemption.

5. It follows that in neither case was there a decision by this Court determining the point, which could now be approached with no authority to follow.

6. In the present case we have the advantage of having before us the very learned and exhaustive judgment of the Chief Magistrate and the able pleadings of counsel for both sides, and in the light of the arguments advanced I feel inclined to agree with my learned brethren that the impediment dealt with in Article 443 of the Mejlle must be one inherent in the leased property and not in surrounding circumstances which are not within the control of the lessor to remedy.

7. It is only when such an impediment exists that Article 518 comes into operation governing the period from when exemption to pay rent begins, depending upon the fact of the extent of the impediment and whether or not notice was given.

8. In the circumstances I concur in the results reached by my learned brother presiding followed by my brother Greene, to the effect that the appeal be dismissed with costs to include LP. 15 advocate's fees.

Criminal Appeal No. 96 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Frumkin J.

1937
17th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CRA 96/37
Zwanger
and another
v.
Sheinzwit

- 1. NECHAMA ZWANGER
- 2. GUARDIANS OF THE FOUR DAUGHTERS OF THE LATE JACOB ZWANGER Appellants.
- v.
- REUBEN SHEINZWIT Respondent.

Compensation in lieu of diyet — Maximum sum a Criminal Court may award, no matter how many are the claimants — Civil and Religious Courts (Jurisdiction) Ordinance, Section 6(2).

1937
17th September
Manning S.P.J.
Greene J.
and
Frumkin J.
CRA 96/37
Zwanger
and another
v.
Sheinzwit

The maximum sum which a Criminal Court may award as compensation in lieu of diyet under Section 6(2) of the Civil and Religious Courts (Jurisdiction) Ordinance is LP. 250, no matter how many the claimants of compensation may happen to be — So ruled by the Supreme Court sitting as a Court of Appeal.

Henry E. Baker for appellants.

N. Abcarius for respondent.

Manning, S.P.J.: 1. The respondent in this appeal has been convicted of the manslaughter of a person named Zwanger. After the conviction there was an application to the trial judge for compensation in lieu of diyet under section 6 sub-section (2) of the Civil and Religious Courts (Jurisdiction) Ordinance, Cap. 18. The trial judge made an award of LP. 250. It is said by the appellants that that award was made on a wrong basis; namely that the trial judge thought that according to the law he was not entitled to make any award exceeding LP. 250. We shall assume that the award was made on that basis.

2. Mr. Baker, who argued the appeal, laid particular stress on the wording of section 6 sub-section (2) which is as follows:

"A criminal court may, if it sees fit, in any case in which a prosecution for homicide or injury to a member is brought, and at the request of a person entitled to diyet, award any sum not exceeding two hundred and fifty pounds as compensation in lieu of diyet, and shall not be bound in making such award by the rules of the Sharia Law: the amount awarded shall be recoverable as a civil debt: where an order has been made under this provision no further claim for diyet shall be brought before a Moslem religious court."

3. Mr. Baker points to the words "at the request of a person entitled to diyet" and says that those words must mean that each person entitled to diyet may make a request and may be awarded a sum not exceeding LP. 250. We do not agree with that interpretation. The words following "diyet" in the sub-section have to be carefully construed and those are "award any sum not exceeding two hundred and fifty pounds as compensation in lieu of diyet". The sub-section does not say "at the request of a person entitled to diyet; award any sum not exceeding two hundred and fifty pounds as compensation in lieu of diyet to each such person". It is quite clear that the compensation is fixed in general as a lump sum divisible among all persons entitled to diyet. We think that if compensation is

1937
17th September

Manning S.P.J.
Greene J.
and
Frumkin J.

CRA 96/37
Zwanger
and another
v.
Sheinzvit

to be awarded at all in cases of this kind the limiting of the compensation to a total sum of LP. 250 may work very great hardship in many cases. In the great majority of cases, where the deceased was the breadwinner of the family, it is obvious that the sum of LP. 250 is altogether inadequate.

4. The law being as it is we are unable to increase the amount. The decision of the Chief Justice must be affirmed, and this appeal will be dismissed without any costs as respondent's advocate is not asking for costs.

Greene J: I concur with the judgment of the Senior Puisne Judge and have nothing to add: without expressing any opinion as to the adequacy of the compensation awarded.

Frumkin J: I concur and wish to add that I would be happy if the law would allow the Courts to examine the adequacy of the compensation to be awarded in each particular case according to its merits, taking into consideration the position of the deceased, the needs of the claimants, and the financial abilities of the convicted person. It is unfortunate that the Courts are deprived of this power. The law, as it stands at present, fixes the amount which could be awarded at LP. 250, and the Courts are bound by this maximum. The appeal must, therefore, be dismissed.

Civil Appeal No. 139 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Frumkin J. and Abdulhadi J.

1937
22nd September

Manning S.P.J.
Frumkin J.
and
Abdulhadi J.

CA 139/37
Aboulafia

v.
Felman
and another

JACOB ABOULAFIA Appellant.

v.

1. A. FELMAN
 2. A. LIVAY
- as liquidators of the
Jedda Textile Works Ltd. Respondents.

Proof, Burden of — Procedure, Irregularity of — A party failing to discharge the burden of proof on him must not be given a chance for satisfying that burden.

If a party on whom the burden of proof lies fails to satisfy the Court, then he must fail on the particular issue, and the Court must not adjourn the hearing in order to give that party an opportunity of proving that issue, for to adopt such a course will be an irregularity gravely prejudicial to the other party who will have succeeded on this issue, were it not for that course of action adopted.

D. Maman for appellant.

David Bar Rav Hay for respondents.

Manning, S.P.J: 1. This is an appeal on leave granted by the presiding judge of the District Court of Haifa. The respondent had sued the appellant before a Magistrate for the price of goods supplied. There had been a denial of certain items by the appellant and in respect of them the respondent called witnesses. The learned Magistrate reserved his decision, but on the day which he had fixed for its delivery he decided to give the respondent an opportunity of calling further witnesses to prove an item of LP. 34.638. The witnesses were called, the learned Magistrate was satisfied as to the item and gave judgment for the respondent for LP. 89.638. In deciding an appeal by the appellant the District Court held "that the hearing of further evidence was not an irregularity of procedure of such a nature as to prejudice the proper determinations of the case".

2. There were other circumstances to which it is necessary to draw attention. It is admitted that at the hearing when the further evidence was being called the appellant's advocate was ill and that another advocate, to whom he had given a delegation but who knew nothing about the case, asked for an adjournment on this ground. The respondent's advocate agreed to an adjournment but the learned Magistrate decided that the case must go on. It was said that the reason for his so deciding was that the case had already taken a considerable time and he was anxious to finish it. The result, however, was that there was no proper opportunity to cross-examine the additional witnesses and to call evidence in rebuttal. The learned Magistrate had apparently forgotten the well known maxim that justice delayed is better than injustice accelerated.

3. With regard to the general question, when issues are joined in a civil case the burden of proof lies on one party or the other. If the party on whom the burden lies fails to satisfy the Court, then he must fail on the particular issue. In the present case the learned Magistrate had decided that the burden of proving the item of LP. 34.638 lay on the respondent. The

1937
22nd September

Manning S.P.J.
Frumkin J.
and
Abdulhadi J.

CA 139/37
Aboulafia

v.
Felman
and another

1937
22nd September
Manning S.P.J.
Frumkin J.
and
Abdulhadi J.
CA 139/37
Aboulafia
v.
Felman
and another

respondent's advocate led such evidence as he had at his disposal and closed his case. It is clear that he failed to satisfy the learned Magistrate. If the learned Magistrate had given his decision on the day in which he decided to do so, he must have found for the appellant in this issue. But he chose instead to say in effect to the respondent, "You have not proved this item, but I shall adjourn to give you a further opportunity of proving it". In my opinion such a course of action is open to the suggestion that the learned Magistrate was anxious that the respondent should succeed, and it was an irregularity which gravely prejudiced the appellant, as, if it had not been done, the appellant must have succeeded in this issue. Taken in conjunction with the refusal to adjourn and the consequent detriment to the appellant, the latter was certainly justified in urging before us that he had not had a fair trial as regards this item of LP. 34.638. I think that the proper course to take is to set aside the judgments of the District Court and the learned Magistrate and to substitute a judgment for the respondent for LP. 55.- only. The appellant should have his costs here and in the District Court, such costs have to include an advocate's fee of LP. 5.-

Frumkin J: I concur.

Abdulhadi J: I concur.

Civil Appeal No. 149 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

1937
28th September
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 149/37
Kronhauz
v.
Heiman

SHLOMO KRONHAUZ Appellant.

v.

BARUCH HEIMAN Respondent.

Arbitration — Submission to two arbitrators — Authority to arbitrators to elect a third one if they may find it necessary — One of the arbitrators refused to elect a third arbitrator — Power of Court to nominate a third arbitrator — Arbitration Ordinance, Section 6 (1)(c).

The parties to this appeal submitted the differences between them to two arbitrators named in the submission, and they authorised the two arbitrators to elect a third one if they found that

course was necessary in order to reach a decision by majority. Apparently the two arbitrators were unable to agree, and one of them also refused to agree to the election of a third arbitrator. Consequently the appellant sent notices to the arbitrators and to the respondent requesting them to appoint a third arbitrator, and on their failure to comply with the notices within fifteen days appellant applied to the District Court of Haifa (Civil Case No. 47/37) for the appointment of a third arbitrator, but the District Court refused his application. The appellant appealed.

In allowing the appeal and remitting the case to the District Court, the Court of Appeal,

HELD that the District Court was wrong in not appointing an additional arbitrator in accordance with the provisions of Section 6 (1)(c) of the Arbitration Ordinance.

Dov Tovbin for appellant.

Respondent in person.

Judgment: It appears to us that this is an application to the District Court within the meaning of Section 6(1)(c) of the Arbitration Ordinance. The District Court took the view, apparently, that that provision did not apply and refused to appoint an additional arbitrator. In our view, the District Court was wrong in so doing.

The judgment of the District Court will therefore be quashed and the case remitted to it to comply with that provision, with costs of this appeal and LP. 3 advocate's fees.

Criminal Appeal No. 101 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Khayat J.

MUHYEDDIN RUSLAN Appellant.

v.

ATTORNEY GENERAL Respondent.

Criminal law — Election — Time at which right of election of trial has to be exercised by an accused — Magistrates' Courts Jurisdiction Ordinance, 1935, Section 3(1).

1937
28th September
Trusted C.J.
Frumkin J.
and
Khayat J.
CA 149/37
Kronhauz
v.
Heiman

1937
30th September
Trusted C.J.
Greene J.
and
Khayat J.
CRA 101/37
Ruslan
v.
Attorney General

1937
30th September
Trusted C.J.
Greene J.
and
Khayat J.
CRA 101/37
Ruslan
v.
Attorney General

When an accused is brought before a Magistrate's Court for trial, he must be charged before he exercises his right of election to be tried by a British Magistrate or by a District Court under Section 3(1) of the Magistrates' Courts Jurisdiction Ordinance, 1935. If the accused alleges that the procedure laid down in the Section had not been followed, it is for him to prove his allegation.

M. Ben Israel for appellant.

Assistant Government Advocate (Fawzi Ghussein) for respondent.

Judgment: The first point which is raised in this appeal is a technical point which concerns the construction of Section 3(1) of the Magistrates' Courts Jurisdiction Ordinance, 1935. We think that it is clear from that Section that an accused person should be charged before his election. So far as this particular case is concerned, it is for the Appellant to prove to us that the procedure laid down in Section 3(1) was not properly followed, and this he has not done; moreover, it is quite clear from the record that the accused was represented by an advocate, and if the procedure was not strictly complied with we do not think any miscarriage of justice has occurred.

The second point raised is the question of sufficiency of evidence under Section 6 of the Evidence Ordinance. In this case there was not the evidence of a single witness but of two witnesses, both Police constables. The first constable said:

"When I arrested him he had no passport on him and admitted to me that he entered Palestine without a permit, he did not mention to me the date of entry into Palestine."

The second constable later took a statement from the accused which he reduced into writing and to which the accused affixed his thumbprint.

These witnesses were called at the trial and accused did not deny the statements. We are of opinion that there was sufficient evidence against him.

The appeal will be dismissed.

Criminal Appeal No. 104 of 1937.
In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Khayat J.

ATTORNEY GENERAL Appellant.

1. DIAB MOHAMMAD ABU ZARAD
2. HAMDAD ABU BAKER HINDAWI
3. MOHAMMAD ABDEL RAHMAN SALEH
4. SHEHADEH MOHAMMAD HINDAWI
5. HASSAN ABDEL RAHMAN
ABU HINDAWI

Respondents.

1937
30th September
Trusted C.J.
Greene J.
and
Khayat J.
CRA 104/37
Attorney General
v.
Abu Zarad
and others

Appeals — An appeal does not lie from judgment of a District Court discharging an accused on ground that that accused was not committed for trial before it either by an examining magistrate or by the Attorney General although accused was committed for trial before the Court of Criminal Assize — Criminal Procedure (Trial Upon Information) Ordinance, Section 67.

The respondents were committed by the Examining Magistrate for trial before the Court of Criminal Assize. The Attorney General, while staying the proceedings in the Court of Criminal Assize, filed an information in the District Court of Haifa in Criminal Case No. 135/37 charging the accused with theft. After the reading of the information and before the taking of the plea, respondents' advocate raised the point that the Court was not seized with the case as there was no order, either by the Examining Magistrate or by the Attorney General, committing the respondents for trial before it, although there had been an order committing them for trial before the Court of Criminal Assize. The District Court upheld the view taken by the defence and ordered the striking out of the information. The Attorney General appealed on the ground that the law was wrongly applied to the facts.

In dismissing the appeal, the Court of Appeal,

HELD that the appeal did not fall within Section 67 of the Criminal Procedure (Trial Upon Information) Ordinance, which section gives a limited right of appeal to the Attorney General.

Assistant Government Advocate (Fawzi Ghussein) for appellant.

Elias Koussa for respondents.

1937
30th September
Trusted C.J.
Greene J.
and
Khayat J.

CRA 104/37
Attorney General

v.
Abu Zarad
and others

Judgment: We agree that this appeal does not fall within Section 67 of the Criminal Procedure (Trial Upon Information) Ordinance which gives a limited right to the Attorney-General. The result is unfortunate, for in cases such as this an appeal might be useful. It may be a question for the proper authority to consider whether that section should be extended in its scope.

With regard to the main point, we feel that there may be doubt if the District Court was right in the judgment it gave. It is certainly inconvenient, not least to the accused persons, that when a charge is made before the Court of Criminal Assize and that charge be changed that it should not be possible for it to be disposed of immediately by the District Court, and it has been the practice not infrequently, when the Attorney-General has varied the information, for a District Court then and there to be constituted to dispose of the case. If the practice is wrong the accused person may be remanded to prison for some time before he can be tried, which is an unfortunate result. This again is a matter which the proper authority may wish to consider.

We do not decide the main point because we hold that this appeal does not fall under Section 67.

The appeal will therefore be dismissed.

Criminal Appeal No. 96 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Frumkin J.

REUBEN SHEINZWIT Appellant.

ATTORNEY GENERAL Respondent.

Criminal Law — Not necessary that there must be an eye-witness to a crime in every criminal case — Evidence Ordinance, Section 6.

Motive — Prosecution not bound to prove motive in a case of homicide.

The appellant was charged before the Court of Criminal Assize, sitting at Jerusalem, in Criminal Assize Case No. 20/37, with murder contrary to Section 214 of the Criminal Code Ordinance, 1936. The Court of Criminal Assize, constituted of the Chief Justice (Trusted C.J.) sitting alone, from the evidence before it, found the appellant guilty of manslaughter and sentenced him to fifteen years imprisonment. The appellant appealed. The two main grounds of appeal were: (1) that there must be an eye-witness to a crime in every criminal case and (2) that no motive was proved by the prosecution.

In dismissing the appeal, the Court of Appeal,

HELD (1) that Section 6 of the Evidence Ordinance did not mean that there must be an eye-witness to a crime in every criminal case.

(2) that though evidence of motive may be of considerable weight in a case of murder, yet the prosecution is not bound to prove it in a case of homicide.

Referred to: CRA 43/33.

The relevant facts sufficiently appear from the judgment.

N. Abcarius for appellant.

Solicitor General (Alan Rose) for respondent.

Manning, S.P.J.: 1. On the 27th July, 1937, before the Chief Justice sitting alone, the Appellant was convicted of the manslaughter of one Jacob Zwanger. The facts as found by the Chief Justice were as follows: —



1937

8th October

Manning S.P.J.
Greene J.
and
Frumkin J.

CRA 96/37

Sheinzwit

v.
Attorney General

On the 19th February 1937 the Appellant wrote a letter signed Bidderman inviting Zwanger to meet him near a hotel at Petah Tiqvah. There was no such person as Bidderman and the Chief Justice came to the conclusion that the Appellant wrote the letter to divert suspicion from himself and cast it upon the non-existent Bidderman, if necessity should arise. On the 8th March, 1937, the Appellant caused a pit to be dug alongside a water tower at his property at Tel Nof. People living in the immediate vicinity were warned that the water tower had been electrified and to keep away from it. As a matter of fact, the tower had never been electrified. The Appellant took away the keys from the watchman and told him to go away.

2. On the 10th March, 1937, Zwanger met the Appellant by appointment at the Appellant's office at Tel Aviv. The Appellant's secretary was present and was sent out on a message. The Chief Justice found that the Appellant sent her out in order to get her out of the way. On the 11th March, 1937, it was found that the pit near the water tower had been filled in. The pit was re-opened on the 28th March, 1937, and in it was found the dead body of Zwanger. The medical evidence showed that in all probability the cause of death had been strangulation and that other wounds found on the body had been inflicted after death. A towel which had been in the Appellant's office was also found in the pit.

3. From these facts it is clear that the Chief Justice drew the following inferences. Firstly, that sometime prior to the 10th March the Appellant had made up his mind to kill Zwanger; that he made preparations to conceal the body and to prevent any outside persons from being in the vicinity at the time of the killing or the concealment; that he lured Zwanger on some pretext from his office to the water tower at Tel Nof on the morning of March 10th and put him to death there; that before leaving the office with Zwanger he took precautions to see that no one was about to see them leave together; and that after killing Zwanger he caused the body to be buried in the pit which had already been prepared for its reception.

4. These were, in my opinion, entirely justifiable inferences. Abcarius Bey, who argued the appeal on behalf of the appellant, was at great pains to comb through the judgment of the Chief Justice in order to find some mistake in dealing with the evidence. He claims to have found one such mistake, namely that the Chief Justice said there was evidence that the Appellant had at first denied all knowledge of the Bidderman letter,

whereas no such evidence appears in the record. The importance of the Bidderman letter depended on the facts that the Appellant had written it and that there was no such person as Bidderman. Whether the Appellant at first denied or admitted having written it could not disturb the inference which the Chief Justice drew from it.

5. Abcarius Bey further contests the finding that the Appellant caused the pit to be dug alongside the tower. He bases his argument on meticulous comparison of times testified to by certain witnesses as to the events of March 8th. He says that this testimony shows that the Appellant could not have been present while the pit was being dug. I do not gather that the Chief Justice made any finding that the Appellant was present during the whole time that the pit was being dug; he found that the Appellant was responsible for its being dug before the 10th March.

6. Abcarius Bey next turned to the question of the alibi of the Appellant. The Appellant had called witnesses to prove that it was impossible that he had taken Zwanger to Tel Nof on the morning of the 10th March. It is clear that the Chief Justice did not believe these witnesses. He analysed their evidence very carefully, and came to the conclusion that the only reliable evidence was that of one Litvinsky. His evidence showed that the Appellant might easily have taken Zwanger to Tel Nof on the morning of March 10th and having put him to death returned to Tel Aviv to meet Litvinsky at the hour given by him. This ground of appeal is simply a complaint by Abcarius Bey that an alibi which was probably carefully prepared failed to deceive the Chief Justice.

7. The next ground of appeal was based on Section 6 of the Evidence Ordinance, which reads as follows: —

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

The section is rather unhappily worded, as applied to criminal cases it simply means that no one shall be convicted on the evidence of one witness unless the number of witnesses is more than one. However this may be, Abcarius Bey cannot call it in aid to assist the Appellant. The Appellant has not been

1937

8th October

Manning S.P.J.
Greene J.
and
Frumkin J.

CRA 96/37

Sheinzwit

v.
Attorney General

1937
8th October
Manning S.P.J.
Greene J.
and
Frumkin J.
CRA 96/37
Sheinzwit
v.
Attorney General

convicted on the evidence of one witness, the evidence against him consisted of the testimony of a number of witnesses, the joint effect of which was to lead to a strong presumption of the guilt of the Appellant. I am completely against the suggestion of Abcarius Bey that the section means that there must be an eye-witness to the crime in every criminal case.

8. The last ground of appeal is that no motive was proved and Abcarius Bey cited as an authority the case of Joda and Anor v. The Attorney General, Criminal Appeal No. 43 of 1933. The District Court of Jaffa had convicted two persons of the murder of one Shahin and had found evidence of motive. On appeal this Court held that the evidence did not show enmity between the accused and the deceased and held that in the absence of such evidence there was not sufficient evidence to support the conviction. I do not think that this Court meant to lay down the principle that motive must be proved in a case of murder. Any such principle would be bad law and I wish to make it clear in this decision that, though evidence of motive may be of considerable weight, the prosecution is not bound to prove it in a case of homicide.

9. I think that this is a frivolous appeal. The Appellant had the advantage of a very careful trial and was given the benefit of every reasonable doubt. In my opinion the appeal should be dismissed and the conviction and sentence affirmed, the sentence to date from the date on which we announced the dismissal of the appeal, September 17th, 1937.

Greene J: I concur.

Frumkin J: I concur.

Criminal Appeal No. 115 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Khayat J.

ARIEH KUTSHER Appellant.

v.

ATTORNEY GENERAL Respondent.

Appeals — No appeal lies under the Palestine (Western Wailing Wall) Order in Council 1931, Article 3.

1937
8th October
Trusted C.J.
Greene J.
and
Khayat J.
CRA 115/37
Kutsher
v.
Attorney General

In Criminal Case No. 252/37 of the District Court, Jerusalem, Kutsher was charged with blowing the horn (Shofar) contrary to Article 3 of the Palestine (Western Wailing Wall) Order in Council and Section 5 of the Schedule thereto. He pleaded guilty and was sentenced to six months imprisonment. He appealed.

In dismissing his appeal, the Court of Appeal,

HELD that the appeal could not be entertained, as no appeal lay under the Palestine (Western Wailing Wall) Order in Council.

E. Washitz for appellant.

Assistant Government Advocate (Fawzi Ghussein) for respondent.

Judgment: We take the view that there is no appeal under the Palestine Order-in-Council (Western Wailing Wall) 1931. This appeal therefore cannot be entertained by this Court.

With regard to the particular case, it is not necessary for me to point out the gravity of an act of this kind and we feel that the sentence was justified.

Owing, however, to the present state of the Appellant, I order, in my capacity as Chief Justice, that he be given special treatment.

The appeal is therefore dismissed.

Criminal Appeal No. 114 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Abdulhadi J.

ABDUL FATTAH DEIFALLAH
ABU HUSSEIN Appellant.

v.

ATTORNEY GENERAL Respondent.

Criminal law — Firearms — Prosecution for possession of firearms — Maximum punishment for offence six months imprisonment — If firearm of military value maximum penalty three years — To obtain a conviction for possession of firearms of military value prosecution must prove the element of the firearm being of military value — Firearms Ordinance, Section 36.

1937
8th October
Trusted C.J.
Greene J.
and
Khayat J.
CRA 115/37
Kutsher
v.
Attorney General

1937
9th October
Trusted C.J.
Greene J.
and
Abdulhadi J.
CRA 114/37
Abu Hussein
v.
Attorney General

1937
9th October
Trusted C.J.
Greene J.
and
Abdulhadi J.
CRA 114/37
Abu Hussein
v.
Attorney General

In Criminal Case No. 216/37 of the District Court, Jerusalem, Abu Hussein was charged with being in possession of serviceable firearms and live ammunition without authority or licence contrary to Regulation 8A of the Emergency Regulations, 1936. After Abu Hussein had pleaded guilty to the charge, the prosecution applied to amend the charge to be contrary to Section 36 of the Firearms Ordinance, and the Court ordered an amendment. Subsequently the Court passed a sentence of eighteen months imprisonment. Abu Hussein appealed.

In convicting appellant of being in possession of firearms contrary to Section 36 (2) (a) of the Firearms Ordinance and reducing the sentence to one of six months imprisonment, the Court of Appeal,

HELD that in a prosecution for being in possession of firearms of military value, there must be evidence, in order to bring the offence within the proviso to Section 36 of the Firearms Ordinance, that the firearm is of military value.

Najib Abu Sha'ar for appellant.

Junior Government Advocate (Omar Wa'ri) for respondent.

Judgment: This is an appeal from a conviction by the District Court convicting the accused of being in possession of a rifle and a revolver.

It is clear that upon the trial by the District Court certain irregularities occurred, but we are satisfied from the record that the accused was unquestionably in possession, without a licence, of the firearms in question, and we are satisfied that he should be convicted under the Firearms Ordinance, Section 36 (2) (a).

That section provides various prohibitions in connection with the Ordinance and it concludes with the punishments which follow for infringements of these prohibitions. The maximum punishment in the ordinary case is six months, and there is a proviso that if the firearm was of military value the penalty may be increased to three years.

It would appear in this case that the firearms were of military value, but there is no evidence as to this and it does not appear from the record that the accused pleaded guilty to being in possession of firearms of military value, although he pleaded guilty to the original charge. In our view there should undoubtedly be evidence that the firearm is of military value in order to bring the offence within the proviso to Section 36 of the Firearms Ordinance.

1937
9th October
Trusted C.J.
Greene J.
and
Abdulhadi J.
CRA 114/37
Abu Hussein
v.
Attorney General

This Court has, by virtue of Section 72 of the Criminal Procedure (Trial Upon Information) Ordinance, power to amend the judgment of the District Court. To make it quite clear, we convict the accused of being in possession of firearms contrary to Section 36 (2) (a) of the Firearms Ordinance, but in the absence of any plea as to the firearms being of military value and in the absence of any evidence to that effect, we reduce the sentence to one of six months' imprisonment to run from the date of the conviction, that is 20th September, 1937.

Civil Appeal No. 178 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khayat J. and Abdulhadi J.

MUHAMMAD ISMAIL AS'AD,
AND FOUR OTHERS Appellants.

v.

AHMAD SALEM IBRAHIM AYESH Respondent.

Jurisdiction — Water, Rights to — Action as to rights to water within jurisdiction of Land Court.

An action involving rights to water is one which concerns a dispute as to rights over land and is within the jurisdiction of the Land Court.

E. Georges Elia for appellants.

Anton Hanania for respondent.

Judgment: In this case the Respondent took an action against the Appellants in the Land Court of Jerusalem alleging that they were preventing him from exercising his rights to water. In spite of the way in which the statement of claim has been drawn it is quite clear to us that this action involved a dispute as to rights over land and was therefore within the jurisdiction of the Land Court. This disposes of the first ground of appeal raised by George Eff. Elia on behalf of the Appellants. The second ground of appeal is that the proper parties were not before the Court. As to this the allegation was that the five Appellants had interfered with the respondent's right to water,

1937
12th October
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 178/37
As'ad
and others
v.
Ayesh

1937
12th October
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 178/37
As'ad
and others
v.
Ayesh

and it was quite clear that they were claiming certain rights to the same water. There was no evidence that any other members of the same family had contested the right of the respondent and for this reason we think that the five Appellants were properly made parties to the action. Another ground of appeal is that there was a gross error in procedure. A gentleman named Shepherd was appointed by the Court as an expert to investigate the dispute. He investigated the dispute and gave the result of his investigation in evidence on oath. No objection was taken at the time by the advocate for the Appellants and we refuse to consider this ground of appeal for this reason. Lastly it is said that the judgment is too ambiguous. George Eff. Elia said that the finding of the Court that the respondent was entitled to 2½ hours every 9 days from the water of the As'ad family is an ambiguous finding. We are of opinion that this finding was justified by the evidence. It does not affect in any way the order of the Court which was an order against the five Appellants ordering them to refrain from interfering with Plaintiff's rights to the water. There are no further grounds of appeal and the appeal must be dismissed with costs to include LP. 3. - advocate's fees.

Civil Appeal No. 181 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khayat J. and Abdulhadi J.

KHALIL MALAS AND CO. Appellant.

v.

BUCOWINA SOCIETY Respondent.

Foreign company — Contracts — Contract between foreign company and a resident of Palestine — Breach of contract by person in Palestine — Foreign company entitled to sue in Palestine.

Damages — Manner of calculating them.

The respondent company entered into an agreement with the appellant for the supply of wood which was to be shipped in five consignments. The first consignment, which reached the appellant later than the date fixed in the agreement, was taken

1937
13th October
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 181/37
Malas & Co.
v.
Bucowina Society

1937
13th October
Manning S.P.J.
Khayat J.
and
Abdulhadi J.
CA 181/37
Malas & Co.
v.
Bucowina Society

over by the appellant without any objection, but the appellant refused to accept the second consignment which also arrived late, and the respondent company sued appellant for breach of contract in the District Court of Haifa (Civil Case No. 236/35) and obtained judgment. The appellant appealed. The two main grounds of appeal raised were: (1) that the respondent company could not sue in Palestine and (2) that the measure of damages for breach of contract for the sale of goods was the difference between the agreed price and the market price at the time of the breach.

In dismissing the appeal, the Court of Appeal,

HELD (1) that the respondent company was entitled to sue appellant in Palestine for breach of contract, and it did not commit any illegality by entering into contractual relations with the appellant.

(2) that the measure of damages for breach of contract for the sale of goods is the difference between the agreed price and the market price at the date of the breach plus any expenses incurred and which flow directly from the breach of contract.

Distinguished: CA 140/26, 1 P.L.R. 99.

Khader Aweida for appellant.

P. Margolin for respondent.

Judgment: This appeal arises out of an agreement between the appellant and the respondent company with regard to the sale of wood. The wood was to be shipped in five consignments, first consignment to be in April or May 1935 and the remaining consignments at intervals of thirty days. The first consignment arrived in June, 1935, the appellant made no objection whatever to this delay. He made an objection that the wood was not up to the standard as laid down in the agreement. He made no attempt to prove this before the District Court and it need not be any further considered. The District Court having heard evidence awarded the respondent company LP. 256.332 mils damages. The first ground of appeal is that the respondent company was not entitled to sue in Palestine. Khader Eff. Aweida, who argued the appeal, cited Civil Appeal No. 140 of 1926, reported in the Palestine Law Reports page 99. A perusal of that decision shows that the facts were entirely different in that case. It was decided that a foreign company carrying on business in Palestine without being registered was an illegal company and could not present a petition under the Bankruptcy Law. In the present case the respondent is a company resident abroad with whom the appellant has entered into contractual relations. The company has not committed any illegality and

1937

13th October

Manning S.P.J.
Khayat J.
and
Abdulhadi J.

CA 181/37

Malas & Co.

v.

Bucowina Society

is entitled to sue in Palestine for any breach of contract. The other ground of appeal was with reference to the question of damages. Khader Eff. Aweida has referred to the well known principle that in cases of breach of contract for the sale of goods, the measure of damages is the difference between the agreed price and the market price at the time of the breach; but that does not prevent the company from proving that they incurred other expenses flowing directly from the breach of contract. In the present case they proved to the satisfaction of the District Court that other damages had been incurred and the District Court was justified in allowing these further damages. An attempt was made to make the delay in the first consignment a ground for repudiating the contract, but it is quite clear from the terms of the contract that if the appellant sustained any damages owing to the delay he had to submit the matter to a tribunal specially mentioned in the contract. There was a further term in the contract that the appellant was bound to grant additional time if necessary for the completion of the contract. We order that the appeal be dismissed with costs to include LP. 5. - advocate's fees.

Civil Appeal No. 186 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice and Greene J.

RIVKA CASHMAN Appellant.

v.

LINDSAY GORDON CASHMAN Respondent.

Personal status — Marriage, Nullity of — Civil Courts have for time being no jurisdiction to grant a decree of nullity of marriage — Palestine Order in Council, 1922, Article 64.

The appellant and respondent, both being British subjects and who were said to have been permanently residing in Palestine, married each other in England in 1936. For some reason the wife, the appellant, commenced proceedings in the District Court, Haifa (Civil Case No. 39/37) for obtaining a decree of nullity of marriage. The District Court held that it had no jurisdiction to grant the relief claimed. The wife appealed.

In dismissing the appeal, the Court of Appeal,

1937

15th October

Trusted C.J.
and
Greene J.

CA 186/37

Cashman

v.

Cashman

HELD that the Civil Courts have no jurisdiction to grant a decree of nullity of marriage, and Article 64 of the Palestine Order in Council must be construed in its ordinary meaning, and in the ordinary meaning of words a decree of dissolution of marriage includes a decree of nullity of marriage.

Approved: Inverclyde v. Inverclyde, (1931) Pr. D. 41.

Jacob S. Shapiro for appellant.

No appearance by respondent.

Judgment: This appeal raises an interesting point under the Palestine Order-in-Council, involving the jurisdiction of the Civil Courts in dealing with matters of personal status of foreigners.

For the purposes of this case, it has been said that the parties are British subjects domiciled in Palestine. The question of domicile has not been argued in this Court and we desire to make it clear that we must not be taken as agreeing with the view taken by the District Court, and we do not express any opinion as to this point.

The main issue before us is whether or not a decree of nullity comes within the prohibition of Article 64 of the Order-in-Council which says: —

“that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an Ordinance is passed conferring such jurisdiction.”

It is not suggested that any ordinance has been passed conferring that jurisdiction.

In the ordinary meaning of words, dissolution of marriage includes a decree of nullity, and that seems to us to be supported by the decision of *Inverclyde v. Inverclyde* (Law Reports, Probate Division, 1931, page 41), an important case from the decision in which no appeal was made.

Now an argument against that construction is based on the amendment of Article 65 of the Order-in-Council dated 1st April, 1935, dealing with Religious Courts. Religious Courts, other than Moslem Religious Courts, have a similar limitation under the Order, in that they have no power to grant a decree of dissolution of marriage of a foreign subject; that provision of Article 65 was implemented by the amendment which pro-

1937

15th October

Trusted C.J.
and
Greene J.

CA 186/37

Cashman

v.

Cashman

1937
15th October
Trusted C.J.
and
Greene J.
CA 186/37
Cashman
v.
Cashman

vides: "For the purposes of this Article, decree of dissolution of marriage includes a decree of divorce and a decree of nullity." We think that Article 64 must be construed in its ordinary meaning and it is not necessarily depending upon Article 65, and we do not think it can be argued that because Article 65 has been amplified by the amendment of 1935, Article 64 has in consequence been limited in any way. It may be that that amendment was made because the Civil Courts have no control over the Religious Courts by way of appeal from Religious Courts and they may have been misinterpreting their powers — whereas no such explanation was considered necessary in the case of the Civil Courts.

This appeal will therefore be dismissed.

Civil Appeal No. 187 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice and Khayat J.

YACOUB HASSAN SAGHIR KHAMRA . . . Appellant.

v.

1. ITZHAK BITTY
2. S. ASTASHINASKY . . . Respondents.

Possession, Recovery of — What must a person claiming recovery of possession establish to succeed in his claim — Possession a question of degree for the trial Court — Ottoman Magistrates Law, Article 24.

A person claiming recovery of possession under Article 24 of the Ottoman Magistrates Law must prove his title when he applies for possession, and his earlier possession must presumably be reasonably recent possession. Possession must be very largely a question of fact; it must be a question of degree, which is a question for the trial Court.

Anas Khamra for appellant.

Jacob Gavison for respondents.

Judgment: This is an appeal from a decision of the Land Court of Haifa which reversed a decision of the Chief Magistrate.

1937
18th October
Trusted C.J.
and
Khayat J.
CA 187/37
Khamra
v.
Bitty
and another

The proceedings were brought by the Plaintiffs (Respondents here) to recover possession of a certain land, and Article 24 of the Ottoman Magistrates Law would appear to apply which requires in such circumstances: —

"If a person is in possession (mutassarref) of immovable property by virtue of a title-deed, and another person trespasses on it and interferes with his possession and establishes himself on it, the person in possession may, if he brings an action for the restitution of his possession and proves that he is the actual possessor and by other evidence that he has been in possession of the property previous to the trespasser, the trespasser shall be adjudged to remove his interference with the property and it shall be restituted to the original possessor. And if the holder of the title-deed takes possession of the immovable property without taking this legal course, but by force and coercion, and the other party applies to Court, the previous position would be restored, and the holder of the deed warned that he should take the legal steps."

In other words, he has to prove his title when he applies for possession. The earlier possession must presumably be reasonably recent possession and possession must be very largely a question of fact. There are various ways in which possession may be had, e.g. by the owner occupying the property himself or by an agent, by fencing, or by regular visits to the property.

In this particular case we find that the land is not cultivable land and that it is intended to be used for building purposes. Various matters were considered by the Chief Magistrate and eventually he based his decision on the fact that a watchman visited the premises. He says:

"I have therefore to decide whether the visits of a watchman to a vacant piece of ground, when that watchman serves an employer who may or may not be the owner, constitutes possession by that employer. In my opinion it does not and reluctant as I am to refuse relief to the Plaintiff, in view of my opinion of the Defendant's case, I cannot, when deprived of the power to decide the issue of ownership in his favour, hold that he was in such effective possession of this land as would justify my making an order of dispossession against the Defendant, satisfied though I am that the latter has produced no shred of right to justify his position."

It seems to us that it must be a question of degree, how far visits by a watchman can amount to possession, and must depend upon the facts of the particular case, and this would seem to be a question for the Court of trial.

1937
18th October
Trusted C.J.
and
Khayat J.
CA 187/37
Khamra
v.
Bitty
and another

1937
18th October
Trusted C.J.
and
Khayat J.

CA 187/37
Khamra
v.
Bitty
and another

It seems to us that there was evidence in this case which justified the Magistrate in the view he took, the question of possession being a question of degree, and he was the person to decide whether the facts in this case amounted to possession or not.

The appeal will therefore be allowed, the decision of the Land Court quashed and the judgment of the Chief Magistrate restored, with costs and LP. 3. - advocate's fees.

Civil Appeal No. 132 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Khayat J.

1937
21st October
Trusted C.J.
Greene J.
and
Khayat J.

CA 132/37
Cohen-Zedek
v.
Belozerkovsky

SHLOMO COHEN-ZEDEK Appellant.

v.

DAVID BELOZERKOVSKY Respondent.

Damages — Contracts — Waiver — Contract provided for damages at so much per day — Party entitled to damages occupied subject matter of contract — Not entitled to damages.

Under the terms of a contract for the building of a house, the respondent, the contractor, was to pay to the appellant, the owner, LP. 5 per day in respect of each day after the date fixed in the contract for the completion of the building. There was a delay in the completion of the building, but the owner took delivery of the building at a definite date. Subsequently he sued the respondent for damages. The District Court held that by taking delivery the appellant waived his right to damages. Appellant appealed, and the respondent cross-appealed on the ground that appellant is not entitled to damages at all.

In dismissing the appeal and cross-appeal, the Court of Appeal,

HELD that the appellant, having regard to the terms of the contract which provided for damages at so much per day, could not both occupy the building and have damages, and by taking delivery of the building he waived his right to damages.

A. Wittkowski for appellant.

L. Hofmann for respondent.

1937
21st October
Trusted C.J.
Greene J.
and
Khayat J.

CA 132/37
Cohen-Zedek
v.
Belozerkovsky

Judgment: This is an appeal which comes to this Court from the District Court of Jaffa, sitting at Tel-Aviv, arising out of a building contract; the material clause with which we are primarily concerned is found in an additional contract entered into whereby it was agreed as follows: —

“Mr. Belozerkovsky hereby undertakes to complete the building not later than on the 1st March, 1936, (apart from small usual repairs) and in the event that he shall fail to complete the building within the time fixed, Mr. Belozerkovsky shall pay to Mr. Cohen-Zedek the sum of LP. 5 in respect of each day of delay as agreed and liquidated damages.....”

It seems that the building was not completed within the stipulated time and the matter went on that point and others before the District Court. The Court found as a fact that the contractor did not finish the building on the 1st of March, 1936. It seems also, although the building was not entirely completed, the owner entered into occupation after a certain number of days' delay, and the Court below held that by doing so he waived his right to damages. It must be a matter of common sense that if a contract such as this provides for damages at so much a day, the owner cannot both occupy the building and have the damages. The District Court was perfectly justified in drawing the inference that by taking delivery the Appellant waived his right to damages.

The Respondent contends that no damages should be paid at all because it was the fault of the owner. Presumably these matters were before the District Court which drew the inference that the Respondent is liable for a certain number of days delay in damages. With this finding we do not interfere.

As to the question of figures, this also was a matter for the District Court.

The result will be that the appeal and cross-appeal will both be dismissed, with no costs to either side.

Civil Appeal No. 141 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice and Abdulhadi J.

1937
25th October
Trusted C.J.
and
Abdulhadi J.
CA 141/37
Kasem
v.
Ayyoubi

JAMAL ABDUL HADI EL KASEM Appellant.

v.

SUBHI EL AYYOUBI Respondent.

Immovable property — Land Registers — Application for rectification of Land Register under Section 66 of Land (Settlement of Title) Ordinance — Cases to which Section applicable.

The respondent, in an action brought in the Land Court of Nablus (Land Case No. 29/37), applied for the rectification of the Land Register in respect of an entry relating to his land. The land in question was subject to settlement proceedings and, on 22nd June, 1934, the Schedule of Rights showed it as disputed and subject to a right of way, although the old register did not show any right of way over the land. The respondent bought the land, the subject matter of the action, on 7th November 1935. The respondent relied in his claim on Section 66 of the Land (Settlement of Title) Ordinance. The Land Court ordered the rectification of the register by the deletion of the entry as to the right of way. The appellant appealed.

In allowing the appeal and setting aside the judgment of the Land Court, the Court of Appeal,

HELD that the provision "that a right recorded in the existing registers has been omitted or incorrectly set out in the register" contained in the latter part of the first paragraph of Section 66 of the Land (Settlement of Title) Ordinance has no application when the right recorded in the existing registers has been varied by the Settlement Officers or the Courts on appeal from a Settlement Officer under the provisions of the Land (Settlement of Title) Ordinance.

Appellant in person.

E.D. Goitein for respondent.

Trusted, C.J.: This appeal involves the consideration of Section 66 of the Land (Settlement of Title) Ordinance, Cap. 80, and raises a point of considerable importance.

The object of that ordinance is to provide for the settlement of title to land and the registration of title, and Settlement Officers are given express powers.

The method provided is shortly that a schedule of claims is prepared, which after investigation is followed by a schedule of rights, which may be revised by the Settlement Officers, and provisions are made for appeals from the decisions of Settlement Officers.

Section 66 provides —

"After the completion of the settlement, rectification of the register may be ordered by the land court, subject to the law as to limitation of actions, either by annulling the registration, or in such other manner as the court thinks fit, where the court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register:

Provided that, where a person has since the settlement acquired land in good faith and for value from a registered owner, the court shall not order a rectification of the register."

We are concerned only with the latter part of the first paragraph, i.e. "that a right recorded in the existing registers has been omitted or incorrectly set out in the register." I do not think that this provision has any application when the right recorded in the existing register has been varied by the Settlement Officers or the Courts on appeal from a Settlement Officer, under the provision of the ordinance.

In order to prevent the complications which might arise, while settlement is in progress no voluntary transfer can be effected without the authority of the Settlement Officer. Where such a transfer is authorised the transferee, as from the date of the transfer, must stand in the shoes of the transferor. If the transfer take place in time for him to do so he may object to the schedule of rights, if the transfer take place when it is too late to object, he must take the land as it appears in the schedule of rights.

From the judgment in this case it seems that on 22.6.34 the schedule of rights showed the land in question as disputed and subject to a right of way, and that the Plaintiff in the action (now Respondent) bought the land on 7.11.35.

It is clear, therefore, that the Plaintiff in the Court below (now Respondent) bought after the publication of the schedule of rights and when presumably there was an incumbrance on the register.

1937
25th October
Trusted C.J.
and
Abdulhadi J.
CA 141/37
Kasem
v.
Ayyoubi

1937
25th October
Trusted C.J.
and
Abdulhadi J.
CA 141/37
Kasem
v.
Ayyoubi

The Plaintiff (Respondent) sought to invoke the provision of Section 66 to which I have referred, but I do not think that in the circumstances it applies.

In my opinion the action was misconceived, and this appeal should be allowed, and the judgment of the Land Court set aside with costs.

Abdulhadi J: I concur.

Civil Appeal No. 174 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Greene J. and Khayat J.

1937
28th October
Trusted C.J.
Greene J.
and
Khayat J.
CA 174/37
Abyad
v.
Shehab

HANNA NASER ABYAD Appellant.

v.

YOLA SHEHAB Respondent.

Admission — When binding on the person making it.

An admission, to be binding, must be made in a matter which is properly before a tribunal — So held by the Supreme Court sitting as a Court of Appeal.

Referred to: Urquhart v. Butterfield, 37 Ch. D. 357.

No appearance by appellant.

A. Levin for respondent.

Trusted, C.J.: This is an appeal from the judgment of the District Court of Haifa dated 29.4.37, confirming the judgment of the Chief Magistrate of Haifa dated 8.3.37.

This appeal was originally fixed for hearing on the 8th of October, 1937, but owing to the illness of Mr. Elias Koussa, Counsel for Appellant, the hearing was adjourned for today. Counsel for Appellant absented himself today also, without giving any reasons, and as it was shown that he was properly served we decided to hear the Respondent's reply to the points raised by Mr. Koussa in his statement of appeal.

From the facts of this case it would appear that it originally started with foreclosure proceedings on a mortgage deed

1937
28th October
Trusted C.J.
Greene J.
and
Khayat J.
CA 174/37
Abyad
v.
Shehab

before the Chief Execution Officer. Interest was payable on that deed and it fell into arrear. The proceedings were in the early stages of the dispute brought under Section 14 of the Land Transfer Ordinance which provides that application for the sale of immovable property in satisfaction of a mortgage may be made to the President of the District Court.

It appears that in the course of these proceedings the then advocate of the present Respondent made an admission as to the amount of the interest in arrear, which admission he later found to have been wrongly made by mistake.

I should be loath to say anything which might lead to any lessening of responsibility on the part of advocates. It seems to me that advocates acting for clients have not always that sense of responsibility which they should possess, and I hope that it will be appreciated that advocates are in a particular position and have a particular responsibility towards their clients and the Courts.

A separate action was brought later, in the Chief Magistrate's Court, to recover the interest in arrear, independently of the foreclosure proceedings, and in this action the question arose as to whether or not the admission as to the amount of interest due, to which I have referred, prevented the Plaintiff from recovering the full amount claimed. The Chief Magistrate held that it did not on the ground that it was made owing to a genuine mistake.

The question then went on appeal to the District Court of Haifa, which supported the judgment of the Chief Magistrate on a somewhat different ground. It took the view that the President of the District Court sitting as a Chief Execution Officer did not constitute a Court and that an admission made before him might be shown to have been wrongly made as it was not made in accordance with Article 1647 of the Mejelle.

It seems to me that if one takes the Mejelle, or if one applies the principles of English Law it must be clear that an admission to be binding must be made in a matter which is properly before the tribunal. There is no doubt, under English law, that counsel may make an admission which binds the client, and according to Phipson such admissions are in civil cases conclusive, if made for the purpose of dispensing with proof in the trial but are otherwise merely *prima facie* evidence against a client (See Urquhart v. Butterfield, 37 Ch. D. 357).

1937
28th October
Trusted C.J.
Greene J.
and
Khayat J.
CA 174/37
Abyad
v.
Shehab

In the case before us the admission was not made in regard to any issue before the tribunal, as the President of the District Court was purported to exercise his powers with regard to foreclosure of a mortgaged property and not as to the amount of the interest as to which the admission was made; and although the line may be a very narrow one, I think that an admission so made is not conclusive and can be withdrawn, and that it is not such a binding admission as to prevent the full amount being recovered.

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

We are very much obliged to Mr. Levin, who appeared on behalf of the respondent, for his very interesting arguments on the points raised in this case.

Greene J: I concur.

Khayat J: I concur.

Civil Appeal No. 194 of 1937

In the Supreme Court sitting as a Court of Appeal.

Before: Copland J. and Khayat J.

MARCUS MAIER Appellant.

v.

JOINT LIQUIDATORS
OF "PHOENIX LIFE INSURANCE COMPANY VIENNA"
IN LIQUIDATION Respondents.

Jurisdiction — Contract ousting jurisdiction of Palestine Courts — Effect of such contract on jurisdiction.



Copland J.
and
Khayat J.

CA 194/37
Maier

Joint Liquidators
of Phoenix
Insurance Co.

In Civil Case No. 50/37 of the District Court, Jerusalem, the appellant applied for a judgment reversing a decision of the respondents who rejected a claim made by the appellant in respect of five insurance policies made with the Phoenix Life Insurance Company Vienna on the ground that no consideration was received in Palestine and that the only act that was done by the company's branch here was to issue the policies on the instructions of the Head Office. The contract was made in Zurich, but to suit the convenience of appellant the company agreed to issue the policies in Palestine and to pay him the money here. By agreement of the parties a clause was inserted in the policies that any dispute arising out of those policies was within the jurisdiction of the Courts of Zurich. The District Court dismissed the action on the ground that it must be brought within the jurisdiction of the Courts of Zurich. The appellant appealed.

In dismissing the appeal, the Court of Appeal,

HELD that as the dispute which arose between the parties was one arising out of the policies, and as the parties agreed that all disputes arising out of the policies were within the jurisdiction of the Courts of Zurich, the Courts of Palestine were not the competent Courts to deal with it.

B. Nathan for appellant.

B. Joseph for respondents.

Judgment: 1. The present appellant took out five insurance policies with the Phoenix Life Insurance Company of Vienna. To suit the convenience of the appellant, the company agreed to issue the policies in Palestine. The parties, by agreement, inserted a clause in the policies that any dispute arising

1937
1st November
Copland J.
and
Khayat J.
CA 194/37
Maier

v.
Joint Liquidators
of Phoenix
Insurance Co.

out of these policies is within the jurisdiction of the Courts of Zurich.

2. The respondent company is being wound up and the appellant submitted his proof of claim to the Liquidators which was rejected. He then appealed to the District Court, Jerusalem, against that rejection. The District Court dismissed his petition.

3. The parties having agreed that all disputes arising out of the policies are within the jurisdiction of the Courts of Zurich, and this being a dispute arising out of the policies, the Courts in Palestine are not the competent Courts to deal with it.

4. For these reasons and for the reasons given by the District Court, and without calling on Mr. Joseph, the appeal should be dismissed with costs to include LP. 5 advocate's fees.

Civil Appeal No. 179 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge and Khayat J.

ALICE HANNA DAHDAH, WIDOW OF
NICOLA ANDRAWES ZA'ROUR IN HER
PERSONAL CAPACITY AND ALSO AS
GUARDIAN OF HER MINOR CHILDREN Appellant.

v.

KARIMEH KHALIL ABU GHAZALEH . . . Respondent.

Succession — Estates — Appeals — Application for an order prohibiting a religious court from dealing further with a succession — Grant of application — Appeal from such order — Whether appeal lies from such order — Succession Ordinance, Section 9.

An application was made to the President of the District Court of Jaffa (Estate Case No. 34/37) by the respondent under Section 9 of the Succession Ordinance for an order prohibiting the Greek Orthodox Religious Court from dealing further with the succession of the late Nicola Za'rour, and an order to that effect was given. The appellant appealed that order. At the hearing of the appeal, it was submitted that no appeal lay from an order made under Section 9 of the Succession Ordinance.

1937
2nd November
Manning S.P.J.
and
Khayat J.
CA 179/37
Dahdah
v.
Abu Ghazaleh

1937
2nd November
Manning S.P.J.
and
Khayat J.
CA 179/37
Dahdah
v.
Abu Ghazaleh

In remitting the case to the President of the District Court for making a statement of the reasons on which he based his order, the Court of Appeal,

HELD that an order made by a President of a District Court under Section 9 of the Succession Ordinance is appealable, and the matter is concluded by Article 176 of the Ottoman Code of Civil Procedure.

A. Levitsky and B. Farajalla for appellant.

N. Germanous for respondent.

Manning, S.P.J.: 1. Nicola Zarour died on the 20th October 1936. By his last will and testament dated September 1st., 1935, he appointed his widow, the present appellant, his executrix and the guardian of his children, and made certain dispositions as regards his property.

2. The will made no provision for the mother of the testator, the present respondent, and on the 2nd November, 1936, she executed a document waiving any right she might have had to succeed to any part of the estate of the testator, on condition that she should not be liable for any of the debts. This document is clear and unequivocal and in it the respondent renounces her right to any share not only in the mulk property of the testator, but also in his miri land.

3. The testator had been a Palestinian citizen and a member of the Eastern (Orthodox) Community. The appellant applied to the Court of that Community for a certificate of succession and the Court gave its decision on the 29th December 1936. It had before it the waiver of the respondent to which I have already referred, and not unnaturally decided that the respondent was no longer a party to any question with regard to the succession. It stated that all the other heirs consented to the jurisdiction and made an order with regard to the distribution of the testator's estate, including his miri land.

4. The Court of the Community had confirmed the will of the testator and on the 2nd March 1937 dealt with an application by the respondent objecting to the said confirmation. It decided that there were no legal grounds to set aside its judgment confirming the will. The respondent appealed to the Court of Appeal of the Community and that Court gave its decision on the 28th September 1937. It decided that the respondent was not an heir of the testator according to the Byzantine Law, as the testator had left a wife and children,

1937
2nd November
Manning S.P.J.
and
Khayat J.
CA 179/37
Dahdah
v.
Abu Ghazaleh

and that consequently she was not entitled to oppose the confirmation of the will. It pronounced the will to be valid in form and otherwise made in compliance with the law, and upheld its confirmation by the Court below. It held that any miri land should be excluded from the dispositions in the will.

5. During the time when her appeal was pending before the Court of Appeal of the Community the respondent applied under Section 9 of the Succession Ordinance for an order prohibiting the Court of the Community from dealing further with the succession of the testator. She succeeded in getting an order to this effect from the President of the District Court of Jaffa on the 23rd July 1937. From this order the appellant has appealed.

6. It was urged before us by Mr. Germanous, the advocate for the respondent, that no appeal lies from an order made under Section 9 of the Succession Ordinance. With this I do not agree. There have been several decisions of this Court to the effect that an appeal does lie from such an order, and I think the matter is concluded by Article 176 of the Code of Civil Procedure which enacts that judgments in matters in which no question of value is in issue are appealable.

7. The learned President gave no reasons for his order. The section gives him a discretion to make the order "if he deems it just or convenient". In the earlier part of this judgment I have set out at some length the history of the case in the Court of the Community in order to show that the matter is one in which it was desirable that the learned President should have assigned reasons for the exercise of his discretion. I have come to the conclusion that it is impossible for this Court to deal with this appeal until it knows why the learned President deemed it just or convenient to make the order. In my opinion the matter should be remitted to him for a statement of the reasons on which his order was based. When this statement is before us, we shall be in a position to decide the appeal.

Meanwhile the decision will be postponed.

Khayat J: I concur.

Civil Appeal No. 142 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice and Greene J.

DAVID MOYAL Appellant.

v.

ELHANAN KARWASSARSKY,
AS CURATOR FOR THE
PROPERTIES AND CHATTELS
OF SHEIKH TEWFIQ EL DAJANI,
INTERDICTED Respondent.

1937
3rd November
Trusted C.J.
and
Greene J.
CA 142/37
Moyal
v.
Karwassarisky

Champerty contracts — Definition of.

The appellant sued the respondent in his representative capacity in the District Court of Jaffa for damages for breach of contract and for the return of certain moneys paid by appellant in pursuance of that contract. The District Court dismissed the claim for damages but ordered the return of the moneys paid by appellant under the contract; it being of the view that the contract was one of those contracts known to the English law as 'champerty contracts.' Appellant appealed.

In allowing the appeal, setting aside the judgment of the District Court and remitting the case to it for completion, the Court of Appeal,

HELD that a champerty may be defined as a bargain between a plaintiff or defendant in a suit and a third person, *campum partire*, to divide between them the land or other matter sued for in the event of the litigant being successful in the suit, whereupon the champertor is to carry on the party's suit or action at his own expense; or it is the purchasing the right of action or suit of another person. The contract in this particular case between the parties was not champertious.

Referred to: CA 67/36, ante p. 116

E.D. Goitein for appellant.

Respondent in person.

Judgment: This is an appeal from a judgment of the District Court, Jaffa, dismissing a claim by the Plaintiff in an action for damages for breach of a contract but ordering the return of certain moneys paid by him under the contract.

1937
3rd November
Trusted C.J.
and
Greene J.
CA 142/37
Moyal
v.
Karwassarsky

The main ground of the decision of the District Court appears to be in para. 3 of its judgment, which is as follows:

"The contracting parties did not fix a period for the carrying out of the contract for the transfer of the vineyard into the plaintiff's name; but they left it up to the completion of the litigation regarding the said vineyard. It could be said that the disputes have not so far, in fact, commenced although 13 years passed, even if it commenced it may not be completed in years. Such a contract cannot be looked at as a valid one since its execution. This makes us consider it as one of the contracts which are known to the English law as "champerty contracts" which encourages and increases litigation."

Assuming that the principles of the English doctrine of champerty apply in Palestine, I think it is necessary to look a little more closely into that doctrine, and this particular contract. Champerty may be defined as a bargain between a plaintiff or defendant in a suit and a third person, *campum partire*, to divide between them the land or other matter sued for in the event of the litigant being successful in the suit, whereupon the champertor is to carry on the party's suit or action at his own expense; or it is the purchasing the right of action or suit of another person.

Under the contract in this case the Defendant sold to the Plaintiff certain land at the price of £. 20 Egyptian per dunum.

It appeared from the contract that the vendor (Defendant in the Court below and here Respondent) was not in a position to give a clear title, and clauses 3 and 9 of the contract provide as follows:

"3. The second party undertakes to introduce all the necessary cases against Messrs. Salim George Haddad and his partner Shakib el Haj to cancel the said deed of sale and to reduce the usurious interest which was added to the deed of sale. The second party undertakes also to institute all the necessary actions against the neighbours who have trespassed on the said vineyard or any part thereof in his capacity as an advocate but without charging any advocate's fees and to pay from his own money all the necessary expenses and fees for all the actions with the permission and authorisation of the first party. Provided only that the second party shall have the right to deduct such expenditure from the balance of the purchase price and provided only that he (the second party) obtains the permission and authorisation of the first party to make such expenditure.

1937
3rd November
Trusted C.J.
and
Greene J.
CA 142/37
Moyal
v.
Karwassarsky

9. The purchaser has the right to make the said transfer in his name or in the name of any person he wants or appoints."

It should be noted that the purchaser (Plaintiff below and Appellant here) was at all material times and is an advocate.

The purchaser also agreed to advance certain other moneys on account of the vendor which were to be deducted from the purchase price. It is clear that the expenses and fees were to be paid by the vendor out of the purchase price. The only criticism that can be made is that the purchaser was giving his services as an advocate, presumably, although there is no finding as to this — in consideration of the agreed price. There would appear to be nothing repugnant to the general principles of the Palestinian Law in this (although not directly in point cf. the Advocates Ordinance, Cap. 2, sec. 22).

Taking the agreement as a whole we do not think it is champertious.

The District Court also, in paragraphs 4 and 5 of its judgment, found as follows: —

"4. Add to that that the plaintiff himself did not take actual steps as he undertook to do in the contract as far as the actions which he should have instituted against the persons who claim the ownership of the vineyard and against those who have trespassed over the boundaries of the said vineyard.

5. His sleeping over his rights, namely not taking any steps for such a long period without any excuse. From this it could be inferred that he left the contract; and for this reason he cannot claim damages provided for as was decided by the Supreme Court in Civil Appeal No. 67 of 1936. All these reasons made us dismiss his action for the liquidated damages, namely the £. 10,000."

To some extent these amount to findings of fact but it is clear that the judgment of the Court below turned primarily upon the question of champerty. It is clear also from the argument in this Court that the parties do not agree as to the facts. With regret we have to come to the conclusion that the case must go back to the District Court to find fully the facts and to draw such inference as may be necessary therefrom as to performance, variation or recession.

In particular, with reference to para. 6 of the judgment, we would point out that the principle underlying the decision

1937
3rd November
Trusted C.J.
and
Greene J.
CA 142/37
Moyal
v.
Karwassarsky

in Civil Appeal 67/36 (*ante* p. 116) may be stated as follows: — there may be a lapse of time allowed by both sides so long as to raise the inference that both parties thought that each of them had treated the business as at an end. This principle is discussed in Halsbury (2nd Edition) Vol. VII, pp. 186 and 203. Each case must be considered in the light of its own facts.

The judgment of the District Court is therefore set aside with costs and the case remitted for completion. Advocate's fees LP. 5.

We make no finding as to the points raised in the cross-appeal.

At the close of the hearing the Respondent undertook to take no action for 21 days in order that the Appellant could make any application he desired to the District Court.

Criminal Appeal No. 122 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

- 1. ALBERT FLOYD
- 2. MOSHE SHAPIRO Appellants.

v.

ATTORNEY GENERAL Respondent.

By-Laws — Not necessary to publish them for a period of one month before enactment thereof.

Ordinance — Meaning of word "Ordinance" in Article 17(1)(d) of Palestine Order in Council.

In Criminal Case No. 4781/37 of the Magistrate's Court of Jerusalem the appellants were charged with contravening certain sections of the Jerusalem (Advertisements) By-Laws, 1937. An objection was taken before the Magistrate to the effect that the By-Laws in question had not been published as a draft for a period of one month before the enactment thereof. The Magistrate upheld the objection and dismissed the charge. The Attorney General appealed to the District Court, Jerusalem (Criminal Appeal No. 80/37) and that Court reversed the decision of the Magistrate and remitted the case to him for trial. The appellants appealed.

1937
17th November
Manning S.P.J.
Copland J.
and
Khayat J.
CRA 122/37
Floyd
and another
v.
Attorney General

In dismissing the appeal, the Court of Appeal,
HELD (1) that there is no provision in the law of Palestine that any rules, regulations or by-laws should be made public for a month before their enactment.
(2) that the word "Ordinance" in Article 17(1)(d) of the Palestine Order in Council means an ordinance promulgated by the High Commissioner after consulting the Advisory Council and does not include any rules, regulations or by-laws made under the provisions of an Ordinance — the word "Ordinance" cannot refer to any statutory legislation made either by the High Commissioner himself or by anybody or person to whom powers have been delegated to make any rules or regulations.

Overruled: Proposition of Frumkin J. in Misd. App. 18/28, 1 P.L.R. 283.

B. Geichman for appellants.

Junior Government Advocate (E. Salant) for respondent.

Judgment: In this case the Appellants were charged in the Magistrate's Court of Jerusalem with contravening certain sections of the Jerusalem (Advertisements) By-Laws, 1937.

Before the learned Magistrate an objection was taken that these By-Laws had not been published as a draft for a period of one month before the enactment thereof. The learned Magistrate agreed to this objection and dismissed the charge.

On appeal to the District Court of Jerusalem, that Court reversed the decision of the learned Magistrate and remitted the case to him for trial.

The appellants have appealed to this Court and the only question before us is whether these By-Laws should have been published as a draft for one month before their enactment.

Mr. Geichman for the Appellants relies on Article 17(1)(d) of the Palestine Order-in-Council as substituted by the amending Order-in-Council of 1923. The relevant part of that article is "No Ordinance shall be promulgated unless a draft of the same shall first have been made public for one calendar month at the least before the enactment thereof".

The question is what does the word "Ordinance" mean in that part of the article, and the answer to that can be found when referring to Article 17(1)(a) which provides that "The High Commissioner shall have full power and authority to promulgate such Ordinances as may be necessary for the peace,

1937
17th November
Manning S.P.J.
Copland J.
and
Khayat J.
CRA 122/37
Floyd
and another
v.
Attorney General

1937
17th November
Manning S.P.J.
Copland J.
and
Khayat J.
CRA 122/37
Floyd
and another
v.
Attorney General

order and good government of Palestine..."; and Article 17 (1)(b) enacts that "No Ordinance shall be promulgated by the High Commissioner until he has consulted the Advisory Council...". From these two paragraphs of Article 17, it is quite clear that an Ordinance means a law promulgated by the High Commissioner after he has consulted the Advisory Council, and the word "Ordinance" cannot refer to any statutory legislation made either by the High Commissioner himself or by any body or person to whom powers have been delegated to make any Rules or Regulations.

Reference has been made to the Interpretation Ordinance and to the definition of Ordinance contained therein. The Interpretation Ordinance has no reference to the Order-in-Council.

Mr. Geichman further relied on a decision of this Court in *Misd. Appeal No. 18 of 1928, Attorney General v. Abraham Altshuler*, reported on page 283 of the law Reports of Palestine 1920-1933. In that case Frumkin J. was reported to have said "I concur in the judgment of my learned brethren in that 'Ordinance' in Article 17 (1)(a) and (c) of the Palestine Order-in-Council is meant to include all sorts of enactments made by subordinate legislature as well as ordinances proper".

The leading judgment in that case was given by McDonnell C.J., and no such explicit statement is to be found in his judgment. The other member of the Court, Corrie J., concurred with the Chief Justice, and therefore we do not quite understand the judgment of Frumkin J. when he said that he concurs with the judgment of the others to the effect I have stated. If anything to the effect stated by Frumkin J. is to be found in the judgment of the Chief Justice, then we think it is much too broadly stated, and we think that the proposition as laid down by Frumkin J. must be over-ruled.

Finally we are all of the opinion that the word "Ordinance" in Article 17 (1)(d) of the Palestine Order-in-Council as substituted means an ordinance promulgated by the High Commissioner after consulting the Advisory Council and does not include any rules, regulations or by-laws made under the provisions of an ordinance.

There is no provision in the law of Palestine that any rules, regulations or by-laws should be made public for a month before their enactment and therefore we are in agreement with the judgment of the District Court. That judgment must be affirmed and this appeal must be dismissed. No costs.

Criminal Appeal No. 128 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

ARIEH ULITSKI
ZEHAVA ULITSKI Appellants.

JERUSALEM LOCAL BUILDING
AND TOWN PLANNING COMMISSION Respondents.

Proceedings — Meaning of word in Section 39 (1) of the Town Planning Ordinance, 1936, and Section 131 of the Municipal Corporations Ordinance, 1934.

Appeals — Persons entitled to appeal under Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935.

1937
17th November
Manning S.P.J.
Copland J.
and
Khayat J.
CRA 128/37
Ulitski
and another
v.
Jerusalem Local
Building and
Town Planning
Commission

The appellants were charged before the Magistrate's Court of Jerusalem in Criminal Case No. 1780/37 with an offence against Sections 35 and 36 of the Town Planning Ordinance, 1936, in that they built without a permit an additional floor to their house. The Magistrate dismissed the charge on the ground that the proceedings were not instituted by a properly authorised person and acquitted the accused. The respondents appealed to the District Court, Jerusalem (Criminal Appeal No. 39/37) and were successful there. Appellants appealed to the Supreme Court by leave. The two main grounds of appeal raised on their behalf appear in the judgment reported hereinafter.

In allowing the appeal, setting aside the judgment of the District Court and restoring the judgment of the Magistrate, the Court of Appeal,

HELD (1) that the word "proceedings" in Section 39 (1) of the Town Planning Ordinance, 1936, and in Section 131 of the Municipal Corporations Ordinance, 1934, is not limited in any way and it applies equally to civil and criminal proceedings. It followed therefore that criminal proceedings instituted by the Jerusalem Local Building and Town Planning Commission were properly brought.

(2) that under Section 5 of the Magistrates' Courts Jurisdiction Ordinance, 1935, the only persons having the right of appeal are, firstly, a convicted person, and secondly, the Attorney General or his representative. That being the position, the respondents had no right to appeal the judgment of the Magistrate acquitting the appellants.

1937
17th November
Manning S.P.J.
Copland J.
and
Khayat J.

CRA 128/37
Ulitski
and another
v.

Jerusalem Local
Building and
Town Planning
Commission

A. Levitsky for appellants.
Saba Said for respondents.

Judgment: In this case the Appellants were acquitted in the Magistrate's Court of Jerusalem of a contravention under the Town Planning Ordinance, No. 28 of 1936. The complainants in that case, the Jerusalem Local Building and Town Planning Commission, appealed to the District Court and were successful in their appeal. Leave was granted to appeal to this Court.

The first point taken by Mr. Levitsky for the Appellants is that the Jerusalem Local Building and Town Planning Commission had no power under the law to institute proceedings of a criminal nature against any person. We are against him on this point. Section 39(1) of the Town Planning Ordinance 1936 says "A Local Commission, being a Municipal Council, may institute proceedings in or appear before any Court in accordance with the provisions of Section 131 of the Municipal Corporations Ordinance 1934"; and when we turn to the latter section we find there the words "any municipal corporation or council may institute proceedings in and appear before any Court." The word "proceedings" in those two sections is not limited in any way, and we have no hesitation in holding that the word applies equally to civil and criminal proceedings.

Mr. Levitsky's second point is that the Respondents had no right of appeal from the judgment of the learned Magistrate. On this we are in agreement with him. Under section 5 of the Magistrates' Courts Jurisdiction Ordinance, No. 16 of 1935, only two persons have a right of appeal: firstly a convicted person, secondly the Attorney General or his representative. It has been clearly laid down in previous cases that when there has been an acquittal in the Magistrate's Court, the only person who can appeal is the Attorney General or his representative.

In the present case also we hold that the Respondents had no right to appeal from the judgment of the learned Magistrate acquitting the appellants, and for this reason the present appeal is successful, and the judgment of the District Court must be set aside and the judgment of the learned Magistrate restored.

The Appellants will have the costs of this appeal to include LP. 5 advocate's fees.

Civil Appeal No. 204 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Khayat J.

ABRAHAM GUDAL Appellant.

v.

GIZA BERNFELD Respondent.

Prescription — Manner of calculating period of limitation — Mejelle, Article 1660 — Land Law (Amendment) Ordinance, Section 7.

Delivery — Sale of property to more than one person — Receipt by one of purchasers sufficient to constitute delivery.

Evidence on commission — In absence of provision in law as to payment of expenses for taking the evidence on commission party applying must pay them.

Liability, joint and several — Nothing in agreement to show that members of one party are sureties for one another — Liability several — Mejelle, Article 1113.

By an agreement dated 1st July, 1921, the respondent sold to appellant and another person by the name of Tauber a garage, motor cars, etc. for a price of L.E. 1800. Apparently nothing was paid of the purchase price and the respondent instituted an action in the District Court, Jerusalem, on 21st June, 1936, claiming the purchase price from the appellant. She obtained judgment for the amount in claim. The appellant appealed; the main grounds of appeal raised on his behalf appear in the judgment of the Court of Appeal reported hereinafter.

In setting aside the judgment of the District Court and substituting a judgment for the respondent for L.E. 900, the Court of Appeal,

HELD (1) that in actions other than those relating to immovable property which are based on documents the period of limitation depends upon the date which the document in question bears, if it is a Gregorian year, then the period of limitation is calculated according to the Gregorian calendar, if it is a Lunar year, then the period of limitation is calculated according to the Lunar calendar. The word "years" in Article 1660 of the Mejelle might mean either Lunar or Gregorian years, and Section 7 of the Land Law (Amendment) Ordinance was enacted to change the law with respect to immovable property, and left the previous law untouched as regards other actions.

1937
19th November
Manning S.P.J.
Greene J.
and
Khayat J.
CA 204/37
Gudal
v.
Bernfeld

1937
19th November
Manning S.P.J.
Greene J.
and
Khayat J.
CA 204/37
Gudal
v.
Bernfeld

- (2) that as the sale was to the appellant and Tauber, a receipt by either of them of the property was sufficient to constitute a delivery. Further in this present case the agreement showed that the property sold passed into the possession of appellant and Tauber, and the appellant admitted in Court that the property was left in the hands of Tauber.
- (3) that in the absence of any provision in the law as to which party should pay the expenses for the taking of evidence on commission, the party making the application should pay such expenses.
- (4) that since the agreement did not show that the liability of appellant and Tauber was joint and several in that there was nothing in it to indicate that appellant and Tauber were sureties for each other in accordance with Article 1113 of the Mejele, the appellant was only liable for half the amount claimed.

Approved: CA 112/31, 1 P.L.R. 674.

A. Levin for appellant.

A. King for respondent.

Manning, S.P.J: 1. On May 21st, 1937, the District Court of Jerusalem gave judgment against the appellant for L.E. 1800, the price of a garage, motor cars etc. sold to him on July 1st, 1921. The appellant has appealed and the first ground of appeal put forward by Mr. Levin on his behalf is that the action was barred by limitation. The action was instituted on the 21st June 1936, and the period of limitation is 15 years. If years are reckoned according to the Gregorian calendar the action is in time, if the period is reckoned in lunar years, it comes to 15 years 4 months. In the translation of the memorandum of sale which was before the Court below and to which no objection was taken by the appellant, the agreement is dated 1st July, 1921. In the case of Sabbagh v. Strahilevitz, reported on page 674 of the Law Reports of Palestine, 1920-33, this Court held that where a document bears a date according to the Gregorian calendar, the period of limitation must be calculated in Gregorian and not in lunar years. Mr. Levin has urged us to hold that this case was wrongly decided as its correctness would lead to the curious position that the period of limitation of actions is a fluctuating one depending on the mode in which a date is expressed in a document, whenever an action is founded on an instrument in writing. The position is certainly a curious one, but I am informed by my brethren of the Supreme Court who were here before the Occupation that the same position existed

1937
19th November
Manning S.P.J.
Greene J.
and
Khayat J.
CA 204/37
Gudal
v.
Bernfeld

in Turkish times as regards actions other than these relating to immovable property. They say that "years" in article 1660 of the Mejele might mean either lunar years or Gregorian years — if the action was founded on a document and that document bore a Gregorian date, then years in the article must be interpreted to mean Gregorian years. This being so, it cannot be urged that the Sabbagh case was incorrectly decided.

2. Mr. Levin made another attempt to convince us that he was right by referring to section 7 of Cap. 78 (Vol. II, Laws of Palestine, page 850) which 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."

Mr. Levin's argument is that the section shows that "year" in Palestinian Law must have always meant "lunar year"; and that the section has altered this, but only with regard to immovable property. This argument ignores the distinction to which I have already referred between actions relating to immovable property and other actions; in the former year always meant lunar year, but in the latter either a lunar or a calendar year. Section 7 of Cap. 78 was enacted to change the law with respect to immovable property, but it left the previous law untouched as regards other actions, and that law is as I have already set out. The first ground of appeal must fail.

3. Mr. Levin's second ground of appeal was that the appellant denied having received the property sold and that the respondent should have been called on to prove delivery. The memorandum of sale shows that the property passed into the possession of the appellant and one Tauber on July 1st., 1921, and the appellant admitted in Court that the property was left in the hands of Tauber. The sale having been to the appellant and Tauber, a receipt by either of them of the property was sufficient to constitute a delivery. This ground of appeal must fail.

4. The third ground of appeal relates to the procedure adopted by the Court. The Court was satisfied that there had been an admission by the appellant as to the receipt of the property sold. The appellant then asked that the respondent should be required to take the oath. The respondent happened

1937
19th November
Manning S.P.J.
Greene J.
and
Khayat J.
CA 204/37
Gudal
v.
Bernfeld

to be in Vienna so the Court ordered that the defendant should deposit LP.5. to cover expenses, and adjourned the hearing *sine die*. This was on the 19th March, 1937. The next hearing was on the 21st May, 1937. The appellant then said he had not been able to get LP.5., he suggested that he had got an advocate to appear for him and asked for an adjournment. The Court refused to grant any further adjournment and proceeded to give judgment for the respondent.

5. Mr. Levin says the appellant should not have been asked to pay the expenses of administering the oath and refers to article 42 of the Addendum to the Code of Civil Procedure, which makes no provision as to payment of such expenses by either party. My opinion is that, no provision having been made, the expenses should be paid by the party who made the application, that is the appellant. Mr. Levin said the Court could have given judgment for the respondent, dependent on her taking the oath. This may be so, but the appellant did not apply for this to be done. This ground of appeal fails.

6. Mr. Levin's last ground of appeal is that there was nothing to show that the appellant and Tauber were jointly and severally liable and that therefore judgment should have been given against the appellant for half the amount only. He relies on article 1113 of the Mejele which reads as follows:—

“If someone sell a property to two persons, he claims his share separately from each of them, so far as the buyers are not sureties the one for the other, he cannot claim the debt of the one from the other.”

There is nothing in the memorandum of sale to indicate that the appellant and Tauber were sureties for each other and therefore I think that Mr. Levin is right.

7. The judgment of the District Court must be set aside and a judgment be substituted for the respondent for L.E. 900 (nine hundred Egyptian pounds) and costs as allowed in the Court below, with interest at 9% from date of action. Each party will pay his and her own costs of this appeal.

Greene J: I concur.

Khayat J: I concur.

Civil Appeal No. 191 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khaldi J. and Abdulhadi J.

SHEIKH SULEIMAN TAJI FAROUQI . . . Appellant.

v.

1. MICHAEL HABIB RAJI AYOUB
2. YOUSEF HABIB RAJI AYOUB
3. SHIBLY HABIB RAJI AYOUB
4. ROSA HABIB RAJI AYOUB Respondents.

Contracts — Penalty and damages — Distinction between penalty and damages forms part of the law of Palestine — Ottoman Code of Civil Procedure, Articles 111 and 112 — Palestine Order in Council, 1922, Article 46.

On 12th November, 1929, appellant and respondents entered into an agreement for the sale of land. Appellant paid LP. 200 on account of the purchase price and he was let into possession. In accordance with the terms of the agreement, as was modified subsequently in August, 1930, the balance of the purchase price was to be paid as follows: LP. 400 at the end of February, 1931, one third of the balance at the time of transfer in the Land Registry, and the rest of the price one year after the transfer. The appellant was also to pay the taxes and the tithes. The agreement contained several other provisions, one of which was for the payment of damages in the sum of LP. 2500 by either party in case of breach of all or any of the undertakings. Appellant refused to pay the LP. 400 by the end of February, 1931, and the respondents sued him in the District Court of Jaffa in damages. They alleged as breaches the non-payment of the LP. 400, and of the taxes. The District Court dismissed the action. The present respondents appealed to the Supreme Court and the said Court reversed the District Court and awarded them LP. 2500 damages. The appellant appealed to the Privy Council (Privy Council Appeal No. 1 of 1935, 2 P.L.R. 390). Their Lordships remitted the case to the District Court with certain instructions. The District Court awarded LP. 2500 by way of damages to the respondents. The appellant appealed to the Supreme Court. The main point was that the sum of LP. 2500 was a penalty and not liquidated damages, and that if there was no provision in the Ottoman law distinguishing between penalty and damages, then the English law on the subject should be resorted to and should be introduced into Palestine by virtue of the provisions of Article 46 of the Palestine Order in Council. To reach a decision

1937
25th November
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

1937
25th November

Manning S.P.J.
Khalidi J.
and
Abdulhadi J.

CA 191/37
Farouqi

v.
Ayoub
and others

on the point involved, a pronouncement on the interpretation of Articles 111 and 112 of the Ottoman Code of Civil Procedure had to be made.

In allowing the appeal and remitting the case to the District Court to assess the damages caused to the respondents by the breaches committed by the appellant, the Court of Appeal,

HELD (1) that the distinction between a penalty and liquidated damages, since there is no provision to that effect in the Ottoman law, forms, and has formed, since the date of the Palestine Order in Council, by virtue of the provisions of Article 46 thereof, part of the law of Palestine.

(2) that Article 111 of the Ottoman Code of Civil Procedure is not confined to cases where non-performance is non-performance of the whole or substantially the whole of a contract; each case has to be scrutinized to see how far the article applies. The failure to carry out the undertakings provided for in the article in question means failure for any reason to carry out an undertaking and does not connote the intervening of any obstacle which prevents performance. Accordingly if a person agrees to pay a certain sum as damages for a breach of all or any of his undertakings under the agreement, then the article in question provides that he is liable for that amount of damages if he fails to carry out any single stipulation.

(3) (*per Manning, S.P.J.*) that Article 112 of the Ottoman Code of Civil Procedure applies to any undertaking in any contract whatsoever which amounts to payment of money and is not restricted to undertakings for payment of money arising out of a debt.

(*per Khalidi J. and Abdulhadi J.*) that Article 112 of the Ottoman Code of Civil Procedure applies only to cases where the undertaking to pay money arises out of a document of debt or any other contract or transaction where payment of money is due on an ordinary debt; it does not apply to cases where the payment of a sum of money is one of the conditions of a contract containing mutual undertakings, and such money is not due as a debt.

Referred to: CA 214/26, 1 P.L.R. 123.

CA 97/35, 3 P.L.R. 101.

CA 83/37.

Dunlop Pneumatic Tyre Company Ltd. v.
New Garage and Motor Company Ltd.
(1915) A.C. 79.

B. Joseph for appellant.

M. Eliash for respondents.

1937
25th November

Manning S.P.J.
Khalidi J.
and
Abdulhadi J.

CA 191/37
Farouqi

v.
Ayoub
and others

Manning, S.P.J.: 1. On the 12th November 1929 the appellant and the respondents entered into an agreement under which the respondents were to sell and transfer certain land to the appellant. The appellant was let into possession of the property when the agreement was signed on his paying LP. 200, part of the purchase price. The price was to be calculated according to the quality of the land. By the agreement, as subsequently modified, the property was not to be registered in the name of the appellant until the 13th February 1932. The balance of the purchase price was to be paid as follows: LP. 400 at the end of February 1931; one third of the balance on transfer in the Registry, and the rest of the price one year after the said transfer. At the date of transfer, in order to secure payment of the balance due, the appellant was to mortgage the land to the respondents. Besides stipulations for the payment of the purchase price and the transfer of the land the agreement contained other stipulations with reference to the payment of taxes and tithes by the appellant and the payment of a surveyor by the respondents.

2. Clauses 7 and 8 of the agreement were as follows, the respondents being the first party and the appellant the second party:

"7. The first party shall pay jointly and severally to the second party LP. 2500 in liquidated damages without the necessity for a notification if they breach all or part of their undertakings under clause 2 or any other clause of this contract and shall return also to the second party the advance they received on the signature of the contract whether in cash or in a bill.

8. The second party shall pay to the first party LP. 2500 in liquidated damages without the necessity for a notice if he commits a breach of all or part of his undertakings under this agreement, and shall not be entitled to reclaim the advance received by the first party."

The appellant refused to pay the LP. 400 at the end of February 1931, and the respondents in consequence took action against him in the District Court of Jaffa. They alleged in their statement of claim two breaches of the agreement, failure to pay the LP. 400 and failure to pay taxes, and claimed the LP. 2500 as liquidated damages. The District Court dismissed the action, but on appeal was reversed by this Court, the respondents being awarded LP. 2500 damages.

3. The appellant appealed to the Judicial Committee of the Privy Council (Privy Council Appeal No. 1 of 1935, 2

1937
25th November
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

P.L.R. 390). Their Lordships found that it was impossible to decide the appeal on the material before them and they remitted the action to the District Court of Jaffa. Specific instructions were given as to certain points to be decided. The first was whether article 112 of the Code of Civil Procedure provides the only remedy where the default is delay in payment of a sum of money. The second was whether article 111 of the same Code only applies to a case where the non-performance is non-performance of the whole contract or substantially the whole contract. The Court was also asked to bear in mind the provisions of article 46 of the Palestine Order-in-Council, 1922, and their Lordships said they had no doubt that the jurisdiction of the Courts in Palestine had been enriched by this provision of the Order-in-Council with the well-known legal distinction between a penalty and liquidated damages.

4. The District Court dealt with these issues in a very brief judgment. It did not answer the question with regard to article 111. It did not make any reference to article 46 of the Order-in-Council. With regard to article 112 it laid down the principle that "where the payment of a sum of money or instalments is the essence of the contract and not subsidiary to it, the provisions of article 111 must be applied." It further held that it is not within the competence of a Court to assess the amount of damages where damages are specifically provided for in the contract. No reasons were given except that these rulings were in accordance with principles hitherto adopted by the Courts in Palestine. Judgment was entered for the respondents for LP. 2500 damages. The appellant has again appealed and it has become necessary for this Court to deal somewhat exhaustively with the questions which were so summarily disposed of by the District Court.

5. I have had previous occasion to refer to the difficulty occasioned by the fact that a large and important part of the law in Palestine is in the Turkish language — a language which is not one of the three official languages. There are various translations into each of the official languages, but scarcely a case occurs in which some doubt is not thrown on the accuracy of these translations. In the present case I have been fortunate in that both my brethren are acquainted with the Turkish language. They have translated for me the relevant articles of the Turkish Code into Arabic, and the Court interpreter has translated their versions into English. I think these translations set out the law accurately and though as regards article 111 there is an important variation in the versions, there has been no difficulty in agreeing on its interpretation.

1937
25th November
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

6. The Ottoman Code of Civil Procedure contains in Chapter 5, articles 106 to 112, a short code with reference to damages. The articles with which we are concerned are articles 111 and 112. My brother Khaldi's translation of article 111 is as follows:

"If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded."

My brother Abdulhadi's translation is: —

"In the event where it is pointed out and provided in the contract by the other party that where any of the parties cannot carry out what he undertook, he pays a fixed amount as damages, payment of greater or less than that is not allowed."

I have already referred to what seems to be an important divergence; my brother Khaldi's version being "failure . . . in the carrying out", and my brother Abdulhadi's being "cannot carry out". Both agree that "cannot" is the more accurate translation, but they likewise agree that the correct interpretation of the article is that "cannot" does not connote the intervening of any obstacle which prevents performance, but means failure for any reason to carry out an undertaking. They are agreed that the article is not confined to cases where the non-performance is non-performance of the whole contract or substantially the whole contract. Each contract has to be scrutinised to see how far article 111 applies. If, as in the present case, the appellant has agreed to pay LP. 2500 damages if he commits a breach of all or part of his undertakings under the agreement, then the article provides that he is liable for that amount of damages if he fails to carry out any single stipulation.

7. I agree with my brethren in their opinion as to the interpretation of article 111. Parties are free to enter into such undertakings as they please and if they undertake to pay huge damages for trifling breaches, this article will not help them. I pass now to the consideration of article 112, the translations of which are as follows:

My brother Khaldi's:

"The damages to be awarded for failure to carry out the undertakings which amount to payment of money, is a judgment on the interest at the rate of 1% per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damages. If there is no agreement in the document (sanad)

1937
25th November

Manning S.P.J.
Khalidi J.
and
Abdulhadi J.

CA 191/37
Farouqi

v.
Ayoub
and others

regarding the interest, and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim."

My brother Abdulhadi's:

"Interest at one per cent per month is awarded in respect of the capital amount only as damages for any delay in the carrying out of the undertakings which amount to payment of money. Judgment is entered in respect of this interest without the creditor being bound to prove that he suffered any damage. In the event of no agreement as to interest in a document of debt, and interest is claimed in respect of that claim in the notice, it is necessary that it should be calculated from the date of the notice, otherwise from the date of the filing of the application."

8. My brethren are agreed as to the interpretation of this article and that it applies to contracts in which there is one undertaking only, viz. an undertaking to pay money, and that it cannot be applied to a contract such as the present in which the payments of money are some only among other undertakings. My own interpretation of the translations would not agree with this. "The undertakings which amount to payment of money" seem to me to mean any undertakings in a contract to pay money. If the two articles are read one immediately after the other, it is not a strained interpretation to say that "the undertakings which amount to payment of money" are provided for in article 112 and are excluded from the provisions of article 111.

9. The point, however, is not free from authority, viz. Lipshitz v. Breir, reported on page 123 of the Law Reports of Palestine, 1920-33. In that case Breir undertook to supply Lipshitz with 15 waggons of sand a month and Lipshitz had to pay for these at the end of each month. The agreement was in writing and it was provided by clause 9 that "the party that will not carry out the terms of this contract will pay LP. 100 for damages." Lipshitz made default in paying for the sand and Breir sued him for the amount due, LP. 40.500 and LP. 100 damages; and succeeded in getting judgment for these amounts in the District Court. Lipshitz appealed to this Court and his advocate Mr. Eliash urged that article 112 of the Code of Civil Procedure applied, and not article 111. If I may say so with respect, the case was one that called for some analysis of the law applicable, as Lipshitz was being compelled not only to pay for the sand he had bought but an additional sum two and a half times the value of the sand. This Court, however,

contented itself with saying that "article 112 of the Civil Code of Procedure undoubtedly applies solely to the payment of a certain sum of money and therefore does not apply to this case which is governed by article 111 of the Code of Civil Procedure." The appeal of Lipshitz was dismissed.

10. On the other hand there is the case of Bermann v. Graus cited by Mr. Joseph on behalf of the appellant, the number is Civil Appeal No. 97 of 1935. Mrs. Graus undertook to transfer to Bermann on a future date certain land on which a building was to be erected according to certain specifications. There was a provision in the agreement that rent received by Mrs. Graus from tenants prior to the transfer was to be paid to Bermann. There was the usual clause that "the party going back on this undertaking or committing a breach or not complying with one or more of the stipulations hereof shall pay to the party complying therewith the sum of LP. 2000 damages." The land and building were transferred to Bermann and the price was paid, but Mrs. Graus was distinctly informed by Bermann that the transfer was not to be taken as a waiver of his rights for any breaches of the agreement committed by her. Bermann then sued her in the District Court of Jaffa for LP. 2000 liquidated damages, specifying various breaches of the agreement, including a failure to pay LP. 56, rent alleged to have been received by Mrs. Graus from tenants. The District Court did not go into the issues involved; one learned judge held that the action was maintainable; the other held that it was not, as the property had been transferred; and he held that Bermann might institute an action for ordinary damages. As the judges differed Bermann's action was dismissed. This Court, on appeal, held that Bermann, by accepting transfer of the land, had waived his rights to any claim arising out of minor omissions; that the LP. 56 might be made the subject of a separate action; and that minor omissions were not sufficient ground for allowing damages under the contract. It is difficult to understand how the Court held that Bermann waived any of his rights when he distinctly stated when accepting transfer and paying the price that he did not waive them. The case is interesting in showing that this Court shrank from awarding liquidated damages for minor breaches, and from awarding LP. 2000 damages for failure to pay LP. 56. It had the curious result that, though both Courts agreed that Bermann had a cause of action as regards the LP. 56, no relief was granted him apparently on the ground that he claimed liquidated damages and not ordinary damages. Mr. Joseph (for the appellant) may be excused for reading into the decision a ruling that article 111

1937
25th November

Manning S.P.J.
Khalidi J.
and
Abdulhadi J.

CA 191/37
Farouqi

v.
Ayoub
and others

1937
25th November
Manning S.P.J.
Khalidi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

applies only when the breach goes to the root of the contract. The Court, however, did not say this, and the *ratio decidendi* appears to have been that the main object of the agreement, the transfer of the property, had been carried out, and that Bermann therefore had no further rights under it. I cannot find anything in the decision in conflict with the Lipshitz case (*supra*). That case was decided more than ten years ago and professes to lay down what was then, and appears to have been previously, the accepted interpretation of article 112. I feel that I am not free to express my own opinion in the matter and therefore defer to that of my brethren and to that of the Court in the Lipshitz case. The latter decision answers the question of the Judicial Committee with regard to article 112, and it is now necessary to consider the effect on article 111 of article 46 of the Order-in-Council.

11. A number of authorities were cited by Mr. Eliash to show that in cases of this kind the Courts in Palestine have always applied the provisions of Article 111. There is no necessity to refer to these authorities — it cannot be contested that for some reason the Courts, not only in this, but in other instances, failed to consider certain parts of article 46 of the Order-in-Council, and it has been necessary for the Judicial Committee of the Privy Council to remind us of the existence of those provisions of the article which “enrich” our jurisdiction with principles of English Law. For the purposes of the present case the Judicial Committee specifically referred to the well-established distinction between a penalty and liquidated damages.

12. Mr. Eliash urged that this specific reference was made by their Lordships because they had been inaccurately informed of the principles of the Ottoman Law on the subject of damages. I do not agree with this and do not propose to consider it in any way. I take it that their Lordships have held that the distinction between a penalty and liquidated damages forms, and has formed since the date of the Order-in-Council, part of the Law of Palestine. This being so, I see no difficulty in fitting the principle into the general scheme of the law. The Common Law of England strictly enforced penalties — equity came and intervened to give relief against them. The Ottoman Law in article 111 of the Code of Civil Procedure laid down a strict rule that when the parties have agreed on a definite sum as damages for the breach of any stipulation in a contract, then no more and no less than that sum may be awarded. Just as equity came in England to give relief in a proper case, so has article 46 of the Order-in-Council come to Palestine. A new

1937
25th November
Manning S.P.J.
Khalidi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

article has been, as it were, introduced into the local law as to damages — which, if it took statutory form, would appropriately be numbered as 111A, taking its place between articles 111 and 112. The new article would modify article 111 to the extent that in every case where a specified sum had been agreed on as damages, it would be open to the Courts in Palestine to construe the agreement in order to ascertain whether that specified sum was a penalty or liquidated damages, and if it should be found to be a penalty, to give relief against it by assessing as precisely as possible the damage caused by the breach.

13. Neither advocate has made any point as regards the proviso to article 46 — it has not been suggested that there is anything in the circumstances of Palestine or its inhabitants to prevent this particular principle of equity from taking effect or to subject it to any qualification. Mr. Eliash, for the respondents, did say that it would be unfair that we should have this principle of equity when there is no remedy of specific performance in Palestine. I have already in a previous decision of mine in another case ⁽¹⁾ indicated my opinion that the English equitable remedy of specific performance forms part of the Law of Palestine, and therefore Mr. Eliash cannot expect from me much sympathy for this line of argument.

14. One of the leading cases on the subject of penalty and liquidated damages is *Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Company Ltd.*, 1915 A.C. 79. Lord Dunedin, having said that the question is one of construction to be decided by the Court “upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach”, went on to formulate certain suggested tests which “may prove helpful, or even conclusive”. He said:

“(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid

(c) There is a presumption (but no more) that it is penalty when ‘a single lump sum is made payable by way of compensation on the occurrence of one or more of all of several events, some of which may occasion serious and others but trifling damage’ (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co.*, 11 A.C. 332).”

15. In the present case the breaches alleged were failure to pay LP. 400 on the agreed date and failure to pay certain taxes. These sums were much less than the sum stipulated as

(1) LA 1/36, 3 P.L.R. 178.

1937
25th November

Manning S.P.J.
Khaldi J.
and
Abdulhadi J.

CA 191/37

Farouqi

v.

Ayoub
and others

damages. A presumption that the sum is a penalty is also created by the fact that a single lump sum is made payable on the occurrence of any one of several events, some of which may cause only trifling damage — e.g. failure to pay taxes or tithes, or failure to pay the surveyor. I have no doubt that the sum is a penalty and is not liquidated damages.

16. Both advocates agree that there is no previous decision of this Court as to the effect on article 111 of the provisions of the Order-in-Council. In the case of *Nachtizal and another v. Totah* in the District Court of Jerusalem where the relevant clause in the agreement provided for LP. 10,000 damages, the Court (Evans and Atalla, J.J.) said: —

“Perusal of the contract shows that the breaches may vary indefinitely in importance and injury. Under clause 27 alone the possible breaches vary from one causing a few pounds damages to one threatening the prosperity or existence of the business. The amount of the damages is no less than five times the original partnership fund. We have no doubt in finding that this sum is in truth a penalty and not liquidated damages.”

Nachtizal's claim for damages was dismissed on other grounds which were agreed with by this Court on appeal (Civil Appeal No. 83 of 1937), so the question of penalty and liquidated damages was not considered. I may say that I agree very emphatically with the judgment of the District Court. Mr. Eliash also drew our attention to what was said by Frumkin J. in a recent case, viz. that the Ottoman Law knows of no such distinction as that between a penalty and liquidated damages. This simply means that this is a case where the Courts may resort to article 46 of the Order-in-Council, which provides for the application of English Common Law and Equity in cases to which the Ottoman Law does not extend or apply.

17. Mr. Eliash lastly urged that LP. 2500 was not excessive damages as the appellant's failure to pay the LP. 400 amounted to a repudiation of the whole agreement. Even if the breach by the appellant amounted to a total repudiation, the LP. 2500 remains a penalty, and the damage caused to the respondents by the breach must be assessed. This is a matter for the Court below.

18. My order would be that the judgment of the District Court should be set aside and that the action should be remitted to it to assess the damage caused to the respondents by the breaches committed by the appellant, and that the appellant should have the costs of this appeal, to include LP. 15 advocate's fees.

Khaldi J: (Translation) 1. In this case the respondents brought an action in the District Court of Jaffa stating that on the 12th November 1929 they entered into a contract with the appellant whereby they agreed to sell to him a plot of land on conditions stipulated in that contract. They and the purchaser undertook to carry it out within the period prescribed therein. They further agreed that any one party committing a breach of one or the whole of their obligations will pay LP. 2500 damages to the other party. The period for the transfer was extended by a letter written by the appellant wherein he undertook to pay to the respondents the sum of LP. 400 by the end of February 1931 on account of the purchase price while the other stipulations of the contract remained in force. They alleged that the appellant committed two breaches of the contract, firstly that he did not pay the LP. 400 as he undertook in the letter, and secondly he did not pay the taxes which he had to pay under the contract. They asked for a judgment for the sum of LP. 2500 damages.

2. On the 12th November 1932 the District Court dismissed respondents' claim on the grounds, firstly, that it was not proved that the appellant committed a breach in the non-payment of the taxes, and secondly, that the undertaking for payment of LP. 2500 damages stipulated in clause 8 of the contract did not include the letter of the appellant wherein he undertook to pay LP. 400 on account of the purchase price to the respondents.

3. The respondents appealed from this judgment to the Supreme Court. This Court, on the 5th August, 1933, set aside the judgment of the District and was of the opinion that the stipulation in the contract for the payment of LP. 2500 damages included the letter, and awarded against the appellant the payment of LP. 2500.

4. The appellant appealed to the Judicial Committee of the Privy Council. This Committee, having dealt with the appeal, remitted the case to the District Court Jaffa for the latter to decide two questions given in that judgment. That judgment further drew the attention of the Palestine Courts to article 46 of the Palestine Order-in-Council regarding the powers given to them to apply the substance of the common law, the principles of equity, the powers vested in the Courts of Justice and the Justices of the Peace in England, among other things the well established distinction between a penalty and liquidated damages.

5. The District Court of Jaffa retried the case and gave judgment against the appellant to pay LP. 2500 to the respon-

1937
25th November

Manning S.P.J.
Khaldi J.
and
Abdulhadi J.

CA 191/37

Farouqi

v.

Ayoub
and others

1937
25th November
Manning S.P.J.
Khalidi J.
and
Abdulhadi J.

CA 191/37
Farouqi
v.
Ayoub
and others

dents as damages, under article 111 of the Code of Civil Procedure as he committed a breach of some of the conditions stipulated, without dealing with the contents of the judgment of the Judicial Committee regarding article 46 of the Palestine Order-in-Council.

6. The appellant appealed again to this Court which is now before us. The question is as to whether article 111 or 112 of the Code of Civil Procedure applies to this case. We have to consider these two articles very carefully.

7. Article 111 provides:

“If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded.”

Article 112 provides: —

“The damages to be awarded for failure to carry out the undertakings which amount to payment of money, is a judgment for the interest at the rate of 1% per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (sanad) regarding the interest, and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim.”

8. After careful consideration of these two articles, I am of the opinion that it cannot be argued that article 112 applies to this case, as the damages provided for in this article are in respect of the delay arising out of the payment of money resulting from a document of debt or any other contract. The undertaking for the payment of LP. 400 on account of the purchase price was not included in a document of debt but in a contract containing reciprocal undertakings which should be carried out by the parties. The LP. 400 were not a debt but are an instalment on account of the purchase price of the land which was to be purchased.

9. There is no doubt that article 111 of the Code of Civil Procedure applies to this case as clause 8 of the contract provided that a breach of any or more of the conditions of the contract makes the party committing the breach liable to pay LP. 2500 damages to the other party. The appellant undertook to pay LP. 400 on account of the purchase price to the

respondents and did not carry out his obligation which is one of the obligations mentioned in the contract.

10. What was mentioned in the judgment of the Judicial Committee and the arguments of the appellant's advocate that article 111 of the Code of Civil Procedure cannot be applied unless the non-performance is the non-performance of the whole or substantially the whole of the contract cannot be accepted. Article 111 is clear that in case of a breach of the conditions of the contract the sum stipulated as damages must be awarded. The conditions of the contract include part as it includes the whole of the conditions. Further the contract in this present case is very clear which provided that a breach of the whole or any of the conditions makes the party liable for the payment of that sum. The question as to whether the sum stipulated in the contract is payable in the case of a breach of one or more of the conditions is liquidated damages or a penalty is a question which is not provided for in article 111. The word used in article 111 as in the other articles, 106 to 112, is “damages” and no mention is made of a “penalty”. What I know is that the Courts in the Turkish Empire and the Courts in Palestine used to award the damages stipulated in the contract even though the word used is “penalty” instead of “damages”.

11. In view of the provisions of article 46 of the Palestine Order-in-Council which vested the Courts in Palestine, subject to the provisions of the Ottoman Law and the Palestine Ordinances, to apply the substance of the English Common Law, principles of equity and to exercise the powers vested in the Courts of Justice and the Justices of the Peace in England, among other things the well established distinction between a penalty and liquidated damages, I hold that such a rule is applicable in Palestine and it is to be regretted that the Palestine Courts have not, so far, taken it into consideration. The provision for the payment of LP. 2500 for failure to pay LP. 400 on account of the purchase price is, in my opinion, a penalty more than it is liquidated damages.

12. As long as this sum is a penalty and not liquidated damages, the District Court of Jaffa should have fallen back on article 46 of the Palestine Order-in-Council and assessed the loss caused to the respondents for the failure of the appellant in carrying out his obligations. I therefore hold that the case should be remitted to the District Court. The appellant is to have the costs of this appeal to include LP. 15 advocate's fees.

1937
25th November
Manning S.P.J.
Khalidi J.
and
Abdulhadi J.

CA 191/37
Farouqi
v.
Ayoub
and others

1937
25th November
Manning S.P.J.
Khalidi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

Abdulhadi J: (Translation) 1. This appeal arose from the judgment of the District Court of Jaffa given on the 7th June, 1937, whereby the appellant was adjudged to pay to the respondents the sum of LP. 2500 damages. The respondents brought an action against the appellant which is briefly as follows: That they on 12th November 1929 entered into a contract with the appellant whereby they undertook to sell to him a plot of land on certain stipulated conditions. Each party undertook to carry out his obligations. It was also agreed that each party committing a breach of the whole or any of these undertakings will pay to the other party the sum of LP. 2500 damages. The appellant, subsequent to the contract and on the 6th August 1930, wrote a letter to the respondents whereby he agreed to the alteration of the date of transfer stipulated in the contract, and undertook to pay them up to the end of February 1931 LP. 400 on account of the purchase price, and the other conditions of the contract remained in force. The appellant committed two breaches, firstly, he did not pay the taxes which he had to pay, and secondly he did not pay the sum of LP. 400 which he undertook to pay in the letter and therefore he is liable to pay the sum of LP. 2500 which he undertook to pay in clause 8 of the contract.

2. The District Court, Jaffa, on the 12th November 1932, dismissed respondents' action on the ground that there was no breach regarding the non-payment of taxes and that the undertaking contained in clause 8 of the contract for the payment of damages in case of a breach of the provisions of the contract did not apply to the appellant's undertaking contained in the letter for the payment of LP. 400.

3. The respondents appealed from the judgment of the District Court dismissing their claim to the Court of Appeal. This Court on the 5th August 1933 set aside the judgment of the District Court and gave judgment against the appellant for the sum of LP. 2500 on the ground that the words of the letter "with the understanding that the remaining stipulations of the contract remained in force" meant that failure to fulfil his obligations under the letter was to render him liable to pay the sum of LP. 2500 claimed under clause 8 of the contract.

4. The appellant then appealed from the judgment of the Court of appeal to the Judicial Committee of the Privy Council. The Judicial Committee, having dealt fully with the facts and disputes, remitted the case to the District Court to determine two specified points to make it possible for a decision to be arrived at. Their Lordships also stated: that the Courts in

1937
25th November
Manning S.P.J.
Khalidi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

Palestine having been given by the Palestine Order-in-Council a wide jurisdiction in the laws, procedure and different remedies available in England under the Common Law and Principles of Equity, when dealing with this case will no doubt bear in mind the powers which are vested in them under article 46 of the Palestine Order-in-Council subject to the provisions of the Ottoman Law, the Palestine Order-in-Council, the Ordinances in force; to exercise their jurisdiction in conformity with the substance of the common law, and the doctrines of equity and with the powers vested in the Courts of Justice and the Justices of the Peace in England, among other things the well-established distinction between a penalty and liquidated damages.

5. The District Court of Jaffa dealt with the case again. On the 17th June 1937 it gave judgment against the defendant, the present appellant, for the sum of LP. 2500 provided for by the parties in clause 8 of the contract.

6. The judgment debtor then appealed to this Court from this last judgment of the District Court of Jaffa which is the present appeal with which we are concerned.

7. To facilitate dealing with this appeal, I think it convenient to quote here the provisions of articles 111 and 112 of the Ottoman Code of Civil Procedure as translated by me into Arabic from the Turkish original bearing in mind the words used: —

"111. In the event where it is pointed out and provided in the contract by the other party that where any of the parties cannot carry out what he undertook, he pays a fixed amount as damages, payment of greater or less than that is not allowed.

112. Interest at one per cent per month is awarded in respect of the capital amount only as damages for any delay in the carrying out of the undertakings which amount to payment of money. Judgment is entered in respect of this interest without the creditor being bound to prove that he suffered any damage. In the event of no agreement as to interest in a document of debt, and interest is claimed in respect of that claim in the notice, it is necessary that it should be calculated from the date of the notice, otherwise from the date of the filing of the application.

8. After considering article 112 I believe that it does not apply to this case and I am of the opinion that it is restricted to the damages payable for the delay in payment of a sum of money arising out of a document of debt or any contract or

1937
25th November
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

other transaction where payment of money is due on an ordinary debt. It does not apply to the payment of a certain sum of money which is one of the provisions of a bilateral contract containing reciprocal undertakings to carry out a specified object as the contract in this case by virtue of which no claim could be made for the payment of LP. 400 which he undertook to pay on account of the purchase price. This view is strengthened by the words "capital amount, document of debt, claim" in this article.

9. There is a further point which was discussed and referred to by the Judicial Committee, namely that article 111 of the Code of Civil Procedure does not apply except where the non-performance is non-performance of the whole of the contract or substantially the whole contract. I do not agree with this construction which cannot be justified by the provisions of the article. I am of the opinion that no strict and general rule could be laid as to the question as to whether or not article 111 applies to a case of a non-performance of one or more of the undertakings of a contract, as it varies according to the terms of the contract itself and the intention of the parties. In this particular case the appellant undertook in clause 8 of the contract to pay the sum of LP. 2500 in case of a breach of any or all his undertakings. This undertaking makes him, as a result of the non-payment of LP. 400 on account of the purchase price, liable as this undertaking is part of his undertakings and is connected with the subject matter of the contract, namely the sale.

10. Article 111 and the articles preceding it in Chapter V of the Code of Civil Procedure, which are all the provisions of that code regarding what results from non-performance of contracts, only deal with "damages" and do not deal with "penalties".

11. The absence in these articles (106 to 112) of any provision regarding penalties, and there being no other law allowing the Courts to award penalties in case of a breach, gives power to the Courts to consider it and differentiate it from liquidated damages in conformity with the principles of English law in accordance with the power given by article 46 of the Palestine Order-in-Council as long as these principles do not conflict with the said articles of the Code of Civil Procedure nor with any other law now in force in Palestine. Article 111 provides that the Court should not award more or less than the damages. I see no circumstances which do not allow the application of this principle in Palestine.

1937
25th November
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 191/37
Farouqi
v.
Ayoub
and others

12. The Courts in Palestine, in the past, awarded the amount of damages stipulated in case of a breach of contract, no matter what the amount was. That was done under article 111 without differentiating between it and a penalty. This does not, however, prohibit the Courts from applying this principle in this case as long as article 46 of the Palestine Order-in-Council allows it.

13. When we compare the amount of the LP. 400 which the appellant undertook to pay on account of the purchase price with the sum of LP. 2500 which he undertook to pay if he commits a breach of the whole or part of his obligations, we find that, in accordance with the principles of English law as stated in the judgment of my learned brother the Senior Puisne Judge, the sum of LP. 2500 is a penalty and not liquidated damages as termed by the parties.

14. As long as the sum of LP. 2500 stipulated is a penalty and not liquidated damages, the District Court erred in awarding it. In the circumstances it is necessary to ascertain the actual loss caused to the respondents by the breach of the appellant. As the question of assessing the actual loss is a question for the Court of trial, I am of the opinion that the judgment should be set aside and the case remitted to the said Court. The respondents are to pay the costs of this appeal with LP. 15 advocate's fees.

High Court No. 60 of 1937.

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

Before: Copland J. and Greene J.

1937
29th November

Copland J.
and
Greene J.

HC 60/37
General Mortgage
Bank of Palestine
Ltd.

v.
President District
Court, Tel Aviv
and another

GENERAL MORTGAGE BANK OF
PALESTINE, LTD. Petitioners.

1. PRESIDENT DISTRICT COURT, TEL AVIV
2. S.B. SASSOON,
trustee in bankruptcy of Tova Halperin Respondents.

Immovable property — Mortgages — Mortgagor of immovable property became bankrupt — Application for sale of mortgaged property — Refusal of application on ground that mortgagee must proceed under Rule 47 of Bankruptcy Rules, 1936 — Whether proper order — President of District Court, when functioning under Section 14 of Land Transfer Ordinance, does not constitute a Court but exercises the functions of a Chief Execution Officer — Land Transfer Ordinance, Section 14 — Bankruptcy Ordinance, 1936, Sections 8 and 10 — Bankruptcy Rules, 1936, Rule 47.

Tova Halperin executed on his immovable property two mortgages in favour of petitioners. After the execution of the mortgages, the mortgagor became bankrupt and the second respondent was appointed as trustee of his bankruptcy. The mortgage debts fell due, were not paid, and the petitioners applied to the President of the District Court sitting at Tel Aviv in his capacity as Chief Execution Officer or otherwise acting by virtue of the powers conferred upon him by Section 14 of the Land Transfer Ordinance for the sale of the mortgaged property. The President refused to order the sale, holding that the mortgagee must proceed under Rule 47 of the Bankruptcy Rules, 1936, and that Section 14 of the Land Transfer Ordinance had no application to a case where the mortgagor had become bankrupt, since the said Section 14 must be read subject to Rule 47. Thereupon the petitioners applied for and obtained a rule nisi calling upon the President of the District Court to show cause why an order should not be made ordering him to assume and exercise jurisdiction under Section 14 of the Land Transfer Ordinance. The arguments put forward on the return day by the trustee appear in the order of the High Court reported hereinafter.

In making absolute the rule nisi, the High Court,

- HELD (1) that a President of a District Court, for the purposes of Section 14 of the Land Transfer Ordinance, does not constitute a Court — he exercises the functions of a Chief Execution Officer.
- (2) that the procedure under Section 14 of the Land Transfer Ordinance applies in the case of a bankrupt mortgagor, because Sections 8 and 10 of the Bankruptcy Ordinance, 1936, which specifically lay down that the existing rights of a secured creditor shall in no way be diminished, must mean that a mortgagee can still apply for the sale of the mortgaged property under Section 14 of the Land Transfer Ordinance, and Sections 8 and 10 of the Bankruptcy Ordinance are in no way curtailed by Rule 47 of the Bankruptcy Rules, 1936.

Followed: CA 16/27, 1 P.L.R. 126.

CA 67/28, 1 P.L.R. 346.

Approved: Waddell v. Toleman (1878) 9 Ch. D. 212.

S. Horowitz for petitioners.

Second respondent (S.B. Sassoon) appeared in person.

Order: In this case the Petitioners are the mortgagees under two deeds of mortgage from one Tova Halperin, who has since become bankrupt, and is now represented by his trustee in bankruptcy. It is not disputed that the moneys secured by the mortgages have now become due, and the mortgagees applied to the President of the District Court under Section 14 of the Land Transfer Ordinance for an order for sale of the mortgaged properties. The learned President refused to make the order, holding that the mortgagees must proceed under Rule 47 of the Bankruptcy Rules 1936 and that Section 14 of the Land Transfer Ordinance did not apply in a case where the mortgagor had become bankrupt, since in his opinion Section 14 must be read subject to the provisions of Rule 47. An order nisi was granted to the mortgagees by this Court, calling on the President of the District Court and the trustee to show cause why the President of the District Court should not assume and exercise jurisdiction under Section 14 of the Land Transfer Ordinance.

On the return to the rule, the trustee has supported the reasoning of the learned President and has advanced a further

1937
29th November
Copland J.
and
Greene J.
HC 60/37
General Mortgage
Bank of Palestine
Ltd.
v.
President District
Court, Tel Aviv
and another

1937
29th November
Copland J.
and
Greene J.
HC 60/37
General Mortgage
Bank of Palestine
Ltd.
v.
President District
Court, Tel Aviv
and another

argument that the application for sale was wrongly addressed to the President of the District Court in his capacity as Chief Execution Officer. He has argued that the President of the District Court when exercising the functions conferred on him by Section 14 of the Land Transfer Ordinance constitutes a Court and is not sitting in his capacity of Chief Execution Officer, and, if that is so, then the High Court has no jurisdiction to entertain this present petition. He further asks us to hold that the cases of Max Ben-Zion and another v. The American Palestine Bank Ltd., Civil Appeal No. 16/27 (P.L.R. 1, p. 126) and Shahin v. El-Hayek, Civil Appeal No. 67/28 (P.L.R. 1, p. 346), which laid down that a President of a District Court, when determining an application for sale under the Land Transfer Ordinance, was exercising the functions of a Chief Execution Officer, were wrongly decided and are bad law.

We should have in any case very considerable diffidence indeed in over-ruling a decision of ten years' standing and which has been followed in thousands of applications by Presidents of District Courts even if we thought that it were wrong, but here no question of diffidence arises since we think that both the above cases correctly state the law. In every instance where a President of a District Court or Relieving President of a District Court is to be held to constitute a Court, the Ordinance specifically states that he shall — cf. Sections 11 and 19 of the Courts Ordinance, and Section 26 of the Succession Ordinance. See also Section 3(a) and (d) of the Courts (Temporary Constitution) Ordinance, 1936. Section 14 of the Land Transfer Ordinance (Laws of Palestine, Cap. 81, p. 884) on the contrary states that "Application for the sale of immovable property in execution of a judgment or in satisfaction of a mortgage may be made to the president of the district court....". It will be observed that here there is no mention of any application being made to a "Court" — it is to be made to the President of the District Court. The President of the District Court therefore for the purposes of Section 14 of the Land Transfer Ordinance does not constitute a Court.

With regard to the other point that the procedure under Section 14 cannot be applied in the case of a bankrupt mortgagor, the law is in our opinion equally clear and admits of no doubt.

1937
29th November
Copland J.
and
Greene J.
HC 60/37
General Mortgage
Bank of Palestine
Ltd.
v.
President District
Court, Tel Aviv
and another

There is nothing in the Bankruptcy Ordinance 1936 to support the view taken by the learned President, and we must stress this point that a Rule cannot take away or diminish any right conferred by the Ordinance under which the Rule is made. The provisions of the Bankruptcy Ordinance on the contrary specifically lay down that the existing rights of a secured creditor shall in no way be diminished.

Section 8 (1) and (2) states: —

"8.-(1) On the making of a receiving order, the Official Receiver attached to the Court shall be thereby constituted Official Receiver of the property of the debtor, and thereafter, except as directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with leave of the Court and on such terms as the Court may impose.

(2) But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

and further, Section 10(3) is in these terms: —

"(3) Notwithstanding anything to the contrary in this section, the Court shall not restrain a mortgagee or other secured creditor in the exercise of his legal remedies in respect of any mortgage or security."

These sections must mean that a mortgagee can still apply for an order for sale under Section 14 of the Land Transfer Ordinance, and they are in no way curtailed by Rule 47.

In the English Courts it has been repeatedly held that a mortgagee, where the mortgagor is bankrupt, may take proceedings for foreclosure or sale in the Chancery Division and is not obliged to realise his security in the Bankruptcy Court — he has a choice of what course he will take. Perhaps the strongest case is Waddell v. Toleman (1878) 9 Ch. D. 212, where this principle was laid down. In this case the mortgagee was also bankrupt, but it was held that his trustee could take proceedings outside the Bankruptcy Court. In England the consent of a Court, either the Bankruptcy Court or the Chancery Division, has to be obtained for the sale of mortgaged prop-

1937
29th November
Copland J.
and
Greene J.
HC 60/37
General Mortgage
Bank of Palestine
Ltd.

v.
President District
Court, Tel Aviv
and another

erty — in this country it is the consent of the President of a District Court which is necessary, or that of the Bankruptcy Court. Sections 8 and 10 of the Bankruptcy Ordinance and Rule 47 are in practically the same terms as the corresponding provisions in the English Bankruptcy Act, and by Section 141 of the Bankruptcy Ordinance that Ordinance must be interpreted in accordance with English Law.

For these reasons we think that the rule must be made absolute. The second Respondent must pay the costs and LP. 5 advocate's fees to the Petitioners.

Civil Appeal No. 212 of 1937.

In the Supreme Court sitting as a Court of Appeal.

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

DAVID KINSBRUNNER,
ADMINISTRATOR OF BERL
KINSBRUNNER'S ESTATE Appellant.

v.

BERL KOLB Respondent.

Administration — Action, Right of — Administrator of an estate appointed by a foreign Court not entitled to sue in Palestine.



1937
3rd December
Manning S.P.J.
Copland J.
and
Khayat J.
CA 212/37
Kinsbrunner
v.
Kolb

In Civil Case No. 116/36 of the District Court, Jerusalem, the appellant sued the respondent for a debt alleged to have been due to one Berl Kinsbrunner. The debt was contracted in Austria. The appellant had been appointed as administrator of the estate of Berl Kinsbrunner by the Magistrate's Court, Vienna. The District Court dismissed the action on the ground that appellant had no right to sue in Palestine as he had not obtained letters of administration in Palestine. The administrator appealed.

In dismissing the appeal, the Court of Appeal,

HELD that the appellant, the administrator, could not sue in Palestine as he had not obtained letters of administration in Palestine.

Ph. Fleisher for appellant.

A. Amdur for respondent.

Judgment: 1. In this case the appellant sued the respondent in the District Court of Jerusalem for a debt which was alleged to have been due to one Berl Kinsbrunner. The debt had been contracted in Austria and Berl Kinsbrunner died in 1934.

2. The appellant was suing as administrator of the deceased's estate, he having been appointed by the Magistrate's Court, Vienna, as administrator of the estate of the deceased.

3. The District Court of Jerusalem gave judgment for the respondent on the ground that the appellant had no right to sue in Palestine as he had not obtained letters of administration in Palestine.

1937
3rd December
Manning S.P.J.
Copland J.
and
Khayat J.
CA 212/37
Kinsbrunner
v.
Kolb

4. We are in agreement with the judgment of the District Court. In Cheshire Private International Law, page 408, the following passage occurs: —

“The rule is absolute that the status of an administrator appointed by a foreign Court is not recognised in England. His title relates only to property that lies within the jurisdiction of the country whence he derives his authority, and therefore he has no right to take or to recover property in England without a grant from the English Court”.

5. We are in agreement with that statement of English Private International Law and in the circumstances that rule is the only rule which can be applied in Palestine. The appeal is therefore dismissed with costs to include LP. 5 advocate’s fees.

Civil Appeal No. 189 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice and Khayat J.

GOVERNMENT OF PALESTINE Appellant.

v.

AHMAD HASSAN KATKHUDA,
IN HIS CAPACITY AS MUTAWALLI
OF THE WAQF OF THE MOSQUE OF
QISARIA. Respondent.

Immovable property — Miri land — Waqf — Miri land cannot be created waqf without consent of competent authority — Miri land does not by occupation by a waqf become waqf — Law of Awqaf (Omar Hilmi), Articles 55 and 330.

Certain lands were claimed by Government before the Settlement Officer as mahlul on the ground that the holder of such lands died without heirs. Ibrahim Ahmad Sharkas and Ismail Ahmad Sharkas claimed to be the heirs of the deceased; they lost their claim in the Land Court, and on appeal both parties reached a consent judgment to the effect that the lands be granted to the claimants on payment of bedal misl; the grant to take effect after the expiration of the lease in respect of the lands in question between the Government and the Palestine Jewish Colonization Association. This consent judgment was entered in 1933. In 1922 the lands in question were registered as

1937
4th December
Trusted C.J.
and
Khayat J.
CA 189/37
Government of
Palestine
v.
Katkhuda

miri in the name of the Mosque of Qisaria, which is a waqf created by the deceased. Before the Settlement Officer the mutawalli of the waqf, i.e. the Mosque of Qisaria, claimed the lands by registration and by prescription, Government claimed them as mahlul and Ibrahim and Ismail Ahmad Sharkas also claimed the lands as heirs. The Settlement Officer ordered the registration of the lands as miri in the name of the mutawalli for the time being of the waqf of the Mosque of Qisaria on behalf of the said waqf. Government appealed to the Land Court of Haifa as well as Ibrahim and Ismail Ahmad Sharkas. Both lost in the Land Court and separate appeals were made to the Supreme Court. The only point for decision was whether the waqf could, by occupation by the mutawalli for the period of prescription, acquire a title to miri land.

In allowing the appeal and remitting the case to the Land Settlement Officer to decide what land, originally dedicated, should now be registered as waqf, and in whose name, having regard to the facts including the consent judgment, the balance should be registered, the Court of Appeal,

HELD that in the absence of any express provision in the law authorising it, miri land cannot, by occupation, become waqf, and if such miri land cannot become waqf, it follows that it cannot legally be registered as waqf.

Acting Government Advocate (Fawzi Ghussein) for appellant.

Hanna Asfour for respondent.

Trusted, C.J.: By a waqfieh dated 8th Jamadi el Awal, 1321 A.H., Fatmeh — known as Rohdil Khanum, wife of Ali Bey Sharkas, dedicated as waqf, *inter alia*, “all the garden, orchard and house situated at Hudeidun farm owned by her as per Kushan dated July, 1319; bounded on S.: Miri lands belonging to it; E.: Main road; N.: Ard el Burj; W.: Main road and sand dunes.”

It is clear that part only of the dedicator’s property was affected by this waqfieh and that in addition to the property affected she had miri lands.

It seems that the property was registered in the Land Registry, Haifa, on 13th March, 1922, as miri in the name of the Mosque of Qisaria, i.e. the waqf to which the waqfieh relates.

In 1933 there were proceedings between the Government, which alleged the land was mahlul, and the heirs of Fatmeh, which were settled by a consent judgment in Land Appeal No. 50/32 in this Court as follows: —

1937
4th December
Trusted C.J.
and
Khayat J.
CA 189/37
Government of
Palestine
v.
Katkhuda

1937
4th December
Trusted C.J.
and
Khayat J.
CA 189/37
Government of
Palestine
v.
Katkhuda

"That the land in dispute be granted to Appellants on payment of Bedl Misl, the grant to take effect after the expiration of the present lease by Government to the Palestine Jewish Colonization Association."

The area in which the land in question is situated became subject to settlement and before the Settlement Officer the Government became the Plaintiff — the Mutawalli of the Waqf of the mosque of Qisaria the Defendant — and the heirs third parties. The Settlement Officer, in paragraph 5 of his judgment, summarised the position as follows: —

"The Third Parties based their claim on the consent judgment of the Supreme Court referred to above, although they had never been in possession of the land. The bases of the claim of the Defendant are longer and in the main are as follows: —

- (1) Registration, for which extracts were produced, in the name of Fatima bint Ahmad, otherwise known as Rudail Hanum, who died in 1326 (Turkish Year).
- (2) A dedication by her on 8th Jumada-el-Ula, 1321, of the land and of the trees and buildings then standing on the land as Waqf. The Waqfiya is in order as to form.
- (3) Registration of 13th March, 1922, at the Land Registry at Haifa in the name of the Mosque of Qisaria as Miri.
- (4) Possession by the grantor before the dedication by her and possession by the Mutawalli of the Waqf, undisputed and undisturbed, since 1326, and until the conflicting claims in this case were presented by the Plaintiff and the Third Parties."

It is clear that the dedication being before 1331 A.H., the land on which the trees and buildings were could be properly dedicated, and the only question which arises as to it now is its present extent.

The difficulty of the case is presented by the balance of the land which is miri, registered in the name of a waqf, and which has been found by the Settlement Officer to have been in the possession, continuous undisputed and undisturbed, of the Mutawalli since 1321.

The Land Settlement Officer in para. 11(2) of his judgment held: —

"(2) The alleged dedication of the Miri land did not have the consent of the proper authorities and must be held to have been invalid. The land must therefore be considered as Miri but to be held by the Mutawalli of the Waqf."

1937
4th December
Trusted C.J.
and
Khayat J.
CA 189/37
Government of
Palestine
v.
Katkhuda

It is clear from the waqfiyah that the dedicator did not purport to dedicate her miri land.

The only question — but an important and difficult one — is: Can a waqf, by occupation by the Mutawalli for a period, in this case from 1321 A.H. to 1355 A.H. (1936), acquire a title to miri land?

The Land Settlement Officer takes the view that a mutawalli, on behalf of the waqf, is in the same position as an ordinary individual, and that article 78 of the Land Code applies, and in para. 12 he states:

"A further point remains to be dealt with; namely, whether Miri land can be registered in the name of a Mutawalli on behalf of a waqf. The Director of Land Registration in his letter No. LD. 2/38-5024 of 18th June, 1935, to the Settlement Officer has given various instances, five in number, where Miri land since 1925 has been registered by Land Registrars in Palestine in the names of various Waqfs or in the names of Mamurs Auqaf; he does not allege that such registrations were invalid. In one other instance given by him certain property in Safad was in 1284 A.H. registered as Mulk (not Waqf Sahih) in the name of the Waqf of the Mosque of Abu Yusuf. From these instances and even independently of them the Settlement Officer concludes that the Mutawalli of a Waqf may hold Miri land without its being in any way Miri Mauqufa. The land subject to this action will accordingly be registered as Miri but in the name of the Mutawalli for the time being of the Waqf of the Mosque of Qisaria on behalf of the said Waqf."

The Land Court (para. 6) agreed with the Settlement Officer that the Government's claim was prescribed and held that possession by him would undoubtedly give the Mutawalli a prescriptive title against the State under Article 78 of the Land Code.

It further takes the view (para. 9) that it is not open to the Government to attack title deeds issued by the Land Registry by reason of Article 100 of the Mejelle, a maxim which according to Hooper states: —

"If any person seeks to disavow any act performed by himself, such attempt is entirely disregarded."

It is true that in this particular case the Mutawalli is in the position of a Defendant, but I do not think that affects the question.

1937
4th December
Trusted C.J.
and
Khayat J.

CA 189/37
Government of
Palestine

v.
Katkhuda

No authority was relied upon by the Settlement Officer except the somewhat obscure references to the practice in the Land Registry in para. 12 of his judgment to which I have referred.

No authority was relied upon by the Land Court and no authority touching the point was cited before us.

I have done my best to find such authority — for which reason the delivery of this judgment has been delayed — and I have not succeeded.

According to Omar Hilmi (Tyser translation) Article 330 of the Law of Avqaf provides —

“The Mutevelli of a vaqf cannot by use of the property of the vaqf acquire Arazi miri, or Arazi mevqufe, or an Ijaretein property in order that revenues from them may be obtained for the vaqf.

If he do so, he is made to pay back the property of the dedication which he gave as the price for the thing acquired, and is liable to be dismissed.”

and Article 55 provides —

“If the Mutevelli of a Vaqf buy something on account of the vaqf out of the income of the vaqf, this thing does not become vaqf by the mere fact that it has been purchased out of the income of the vaqf.

Therefore the Mutevelli can, with the consent of the vendor, annul the sale or sell that thing to another.

But if the Mutevelli has, after the purchase, limited the thing, in accordance with the law, by a decree of the judge, for the benefit of the vaqf, then the thing becomes vaqf.

But if the Mutevelli does not buy the said thing with the income of the vaqf, and acquires it by the expenditure of the thing originally dedicated, in such a case that thing becomes vaqf by the mere purchase.

E.g. If the Mutevelli buy a property with dedicated money appointed to be converted into property, such property becomes vaqf by the mere purchase.

For this, the consecration of the dedication by the decision of the judge is not necessary.”

I am told that these provisions are not inconsistent, any apparent inconsistency being removed by the decree of the judge (Qadi).

1937
4th December
Trusted C.J.
and
Khayat J.

CA 189/37
Government of
Palestine

v.
Katkhuda

The Ottoman Land Code deals, *inter alia*, with miri land which, according to Goadby & Doukhan, means land over which a heritable right of possession (tessaruf) is granted by the State to a private person, though the ownership (raqabe) remains in the State. The primary object of this tenure is to ensure that land is available for cultivation, and the primary incident of this form of tenure is that the land reverts to the State in order that it may be regranted (subject to certain rights) on failure of heirs or upon failure to cultivate.

It is a fundamental principle of waqf that a dedicator cannot dedicate what he does not own. In Turkish times he could only dedicate mulk, or miri dedicated with the consent of the Sultan (I express no view as to the devolution of the Sultan's power), the theory no doubt being, that by the making of land waqf, the State — and through the State the members of the State — lost certain rights. At pages 75 and 76 of Goadby & Doukhan it is stated —

“No true dedication of Miri is possible. Miri made Waqf without being granted as Mulk remains Miri. Miri made Waqf in that way belongs to the dedicator as before, and can be sold to another. On the death of the dedicator it passes to those who have the right of succession, and if there is no one having the right to succeed, it belongs to the Beit-el-Mal. In short, the dedication of Miri made Waqf without any grant as Mulk and without the leave of the Sultan cannot be given effect to and cannot be valid. And the grant of the Raqabe must be by way of gift.”

If one accepts the principle, which I think must be accepted, that miri (without special firman) cannot be created waqf, on the broad ground of public policy in the sense of public interest, in my view, unless there is any express provision of the law authorising it, miri cannot by occupation, and in my opinion, although it is unnecessary for the decision of this case, by purchase, become waqf. I know of no such provision.

If such land cannot lawfully become waqf, it follows that it cannot legally be registered as waqf, and I do not think any estoppel can arise from such registration.

In my judgment this appeal should be allowed and the case returned to the Settlement Officer to decide what land, originally dedicated, should now be registered as waqf; and in whose name, having regard to the facts including the consent judgment, the balance should be registered. It is not suggested that the occupation by the Mutawalli was otherwise than on behalf of the waqf.

1937
4th December

Trusted C.J.
and
Khayat J.

CA 189/37
Government of
Palestine

v.
Katkhudn

This being an appeal by the Government of Palestine, and having regard to the circumstances, there will be no order as to costs or advocate's fees.

At the hearing before us all concerned agreed that Civil Appeal 197/37, Ibrahim Ahmad Sharkas and Ismail Ahmad Sharkas v. Ahmad Hassan Katkhuda, in his capacity as the Mutawalli of the Waqf of the Mosque of Qisaria, Land Owner, Haifa, could conveniently be heard together with this case, and it was so heard.

That appeal will also be allowed, with costs here and in the Court below, and the judgment in this case will apply equally to that case. Advocate's fees LP. 5.

Khayat J: I concur.

High Court No. 57 of 1937.

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

Before: Greene J. and Abdulhadi J.

1937
4th December

Greene J.
and
Abdulhadi J.

HC 57/37
Daoudi

v.
C.E.O. Jerusalem
and another

HUSSEIN KHALIL DAUDI Petitioner.
v.

1. CHIEF EXECUTION OFFICER, JERUSALEM
2. MUHAMMAD SAID JAMA'I Respondents.

Debts — Chief Execution Officer — Order for payment of debt by instalments — Question as to amount of instalment within discretion of the Chief Execution Officer.

The petitioner applied for and obtained an order nisi calling upon the Chief Execution Officer to show cause why he should not order the second respondent to pay a higher instalment in the Jerusalem Execution File No. 1722/37.

In discharging the rule nisi, the High Court,

HELD that the question of the instalments to be paid by the second respondent, the Chief Execution Officer having satisfied himself as to the amount which the second respondent was able to pay, was one within the discretion of the Chief Execution Officer.

Petitioner in person.

Second respondent in person.

Order: 1. This is an application for an order to issue to the Chief Execution Officer, Jerusalem, directing him to show cause why he should not order the second respondent to pay a higher instalment. Petitioner is also asking this Court to order the first respondent to proceed with the attachment of the properties of the second respondent.

2. As regards the question of the instalments: the Chief Execution Officer having satisfied himself as to the amount which the second respondent is able to pay, and this being a question within the discretion of the Chief Execution Officer, this Court cannot interfere with.

3. As regards the question of the attachment, the petitioner has not produced to us the order of the first respondent ordering the attachment nor his order postponing the carrying out of the attachment.

4. The rule nisi granted on the 25th October last should be set aside and the application dismissed.

Civil Appeal No. 60 of 1936.

In the Supreme Court sitting as a Court of Appeal.

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

YASSIN YOUSEF ZEITAWI Appellant.
v.
MOSHE MOTZMAN Respondent.

Consideration — Agreement for sale of land — Mutual promises in agreement — Each promise is consideration for the other.

By an agreement for the sale of land the appellant undertook to sell and the respondent undertook to purchase certain lands. The respondent refused to accept the transfer and appellant commenced proceedings against him in the District Court of Haifa (Civil Case No. 119/35) claiming the damages provided for in the agreement. The point was taken that there was no consideration mentioned in the contract, the Judges constituting the District Court disagreed, and in consequence the action was dismissed. Appellant appealed.

1937
4th December

Greene J.
and
Abdulhadi J.

HC 57/37
Daoudi

v.
C.E.O. Jerusalem
and another

1937
6th December

Manning S.P.J.
Copland J.
and
Khayat J.

CA 60/36
Zeitawi

v.
Motzman

1937
6th December

Manning S.P.J.
Copland J.
and
Khayat J.

CA 60/36

Zeitawi

v.

Motzman

In allowing the appeal and remitting the case for a new trial, the Court of Appeal,

HELD that the contract consisted of mutual promises, each promise being the consideration for the other.

Henry Cattan for appellant.

Respondent in person.

Judgment: 1. This appeal arises out of an agreement made between the parties on the 8th December, 1934. The appellant undertook to sell certain land to the respondent, and the respondent undertook to pay the purchase price of the land. A preliminary point was taken in the Court below that there was no consideration mentioned in the contract. On this point the learned judges of the District Court disagreed and in consequence the action of the appellant was dismissed.

2. The contract consists of mutual promises, each promise being the consideration for the other promise. We think therefore that the judgment of Judge Izzat Nammar was wrong and that the judgment of Judge Sherwell was correct.

3. The judgment of the District Court must be set aside and the action remitted for a new trial. The appellant will have the costs of this appeal to include LP. 5 advocate's fees.

4. We wish to suggest that in cases in the District Courts where the Court is composed of two judges and these judges differ on some preliminary point, it would save a great deal of time and expense if they proceeded to deal with the other issues in the case and give a final judgment on all the facts.

High Court No. 68 of 1937.

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

Before: The Senior Puisne Judge and Copland J.

MUHAMMAD MANSOUR O'JELY Petitioner.

v.

- 1. CHIEF EXECUTION OFFICER, JAFFA
- 2. VICTOR ABULAFIA
- 3. MARCO ABULAFIA Respondents.

Execution proceedings — Application under Article 90 of the Ottoman Law of Execution must be made before final order of sale — Ottoman Law of Execution, Articles 90 and 115.

A judgment-debtor, to avail himself of the provisions of Article 90 of the Ottoman Law of Execution, must make his application to the Chief Execution Officer before the final sale is ordered — So laid down by the Supreme Court sitting as a High Court of Justice.

Petitioner in person.

Order: 1. The petitioner is asking this Court to issue an order to the Chief Execution Officer of Jaffa to rescind his order ordering the sale of petitioner's house in view of the provisions of article 90 of the Execution Law.

2. It is clear from the Chief Execution Officer's order that petitioner's application under article 90 was made after final sale was ordered. This being the case, in view of the provisions of article 115 of the same law, the application is dismissed.

1937
6th December

Manning S.P.J.
and
Copland J.

HC 68/37

O'Jely

v.

G.E.O. Jaffa
and others

Civil Appeal No. 198 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Chief Justice, Copland J. and Khaldi J.

1937
8th December
Trusted C.J.
Copland J.
and
Khaldi J.
CA 198/37
Abu Ghazaleh
v.
Agudath Shechunat Hazrifim
"Maccabi" Cooperative Society Ltd.

SULEIMAN ABU GHAZALEH Appellant.
v.
AGUDATH SHECHUNAT HAZRIFIM
"MACCABI" COOPERATIVE
SOCIETY LTD. Respondents.

Rent — Co-owners — One of co-owners of land a cooperative society — Letting of co-owned property to members of society — Claim of rent by other co-owner — Liability of cooperative society to payment of rent — *Mejelle*, Article 1075.

The appellant and the respondents are joint owners of a plot of land. The respondents allowed their members to occupy the jointly owned land and on failing to pay the appellant the rent he claimed for his share, he commenced proceedings in the District Court of Jaffa (Civil Case No. 34/37) claiming rent for his share. The District Court, after hearing the evidence adduced, dismissed the claim. The appellant appealed.

In dismissing the appeal by majority (Trusted C.J. dissenting), the Court of Appeal,

HELD that the respondents had used and worked the property in dispute themselves in the only way in which they could so work it, and in the only way in which their purposes permitted them to do so, namely, by means of their members and therefore they were not liable to payment of rent.

Referred to: CA 115/29, 1 P.L.R. 606.

H. Cattar for appellant.

I. Olshan for respondents.

Trusted, C.J.: The Plaintiff (now the Appellant) in his statement of claim alleged that the Defendants — a cooperative society — were in occupation of certain land, and further alleged that in the circumstances he was entitled to claim the estimated rent from the society amounting to LP. 421.750 mils.

The District Court found that the Defendants are the partners, in the sense of being co-owners of musha shares, with the Plaintiff in the land in question. It is obvious that the

incidents of musha tenure, when interpreted in accordance with the obscure provisions of the *Mejelle*, are unsuitable to modern conditions, but this is a question for the consideration of the Legislature.

It is not easy to discover exactly what the Plaintiff's case was. The trial Court made the following preliminary order: —

"The Plaintiff has to prove that the society has let the land to definite persons for a definite period and received a definite rent for that letting, i.e. rent for leasing the land of the society".

and that Court further found, at the end of its judgment, —

"Wherefore the Court is of opinion that the Plaintiff has failed to prove his contention to the effect that the Defendant lets part of the said land to others, and asserts that all the persons occupying the said land are members in the society and have acquired this share of theirs by virtue of the relevant paragraph of Article 2 of the Cooperative Societies Ordinance No. 50/33 (Drayton, page 395). The society, therefore, cannot be held responsible for the rent claimed by the Plaintiff in accordance with the last paragraph of Art. 1075 of the *Mejelle*. Wherefore Plaintiff's claim is dismissed."

If this is a finding by the Court that the Defendants are themselves occupying the land, I agree with the majority of the members of this Court that the Plaintiff cannot recover. Moreover, having regard to 115/29, P.L.R. 606, I am doubtful if in any circumstances the Plaintiff could recover rent from the Defendants, but I reserve my judgment as to the position of the Plaintiff *vis à vis* the members of the society, as distinct from the society, if any, occupying the land, which does arise in these proceedings.

I agree, therefore, that the appeal should be dismissed, with costs. Advocate's fees LP. 5.

Copland J.: We have already intimated that in our opinion this appeal fails and we now give our considered reasons for that opinion.

This is an appeal from a judgment of the District Court of Jaffa dismissing the Plaintiff's claim for rent for land which he alleges has been let by the Defendants, who are a Cooperative Society, and in which land they are partners with the Plaintiff in undivided shares, it being further alleged that in so letting the property the Defendants made a profit.

1937
8th December
Trusted C.J.
Copland J.
and
Khaldi J.
CA 198/37
Abu Ghazaleh
v.
Agudath Shechunat Hazrifim
"Maccabi" Cooperative Society Ltd

1937
8th December

Trusted C.J.
Copland J.
and
Khaldi J.

CA 198/37
Abu Ghazaleh

v.

Agudath Shechu-
nat Hazrifim
"Maccabi" Cooper-
ative Society Ltd.

The District Court found as facts that the Plaintiff and Defendants were partners in the land, in respect of which the Plaintiff's claim for rent was made, each having a specified musha' share — further that there was nothing in the evidence of the witnesses nor elsewhere which supported the Plaintiff's allegation that the Defendants had let the property to persons other than members of the society, and had thereby made a profit. The burden of proof was on the Plaintiff since he alleged that plots of land had been let to non-members — that burden he failed to discharge and we cannot interfere with the findings of the trial Court.

The District Court have dealt very fully with the facts and we agree with their statement of the law and with the conclusions at which they arrived. This being so it is unnecessary to state in other language that which has already been said. The antiquated provisions of the Mejelle were obviously intended to deal with the question of village musha', and never to apply to a case where a cooperative society, a purely modern conception, is one of the partners. It is agreed that, if two individuals own property in undivided shares, each is entitled to work his share himself, and is entitled to make a profit therefrom by reason of his own efforts without being liable to account to his partner for that profit. However unsuitable they may be one must apply the principles of the Mejelle to the case now before us, and it seems to us, in the circumstances of this case, and each case must be considered on its own facts, that the Respondents (the Defendants in the Court below) have used and worked this property themselves in the only way in which they could so work it, and in the only way in which their purposes permitted them to do so, namely, by means of their members.

We think, for these reasons and for those given by the District Court, that this appeal fails and must be dismissed with costs and LP. 5. - advocate's fees.

Khaldi J: I concur with the judgment of Copland J.

Civil Appeal No. 216 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Greene J. and Khayat J.

MUNICIPAL COUNCIL, JERUSALEM . . . Appellant.

v.

JOSEPH WEINBERG . . . Respondent.

Rates and taxes — Municipal rates — Objection to payment of municipal rates on ground of non-compliance with provisions of Sections 105, 106 and 109 of the Municipal Corporations Ordinance, 1934 — Reply to objection that Section 107 of Ordinance relieved Municipal Council from requirements of law.

1937
13th December
Manning S.P.J.
Greene J.
and
Khayat J.
CA 216/37
Municipal Council,
Jerusalem
v.
Weinberg

The respondent was called upon to pay the municipal rates due from him, but he refused to pay and the appellant commenced proceedings against him in the Magistrate's Court, Jerusalem (Civil Case No. 4413/36) and obtained judgment for part only of the rates. The Council appealed to the District Court, Jerusalem (Civil Appeal No. 157/37) and the respondent cross-appealed. The respondent argued before the District Court that the procedure laid down in Sections 105, 106 and 109 of the Municipal Corporations Ordinance, 1934, for the assessment of the rates had not been complied with in that no Assessment Committee had been set up nor had an assessment list been prepared and published, with the consequent result of being deprived of the right of opposition and appeal under Sections 110 and 111. The Municipal Council argued that it was relieved by Section 107 from the necessity of preparing and publishing the assessment list and that the section in question empowered it to adopt the assessment lists made under the Urban Property Tax Ordinance without the necessity for any further formalities. The District Court held against the Council, set aside the judgment of the Magistrate and dismissed the Council's claim. The Council appealed.

In allowing the appeal, setting aside the judgments of the District Court and of the Magistrate and remitting the case to the Magistrate with directions to hear the two witnesses whom the respondent wished to call and to deliver a fresh judgment, the Court of Appeal,

HELD that Section 107 of the Municipal Corporations Ordinance, 1934, did not relieve the Municipal Council from the necessity of publishing each year a list with regard to any person the rateable value of whose property had already been assessed under the Urban Property Tax Ordinance.

1937
13th December
Manning S.P.J.
Greene J.
and
Khayat J.
CA 216/37
Municipal Council,
Jerusalem
v.
Weinberg

Saba Said for appellant.

M. Scharf (by permission of the Court) for respondent.

Judgment: 1. In this case the respondent was ordered by the Magistrate's Court of Jerusalem to pay to the Municipal Council of Jerusalem the sum of LP. 2.960 mils for rates.

2. Both parties appealed to the District Court, Jerusalem. On behalf of the Municipal Council it was argued that section 107 of the Municipal Corporations Ordinance relieved the Assessment Committee from publishing each year a list with regard to any person the rateable value of whose property had already been assessed under the Urban Property Tax Ordinance. The District Court rejected this argument and under the impression that the name of the present respondent had not been published in accordance with the law it reversed the decision of the learned Magistrate.

3. We are fully in agreement with the judgment of the District Court with regard to the construction of section 107.

4. A second point has, however, been raised by the appellant and that is that there was a definite finding by the Magistrate that the respondent had failed to prove that the law has not been complied with with regard to the publication of the assessment list. This is quite so, but against this the respondent now says that in the Magistrate's Court he wished to call two witnesses on these points and that the learned Magistrate refused to hear them. This had been made a ground of appeal before the District Court, but the District Court did not deal with it in its judgment.

5. In the circumstances we think that the proper order to make is that the judgments of the District Court and the Magistrate's Court should be set aside, and the case be remitted to the Magistrate with directions to hear the two witnesses whom the respondent wished to call and to deliver a fresh judgment in the matter. Costs of this appeal to abide the event.

Civil Appeal No. 195 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge, Khaldi J. and Abdulhadi J.

SALAMEH HAMMAD ABU KHUSAH,
and eleven others Appellants.

v.

SALAMEH AHMAD ABU SWEIREH,
and four others Respondents.

Immovable property — Ownership — Prescription — Possession — Instances in which claim to ownership of immovable property by prescription may be made — Evidence of possession admissible to prove ownership in certain cases — Ottoman Land Code, Articles 20 and 78 — Land (Settlement of Title) Ordinance, Section 51.

1937
13th December

Manning S.P.J.
Khaldi J.
and
Abdulhadi J.

CA 195/37

Khusah
and others

v.

Abu Sweireh
and others

The appellants, who were dispossessed of certain land by a judgment of the Magistrate's Court, commenced, in accordance with Article 27 of the Ottoman Magistrates Law, proceedings in the Land Court of Jaffa (Land Case No. 4/28) to establish their right to ownership of the land of which they were dispossessed. Neither the appellants nor the respondents had a registered title or title deed. The appellants obtained judgment in their favour, but on appeal to the Supreme Court (Land Appeal No. 40/30) the case was remitted to the Land Court to hear the evidence of certain of the witnesses for the respondents who had not been heard. The Land Court, relying on Civil Appeal No. 80/37 in which the Supreme Court said that there was a "practice that the Court could not hear oral evidence of the fact of possession by a plaintiff in support of a claim of ownership by prescription", dismissed appellants' claim. The appellants appealed.

In allowing the appeal, setting aside the judgment of the Land Court and remitting the case to it to hear such evidence as the appellants may adduce in support of their claim, and, if necessary, such evidence as the respondents may adduce in rebuttal, and to decide the dispute in accordance with the law, the Court of Appeal.

HELD (1) that under the law of Palestine there are only two cases in which a person may claim ownership and registration on the ground of possession for a definite period; one being under Article 78 of the Ottoman Land Code and the other under Section 51 of the Land (Settlement of Title) Ordinance.

1937
15th December

Manning S.P.J.
Khaldi J.
and
Abdulhadi J.

CA 195/37
Khusah
and others
v.
Abu Sweireh
and others

(2) that in cases in which claims to ownership of land are not based on either Article 78 of the Ottoman Land Code or Section 51 of the Land (Settlement of Title) Ordinance, possession as part of the evidence in support of the claim to ownership is admissible.

Referred to: LA 76/25, 1 P.L.R. 87
LA 25/32, 1 P.L.R. 766
LA 13/34, 2 P.L.R. 352
LA 56/35, 4 P.L.R. 131

Explained: CA 80/37.

Aziz Shehadeh for appellants.
Rushdi Shawa for respondents.

Manning S.P.J.: 1. This appeal arises out of a dispute as to the ownership of land. It began more than ten years ago when the appellants were dispossessed by a judgment of the Magistrate's Court of Majdal.

Article 27 of the Magistrates Law reads as follows: —

“A decision given in favour of the plaintiff in an action for the recovery of possession does not imply that he is the owner. Consequently if the party who has been ordered to give up possession claims to be the owner of the immovable property in dispute the question will be decided as a separate action in accordance with the law by the competent Court.”

In accordance with this article the appellants brought an action in the Land Court of Jaffa to establish their claim to ownership. Neither they nor the respondents had a registered title or title deed. The Land Court heard evidence and inspected the land and gave judgment in favour of the appellants. On appeal to this Court the respondents succeeded in getting this judgment set aside and in having the case remitted to the Land Court on the ground that the evidence of certain witnesses for the respondents had not been heard. In view of what I shall have to say hereafter it is of importance to note that one of the grounds of appeal was that oral evidence of possession could not be relied upon to prove ownership. It is clear that this Court did not regard this ground of appeal as having any weight; if it had, it would have allowed the appeal at once instead of remitting the action for further evidence.

2. The judgment of this Court was given in 1931. For some reason the Land Court did not deal with the remitted

action until 1937. The Court then asked the appellants what proofs they had to produce in support of their claim. They replied that they had proof of their possession and that the only documentary evidence was receipts for the payment of taxes. The Court apparently decided that it would be a waste of time to go into the merits of the dispute or hear any evidence. Relying on a recent decision of this Court, *Lahham v. Hamed* and others, Civil Appeal No. 80 of 1937, the Land Court dismissed the appellants' claim.

3. All that this Court said in the *Lahham* case (*supra*) was that there was a “practice that the Court could not hear oral evidence of the fact of possession by a plaintiff in support of a claim of ownership by prescription.” This did not apply to the facts of the present case. The appellants were not claiming ownership by prescription. Under local law there are only two cases in which a person may claim ownership and registration on the ground of possession for a definite period, viz: article 78 of the Ottoman Land Code and Section 51 of the Land (Settlement of Title) Ordinance. The appellants were not relying on either of these provisions. Their case was: “we claim ownership of this land. To show that we own it we propose to prove that we, and only we, have always possessed it and cultivated it without deriving our right to do so from any other party, and that we have paid the taxes on it”. They did not say that their possession gave them any right to the land; they adduced their possession merely as part of the evidence in support of their claim. That they were entitled to do so is clear from the previous decisions of this Court.

4. The authority most frequently cited in cases of this kind is a passage from the judgment of Corrie, Acting Chief Justice, in *Inkeiri* and another v. *Zaideh* (Law reports of Palestine, 1920-33, page 87). The Acting Chief Justice said: —

“I hold that while it may be that, after ascertaining all the facts of the case, including those of possession, the Court may declare that a person who has had long undisturbed possession is entitled to registration as owner, there is no rule which entitles a plaintiff to judgment on proof of ten years' undisturbed possession. The provisions of article 20 of the Land Code are only valid as a defence”.

Article 20 of the Land Code provides for a period of limitation of ten years in actions for the recovery of *Miri* land and of course is only available to a defendant in an action. Of itself

1937
15th December

Manning S.P.J.
Khaldi J.
and
Abdulhadi J.

CA 195/37
Khusah
and others
v.
Abu Sweireh
and others

1937
15th December
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 195/37
Khusah
and others
v.
Abu Sweireh
and others

it confers no title; the person in possession relies on the inability of others to eject him. But the Acting Chief Justice in the earlier part of the judgment said that possession is an element in the evidence that a plaintiff may adduce. He makes the distinction quite clear between the fact that possession cannot create any title (apart from the provisions of the law to which I have already referred) and the fact that a plaintiff should be allowed to lead evidence of possession in support of his claim.

5. I have already said that in the present case neither party has a registered title or any document of title and therefore the case which ought to have been followed by the Court below is Issa and others v. Shehadeh and another (Land Appeal No. 13 of 1934). The Court said: —

“In the present case neither party has any registered title nor has any document of title been produced by either side. It follows that the parties may submit evidence of possession and may ask the Court to infer title from the fact of possession”.

6. A case frequently referred to is Da'ibes v. Da'ibes and another (Law Reports of Palestine p. 766). It is merely an authority for the obvious proposition that article 20 of the Land Code does not create any prescriptive right to ownership of land. In this the Court professed to follow the Inkeiri case (supra) but took no notice of what Corrie, Acting Chief Justice, said as to evidence of possession being one of the matters to be considered by a Land Court in determining questions of ownership. The case cannot be cited, as it sometimes is, to justify the exclusion of evidence of possession in disputes as to the ownership of land.

7. My decision in the present appeal is based on the particular facts of the case, but I wish to refer to a passage from the judgment of this Court in the case of Hajla and others v. Sayegh and others (Land Appeal No. 56 of 1935).

“In deciding an issue as to the title of a claimant to land a Court is bound to consider all relevant evidence placed before it, whether that evidence be oral or documentary. If oral evidence is admissible as to possession and boundaries, then such evidence has to be weighed in conjunction with the documentary evidence. A Court is at liberty to refuse to rely on it, but if it regards it as convincing it is not entitled to disregard it merely because it is oral”.

1937
15th December
Manning S.P.J.
Khaldi J.
and
Abdulhadi J.
CA 195/37
Khusah
and others
v.
Abu Sweireh
and others

8. In my opinion the judgment of the Land Court should be set aside and the action remitted to it to hear such evidence as the appellants may adduce in support of their claim, and, if necessary, such evidence as the respondents may adduce in rebuttal, and to decide the dispute in accordance with the law. Costs of this appeal to include LP. 3 advocate's fees to abide the event.

Khaldi J: I concur.

Abdulhadi J: I concur.

Civil Appeal No. 158 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge and Khayat J.

- 1. LEIB NEUSSIHN
 - 2. MOISE ABRAMOVICH NEUSSIHN
 - 3. BERTA KANANOVA Appellants.
- v.
- MIRIAM NEUSSIHN Respondent.

1937
17th December
Manning S.P.J.
and
Khayat J.
CA 158/37
Neussihin
and others
v.
Neussihin

Personal status — Marriage according to Jewish Law in Germany — Certificate by Rabbinical Court that marriage according to Mosaic Law and the Law of Israel — Death of husband — Claim by widow of share in estate — Validity of marriage according to German law contested — Manner to be followed by civil courts to determine status of woman as to whether she is the widow of the deceased or not — Succession Ordinance, Section 23.

Jurisdiction — Point of jurisdiction not raised in Court below — Point within knowledge of party raising it before Court of Appeal — Court of Appeal will not exercise its discretion in favour of party raising point.

Abraham Neussihin and the respondent were married to each other according to the Mosaic Law and the Law of Israel at Wiesbaden in Germany on the 5th September, 1924. Abraham and the respondent then came to Palestine and on the 19th

1937
17th December
Manning S.P.J.
and
Khayat J.
CA 158/37
Neussihin
and others
v.
Neussihin

November, 1924 they both appeared before the Rabbinical Court at Tel Aviv. At the time they were both foreigners but they consented to the jurisdiction of the Rabbinical Court. The Rabbinical Court investigated the circumstances of their marriage at Wiesbaden and gave the couple a certificate of marriage reciting that they had been married at Wiesbaden in accordance with the Mosaic Law and the Law of Israel. In 1926 Abraham became a Palestinian citizen. He died on the 15th December, 1934, and there was no question as to dispositions which he made under his will but there was certain property which could not be disposed of by will. The respondent claimed in the District Court of Jaffa sitting at Tel Aviv (Estate Case No. 35/35) a share of the property in question by virtue of her being a widow of the deceased. The appellants resisted the claim on the ground that the deceased had never married the respondent, as the marriage ceremony at Wiesbaden was invalid according to German law. The District Court decided in respondent's favour and the appellants appealed.

In dismissing the appeal, the Court of Appeal,

HELD that the decree given by the Rabbinical Court at Tel Aviv when Abraham Neussihin and the respondent appeared before it on 19th November, 1924, and consented to its assuming jurisdiction over them, was a decree as to the status of the parties delivered by a competent Court and is entitled to recognition by the Civil Courts in Palestine. On the strength of that decree of the Rabbinical Court, which declared the parties married in accordance with the Mosaic Law and the Law of Israel, the respondent, when her husband became in 1926 a Palestinian citizen, became also a Palestinian citizen. Since at the time of the deceased's death the respondent was a Palestinian citizen and a member of the Jewish faith, the question whether she was the widow of the deceased fell to be determined by the law of the Jewish Community, in accordance with Section 23 (a) of the Succession Ordinance, and according to that law she had established her claim.

Observations with regard to point of jurisdiction not being raised in trial Court and when Court of Appeal will allow such point to be raised before it.

M. Smoira and I. Bar-shira for appellants.

M. Eliash for respondent.

Manning S.P.J.: 1. Abraham Neussihin died on the 15th December 1934. He had made a will before his death and no question arises as to its validity. He, however, had been in possession of certain property which local law did not allow him to dispose of by will, and a lady named Miriam Marie Neussihin (hereinafter called the respondent) claimed a share of this property by virtue of her being the widow of the deceased. Before the District Court of Jaffa the appellants

1937
17th December
Manning S.P.J.
and
Khayat J.
CA 158/37
Neussihin
and others
v.
Neussihin

(children of the deceased by a former marriage) strenuously contested the fact that the deceased had ever married the respondent. The Court decided the issue in the respondent's favour; hence this appeal.

2. Section 23 (a) and (b) of the Succession Ordinance lays down certain rules for determining the issue. These are as follows: —

"23. For the determination of any question as to whether any person is a member of a class, or possesses a character or quality, whereby he is entitled to a share in a succession, the civil courts shall apply the following rules: —

- (a) if the claimant is a Moslem or a member of one of the communities, the Moslem law or the law of the community shall apply;
- (b) if such claimant is a foreigner, his national law shall be applied in accordance with the rules prescribed by section 4 (iii) (c):"

Article 64 of the Palestine Order-in-Council, 1922, enacts that matters of personal status affecting foreigners are to be decided in accordance with the law of the nationality of the foreigner concerned. It is clear from this that in section 23 (a) of the Succession Ordinance "member of one of the communities" means a member who is not a foreigner.

3. If the respondent in this case was a foreigner at the time of deceased's death, the question will fall to be decided by her national law. If she was not a foreigner at the time, it falls to be decided by Jewish Law, as she was a member of the Jewish faith. The deceased and the respondent had been married according to the Mosaic Law and the Law of Israel at Wiesbaden in Germany on the 5th September 1924. They then came to Palestine and in 1926 the deceased became a Palestinian citizen. If the respondent was his wife, she also became a Palestinian citizen; if she was not his wife, she remained a foreigner.

4. It is agreed that there was no other ceremony of marriage between these parties except the ceremony at Wiesbaden in 1924. There is no finding by the Court below as to whether this was a valid marriage according to German Law; and the argument, both here and in the Court below, has been conducted on the assumption that it was invalid according to German Law.

1937
17th December
Manning S.P.J.
and
Khayat J.
CA 158/37
Neussihin
and others
v.
Neussihin

5. The principle of English Private International Law as regards marriage is that, apart from capacity, *locus regit actum*. Mr. Eliash, for the respondent, urges that in a case such as the present, the principle cannot be applied in Palestine. In Palestine there are Courts of the various religious communities, in many matters exercising a jurisdiction entirely independent of the Civil Courts, and in many other matters exercising a concurrent jurisdiction. One of the matters in which they exercise an exclusive jurisdiction is any suit regarding the marriage of members of the particular community concerned other than foreigners. Under article 65 of the Palestine Order-in-Council, 1922, they may also exercise this jurisdiction as regards foreigners, provided that the foreigners consent. One of these religious courts is the Rabbinical Court of the Jewish Community.

6. The deceased and the respondent were both of the Jewish faith. On the 19th November 1924 they appeared before the Rabbinical Court at Tel-Aviv. They were at that time both foreigners but in the circumstances the fact that they agreed to the jurisdiction cannot be contested. The Court investigated the circumstances of the marriage at Wiesbaden and gave them a certificate of marriage reciting that they had been married at Wiesbaden in accordance with the Mosaic Law and the Law of Israel.

7. It is possible to put a narrow construction on these proceedings, and to say that the Court merely decided that the parties before it had been married in accordance with the Mosaic Law and the Law of Israel, but left the question open as to whether such a marriage at Wiesbaden was to be regarded as valid in Palestine. I do not think, however, that such a construction ought to be adopted. The proper construction is that the parties had been married in accordance with the law of the community and that no further formalities would be of any avail to validate what was already valid in the eyes of that law. Judged by that law the parties were husband and wife, and the result of the proceedings was a decree accordingly.

8. There is a Rabbinical Court of Appeal at Jerusalem but there was naturally no appeal against the decision. Neither has any opposition been entered by any of the parties interested. There has been no allegation that there was any departure from recognised procedure such as might make the decree a nullity in law. In the circumstances it would be improper for this Court to canvass the correctness of the decision or to consider whether religious courts, in dealing with questions of marriage

abroad, should embody in their law any principles of Private International Law. The decision was a decree as to the status of these parties delivered by a competent Court and is entitled to recognition by the Civil Courts in Palestine.

9. This disposes of the issue. At the time of deceased's death the respondent was a Palestinian citizen and a member of the Jewish faith. The question whether she is the widow of the deceased falls to be determined by the Law of the Jewish Community. There can be no doubt that according to that law she has established her claim. I am in agreement with the decision of the Court below, but on somewhat different grounds.

10. Dr. Smoira, for the appellants, raised a question as to the jurisdiction of the Court below. Article 64 (iii) of the Palestine Order-in-Council, 1922, enacts that a District Court, in dealing with matters of personal status affecting foreigners, shall be constituted by a President sitting alone. In the present case it was constituted of a Relieving President and another member which is a usual constitution of a District Court. Neither the deceased nor the respondent were foreigners, they having become Palestinian citizens in 1926; but it is alleged that the three appellants are foreigners. The point was not raised in the Court below. If in a case such as the present, a party consents to a lengthy hearing before a Court composed in a certain manner and finds at the end that he is unsuccessful, it is a matter within our discretion whether he ought to be heard to say on appeal that there were certain facts, undisclosed in the Court below, which made the composition of the Court a wrong one. I am against any exercise of our discretion in favour of the appellants in this instance.

11. For the reasons given I am of opinion that this appeal should be dismissed, and that in the circumstances the costs should not be paid out of the estate but should be paid by the appellants themselves, to include LP. 15 advocate's fees.

Khayat J: I concur.

1937
17th December
Manning S.P.J.
and
Khayat J.
CA 158/37
Neussihin
and others
v.
Neussihin

Civil Appeal No. 179 of 1937.

In the Supreme Court sitting as a Court of Appeal.

Before: The Senior Puisne Judge and Khayat J.

1937
22nd December
Manning S.P.J.
and
Khayat J.
CA 179/37
Dahdah
v.
Abu Ghazaleh

ALICE HANNA DAHDAH, WIDOW OF
NICOLA ANDRAWES ZA'ROUR IN HER
PERSONAL CAPACITY AND ALSO AS
GUARDIAN OF HER MINOR CHILDREN Appellant.

v.

KARIMEH KHALIL ABU GHAZALEH Respondent.

Succession — Estates — Jurisdiction — Waiver of right to succession — Matter of succession brought before Religious Court — Consent of party waiving his right not necessary to clothe Religious Court with jurisdiction — In what cases a President of a District Court may make an order under Section 9 of the Succession Ordinance.

The respondent, the mother of the late Nicola Za'rou, by a document in writing waived her right to the succession of her late son on condition that she should not be liable for any of the debts. The will that was executed by the deceased was taken to the Court of the Religious Community of which the deceased was a member and was confirmed. Subsequently the respondent objected to the confirmation of the will, but the Religious Court rejected the objection, and the respondent appealed to the Court of Appeal of the Community. During the pendency of the appeal, which was eventually decided in favour of the appellant, the respondent went to the District Court of Jaffa and applied for an order prohibiting the Religious Court from dealing any further with the succession and obtained an order to that effect. The appellant appealed that order. By its order of the 2nd November, 1937 (*ante* p. 316) the Court of Appeal remitted the case to the President of the District Court to assign reasons for his order. This the President did and sent the case back to the Court of Appeal.

In allowing the appeal and setting aside the order of the President of the District Court, the Court of Appeal,

HELD (1) that a President of a District Court exercising the discretion given him under Section 9 of the Succession Ordinance may make an order under that Section and such order may take one of two forms: — (1) an order prohibiting an Ecclesiastical Court from taking cognizance of the succession of a deceased person i.e. an order preventing the Ecclesiastical Court from commencing any suit with regard to such succession, and (2) an order prohibiting an Ecclesiastical Court from dealing further with a succession suit.

(2) that as the respondent had waived her right to the succession, from which waiver the Ecclesiastical Court inferred that the respondent did not desire to be considered any longer a party in the suit, her consent to the jurisdiction was unnecessary.

A. Levitsky and B. Farajalla for appellant.

N. Germanous for respondent.

Judgment: The facts out of which this appeal arose have been fully stated in the order of this Court dated 2nd November, 1937 (*ante* p. 316)

This Court called upon the President of the District Court of Jaffa to give reasons why he deemed it just and convenient to make an order under Section 9(1) of the Succession Ordinance. The learned President has now set out his reasons. It is clear from those reasons that he ordered the case to be transferred to the District Court in order that the District Court may have an opportunity of amending and revising certain decisions already come to by an Ecclesiastical Court. We do not think that this procedure is intended by Section 9(1) of the Succession Ordinance.

Under that Section the President of a District Court may make an order and that order may take one of two forms: (1) He may make an order prohibiting the Ecclesiastical Court from taking cognizance of the succession of a deceased person — this means an order preventing the Ecclesiastical Court from commencing any suit with regard to such succession. This obviously was not the order intended in the present case. (2) The President may also make an order prohibiting an Ecclesiastical Court from dealing further with a succession suit. This is clearly what was intended in the present case. The scope of such an order must be in most cases confined to matters of succession not already dealt with by the Ecclesiastical Court.

One of the reasons given by the learned President for ordering the transfer was that there were certain legal points involved which could be more justly and conveniently dealt with by the District Court than by the Ecclesiastical Court. The particular legal point referred to was one of waiver. When the question of succession first came before the Ecclesiastical Court, that Court had before it a document admittedly signed by the Respondent renouncing her claim to any share in the

1937
22nd December
Manning S.P.J.
and
Khayat J.
CA 179/37
Dahdah
v.
Abu Ghazaleh

1937
22nd December
Manning S.P.J.
and
Khayat J.
CA 179/37
Dahdah
v.
Abu Ghazaleh

succession. The Ecclesiastical Court inferred from this document that the Respondent did not desire to be considered any longer a party in the suit and that consequently her consent to the jurisdiction was unnecessary. We think that there was material before the Ecclesiastical Court to justify this conclusion and we do not think that this matter should be retried again by the District Court.

We are of opinion that the learned President of the District Court made an erroneous exercise of his discretion, and we therefore order that his order be set aside and that this appeal be allowed with costs to include LP. 5 advocate's fees.

The attachment ordered on 17th July, 1937, will be released.

I N D E X

A C T I O N

Date on which action is deemed to have been brought against Government 219
Right of, by administrator of an estate appointed by a foreign court 353
where persons suing form part of a party to a contract to whom a joint promise is made 15

A C C O M P L I C E

Evidence of, needs corroboration 83

A C C U S E D

Entitled to have access to exhibits upon which an expert witness bases his opinion 221
Same evidence against several, Court may convict some and acquit rest 83
Time at which he should exercise right of electing trial 291
When entitled to have access to statements of witnesses made to police 221

A D M I N I S T R A T I O N

Estate, administrator of, appointed by foreign Court not entitled to sue in Palestine 353

A D M I S S I O N (S)

By advocate on behalf of his client in judicial proceedings conclusive of the facts contained therein 172

A D V O C A T E A N D C L I E N T

Agreement for remuneration of advocate appearing before ecclesiastical Court not covered by Section 21 of Advocates Ordinance 47

A D V O C A T E S O R D I N A N C E

S. 21 47

A G R E E M E N T (S E E C O N T R A C T)

A L I M O N Y

Meaning of term as used in the Order in Council 259

A P P E A L (S)

Arbitration, in, period within which to file 67
to Supreme Court must be by leave 173
Does not lie from judgment of a District Court discharging accused on ground that he was not committed for trial either by Examining Magistrate or by Attorney General 293
Leave to, considerations to be kept in view when determining application for 91
grant of, from District Court, in its appellate capacity, must be by presiding judge 184
not necessary to serve application for, on other party 10
Lies from order under Section 9 of Succession Ordinance 316

APPEAL(S) (Continued)

Persons entitled to, under Section 5 of Magistrates' Courts Jurisdiction Ordinance, 1935, 325

Time within which to make, where no provision in law fixing it 10

ARBITRATION

Appeal in, period within which to file 67
to Supreme Court, must be by leave 173

Court, power of, to nominate an arbitrator where arbitrators refuse to nominate one 290

Misconduct on part of arbitrator proved, Court has power to set aside award or remit it 48

to meet one of parties and discuss questions pertaining to the controversy with him 103

ARBITRATION ORDINANCE

S. 6	290
S. 12	48
S. 13	48
S. 15	67

ATTACHMENT(S)

Conservatory, course third party in whose hands property subject to should follow 95
power of Court of Appeal to order 261

Loss of goods subject to, liability of one of co-trustees therefor 49

ATTORNEY GENERAL

Cannot appeal judgment of District Court discharging accused on ground that he was not committed for trial either by Examining Magistrate or by Attorney General 293

A W A R D (SEE ARBITRATION)

AWLAWIYEH

Land Settlement Officer, jurisdiction of, in claims for 152

BAILEE (SEE TRUSTEE)

BANKRUPTCY

Partnership may be declared bankrupt 58
Procedure under Section 14 of the Land Transfer Ordinance applies to a bankrupt mortgagor's immovable property 348

BANKRUPTCY ORDINANCE, 1936

S. 8	348
S. 10	348

BANKRUPTCY RULES, 1936

R. 47	348
-----------------	-----

B I L L S

Foreign, when do they become liable to stamp duty 108

BILLS OF EXCHANGE (SEE ALSO CHEQUES AND PROMISSORY NOTES)

Alteration in, person alleging, must be given opportunity to prove it 163

BILLS OF EXCHANGE (Continued)

Oral evidence admissible to show, for example, fraud, duress or want of consideration 228

BILLS OF EXCHANGE ORDINANCE

S. 64	163
S. 96	146

BONA FIDES

Absence of, on part of purchaser of land 73
only remedy for purchaser of land is to rely on prescription where there is 73

BY LAWS

Not necessary to publish them for one month before their enactment 322

CHAMPERTY CONTRACT (SEE CONTRACT)

C H E Q U E (S) (SEE ALSO BILLS OF EXCHANGE AND PROMISSORY NOTES)

Oral evidence admissible to prove circumstances under which it was made and negotiated 2

CHIEF EXECUTION OFFICER

Debt, amount of instalment of, to be paid by a judgment debtor, is one for 360

Has no power to order payment of a mortgage debt by instalments 70

President of District Court acts as, when functioning under Section 14 of the Land Transfer Ordinance 348

CHIEF JUSTICE

Cannot make rules of court altering the substantive law 187

CHILDREN

Custody of, within discretion of District Court 195

CIVIL AND RELIGIOUS COURTS (JURISDICTION) ORDINANCE

S. 6	186, 236
----------------	----------

CO-HEIRS (SEE HEIRS)

COMMITTAL

Order of, for manslaughter where accused charged by police for murder 262

COMPENSATION IN LIEU OF DIYET (SEE DIYET)

C O N S E N T

Jurisdiction, to, of party who waived his rights, unnecessary 378

CONSERVATORY ATTACHMENT (SEE ATTACHMENT)

CONSIDERATION

Absence of, oral evidence admissible to prove 228
For mutual promises 361

CONTRACT(S)

Breach of, waiver of, by conduct 161
where party receiving notice to appear in Land Registry does not comply therewith but appears on some other date 243

ChamPERTY, definition of 319

Consideration, for mutual promises in 361

CONTRACT(S) (Continued)

Damages for breach of, liability of parties for, where both appointed one agent for performance 86
 Fact that party to, not willing to complete, may be inferred from facts 243
 Immovable property, for sale of, in absence of anything to the contrary, vendor to complete transfer 88
 Joint promise made to members of party to, some members of that party cannot sue on the contract 15
 Ousting jurisdiction of Courts of Palestine 315
 Penalty or liquidated damages, doctrine of, part of the law of Palestine 331
 Termination of, provision as to adoption of another method for 175
 Time of essence of, non-performance renders undertaking nugatory 120
 When deemed to have been abandoned 116

CONVICTION

Evidence wrongly admitted will not affect it where there is other sufficient evidence to support it 26

CO-OWNERS (SEE OWNERS)

CORROBORATION

Accomplice, evidence of, needs corroboration 83
 Witness, of evidence of one eye, necessary 254

COURT

District, Jurisdiction of, in actions for non-interference with right of way 225
 in matters of injunction 225
 in matters relating to wills 196
 ousting of, by agreement 315
 Land, competency of, to decide action for non-interference in enjoyment of immovable property 133
 to declare a public right 118
 to order cancellation of mortgages on grounds of fraud, etc. 7
 Religious, Greek Orthodox, power of, to authorise sale of property of minors 21
 has jurisdiction to order the administration of miri land 21
 Moslem, exclusive jurisdiction of, to declare succession to estates of Moslems 165
 Power of, to authorise sale of property of minors 21
 Rabbinical, constitution of, must be of at least of three members 9
 Supreme, in principle ought to follow its own decisions 21
 not precluded from overruling its previous decisions unless they remained unchallenged for a considerable length of time, as the law of Palestine is still in its infancy 21
 not within power of, to order special treatment 83
 Power of, to order provisional attachment 261

COURTS (TEMPORARY CONSTITUTION) (FURTHER PROVISIONS) ORDINANCE, 1936

Intention of, 83

CRIMINAL PROCEDURE (TRIAL UPON INFORMATION) ORDINANCE (SEE TRIAL UPON INFORMATION ORDINANCE).

CRIMINAL CODE ORDINANCE, 1936

Not ultra vires 262

CROWN ACTIONS ORDINANCE

S. 4 219

CUSTODY

Children, of, within discretion of District Court 195

CUSTOMS DUES

Course to be followed by importer refusing to pay 148

CUSTOMS ORDINANCE

S. 131 148
 S. 147 148
 S. 154 148

DAMAGES

Contract, for breach of, liability of parties for, where both appointed one agent 86
 Liquidated damages or penalty, doctrine of, forms part of the law of Palestine 331

DEBT

Amount of instalment judgment-debtor should pay is one for Chief Execution Officer 360
 Maturity of, is date on which it falls due 70
 Privileged, rent is, in respect of proceeds of sale of goods kept in leased premises 246

DECISIVE OATH (SEE OATH)

DELIVERY

Immovable property, of, not an essential condition of sale 73
 Property, of, to one of several purchasers 327

DEPOSITIONS

Required to be put in evidence, procedure to be followed in such cases 26

DISTRICT COURT (SEE COURT)

DISPOSITION

Undertaking to re-transfer immovable property is not 42

DIYET

Compensation in lieu of, claim for, may be made by Moslems to a criminal Court 186
 maximum sum awardable as 286

ELECTION

Trial, of, time at which accused should exercise right of 291

ESTATE(S)

Cases in which President of a District Court may make an order prohibiting a religious Court from dealing further with 378

EVIDENCE

Accomplice, of, needs corroboration 83
Depositions required to be put in, procedure to be followed in such cases 26

Documentary, must be rebutted by documentary evidence 253
Hearsay, admissibility of 110

Negative, proof of, not illegal and void 99
Oral, admissible against document 2

admissible to prove circumstances under which a cheque was made and negotiated 2

admissible to prove usurious interest 69,154
extent of admissibility of, against a document 228

inadmissible against a document 18,140
must be considered in conjunction with documentary evidence 131

where contents thereof not contradicted 2
where litigants are brothers 136

Plan produced in, found inaccurate, party producing it not debarred from producing other evidence 73

Record of proceedings in Court, admissibility of, in 208

System, of, may be admitted in civil cases 154

Witness, of an eye, needs corroboration 254

EVIDENCE ON COMMISSION

Expenses of taking of, on party applying 327

EVIDENCE ORDINANCE

S. 6	254
S. 7	254
S. 9	26
S. 13	154
S. 14	154

EXAMINING MAGISTRATE, (SEE MAGISTRATE)

EXECUTION PROCEEDINGS

Application under Article 90 of the Ottoman Law of Execution must be made before final order of sale 363

Provisions of Article 90 of Ottoman Law of Execution inapplicable to daughter of deceased judgment debtor who is married 135

Right to execution of judgment renounced, subsidiary part of judgment cannot be enforced 225

EXPERT

Report by, accused entitled to have access to exhibits upon which expert bases his opinion 221

EXPROPRIATION

Land, of, assessment of compensation payable is one for appreciation of Land Court 150,207

FOREIGN BILLS (SEE BILLS)

GIFT(S)

Non-heirs, to, made by will 196

GOODS

Ownership of, can only be alienated by the true owner 1

GOOD FAITH (SEE BONA FIDES)

GOVERNMENT

Action against, date on which it must be deemed to have been brought 219

GREEK CATHOLIC MELKITES

Maintenance, liability of uncles of minors to pay 191

GREEK ORTHODOX COURT (SEE COURT, RELIGIOUS)

HEIR(S)

Co, prescription between, does not run 178

HIGH COMMISSIONER

May by Ordinance declare Ottoman laws promulgated after 1st November, 1914, to be in force in Palestine 55

HIGHWAYS

Public, Land Court competent to declare 118

HIRE PURCHASE

Agreement of, tests to be applied to determine whether it is one of hire or one of sale 91

IMMOVABLE PROPERTY

Category of, registration in Land Registers is not conclusive evidence of 45

Claim to, not necessary to state boundaries if kushan and map attached to statement of claim 73

Expropriated, assessment of compensation for, matter one for appreciation of Land Court 150,207

Gift of, made by will 196

Income of, dedication of, for charitable purposes, ineffective if dedication ineffective according to personal law of dedicator 211

Miri, administration of, may be dealt with by a religious Court 21

cannot be dedicated as waqf by will 211

without consent of competent authority 354

cannot be left by will 196,211

does not by occupation by waqf become waqf 354

Mortgage is not a registered interest in, under the Succession Ordinance 43

Non-interference in enjoyment of, within jurisdiction of Land Court 133

Ownership of, claim to, on ground of possession, how maintainable 369

evidence of possession admissible to prove 369

IMMOVABLE PROPERTY (Continued)

Partition of, a matter of judicial nature 245
 co-owners cannot go back on 245
 President District Court, power of, to order sale of 7
 Sale of, contract for, in absence of anything to the contrary,
 vendor is to complete the transfer 88
 delivery not an essential condition of 73
 of minors, by authority of religious Court 21
 President District Court is the officer authorised to
 order 7
 procedure under Section 14 of the Land Transfer
 Ordinance applies to, of a bankrupt 348
 Undertaking to re-transfer, is not a disposition 42

INFORMATION

May contain a charge other than that on which accused was
 committed 262
 Perjury, charging with, must contain an allegation of materi-
 ality 208
 Signature of, for Government Advocate 262

INJUNCTION

Jurisdiction in matters of 227

INSURANCE

Policy of, "indubitable", meaning of word, in 99
 provision in, to prove a negative not illegal and
 void 99

INTEREST

Agreement as to payment of, remains effective after maturity 90
 Money paid on account of purchase price, on, from what date
 payable 161
 Mortgage, on, from what date payable 70,139
 Usurious, oral evidence admissible to prove 69,154

INTERPRETATION ORDINANCE

S. 5 26

IRREGULARITY OF PROCEDURE (SEE PROCEDURE)

J E W (S)

Succession to estate of, by a second wife 373

JOINT AND SEVERAL

Liability (SEE LIABILITY)

JUDGMENT

Signature of sentence by presiding judge does not cause
 miscarriage of justice 105
 Subsidiary part of, cannot be enforced where right to execution
 of judgment renounced 225

JUDGMENT BY DEFAULT (DISTRICT AND LAND COURTS) RULES, 1926

R. 4 187
 R. 13 187

JURISDICTION

Consent to, by a party who waived his rights to the res
 in claim, unnecessary 378

JURISDICTION (Continued)

Court, of, not affected by change in law unless provided to the
 contrary 19
 District Court, of (SEE COURT, DISTRICT)
 Injunction, in matters of, (SEE INJUNCTION)
 Land Court, of (SEE COURT, LAND)
 Land Settlement Officer, of (SEE LAND SETTLEMENT OFFICER)
 Ousting of, by agreement 315
 Point as to, refusal of Court of Appeal to allow raising of 373
 Where value of claim is LP. 246 206

LAND (SEE IMMOVABLE PROPERTY)

LAND COURT (SEE COURT)

LAND COURTS ORDINANCE

S. 3 73
 S. 8 136

LAND LAW (AMENDMENT) ORDINANCE

S. 7 327

LAND REGISTERS

Registration in, is not conclusive proof of category of land 45

LAND SETTLEMENT OFFICER

Jurisdiction of, in claims for awlawiyeh 152

LAND (SETTLEMENT OF TITLE) ORDINANCE

S. 10 152
 S. 51 178,369

LAND TRANSFER ORDINANCE

S. 14 348

LANDLORD AND TENANT

Tenant, liability of, to payment of rent for premises unoccupied
 by him owing to his status and not because of any
 fault in premises 271

L A W

Change in, does not affect a right accrued or an obligation
 incurred unless provided to the contrary 19
 Later, with retrospective effect, its effect on earlier laws 110
 Ottoman, promulgated after 1st November, 1914, may be de-
 clared to be in force by Ordinance 55
 Repeal of, does not affect liabilities incurred 26

LEAVE TO APPEAL (SEE APPEAL)

LIABILITY

Several, if nothing in agreement to show that it is joint and
 several 327

LICENCE (S)

Trade, police may refuse their approval if they suspect that
 premises will be used for unlawful purposes 259

LEGISLATION

Later, with retrospective effect, its effect on earlier legis-
 lation 110

MAGISTRATE

Examining, can commit for manslaughter where original
 charge was for murder 262

MAGISTRATES' COURTS JURISDICTION ORDINANCE, 1935

S. 2	206
S. 3	291
S. 5	325
S. 6	184

MAINTENANCE

Meaning of the term as used in this Order in Council 249
 Minor children, to, liability of uncles to pay 191

MARKET OVERT

Law of, does not apply in Palestine 1

MEJELLE

No provision in, touching on a bona fide purchaser 1

Art. 191	175
Art. 262	73
Art. 365	1
Art. 378	1
Art. 443	271
Art. 647	49
Art. 879	196
Art. 1075	364
Art. 1113	327
Art. 1623	73
Art. 1660	327
Art. 1666	73
Art. 1688	110
Art. 1699	99
Art. 1774	253
Art. 1818	142
Art. 1837	142

MINORS

Immovable property of, sale of, by authorisation of religious Court 21

Maintenance of, liability of uncles for 191

MIRI LAND (SEE IMMOVABLE PROPERTY)

MISCONDUCT

Arbitration, in (SEE ARBITRATION)

MORTGAGE(S)

Cancellation of, competency of Land Court to order 7

Chief Execution Officer has no power to order payment of, by instalments 70

Interest on, from which date payable 70,139

Is not a registered interest in land under the Succession Ordinance 43

Procedure under Section 14 of the Land Transfer Ordinance applies to the sale of a bankrupt mortgagor's immovable property 348

MOSLEMS

Diyet, compensation in lieu of, claim for, may be made by, to a criminal Court 186

MOSLEM RELIGIOUS COURTS (SEE COURT, RELIGIOUS)

MUNICIPAL CORPORATIONS ORDINANCE, 1934

S. 107	367
S. 131	325

MUNICIPAL RATES (SEE RATES AND TAXES)

OATH

Decisive, time for tendering 142

OBLIGATION(S)

Not affected by change in the law unless provided to the contrary 19

ORDER

In Section 35 (8) of Town Planning Ordinance, 1936, meaning to be given to the word 247

ORDINANCE

Meaning of word in Article 17 (1) (d) of the Palestine Order in Council 322

OTTOMAN CODE OF CIVIL PROCEDURE

Art. 80	136,154,228,253
Art. 82	136
Art. 111	331
Art. 112	331
Art. 159	187
Art. 181	10

OTTOMAN COMMERCIAL CODE

Art. 145	267
Art. 146	267

OTTOMAN LAND CODE

Art. 20	369
Art. 41	152
Art. 45	152
Art. 52	21
Art. 78	369

OTTOMAN LAW OF EXECUTION

Art. 90	135,363
Art. 115	363
Art. 127	246

OTTOMAN LAWS

Legislature of Palestine entitled to amend or repeal them 262
 Promulgated after 1st November, 1914, may be declared to be in force in Palestine by Ordinance 55

OTTOMAN MAGISTRATES LAW

Art. 7	95
------------------	----

OWNER(S)

Co, prescription between, does not run 178
 Liability of, for rent for use of co-owned property 364

OWNERSHIP

Goods, of, can only be alienated by the true owner 1
 Immovable property, of, claim to, on ground of possession, how maintainable 369
 evidence of possession admissible to prove 369

PALESTINE ORDER IN COUNCIL, 1922

Art. 17	10,322
Art. 18	262
Art. 38	165
Art. 43	10
Art. 46	55,165,262,331
Art. 51	249
Art. 52	165
Art. 57	165

PALESTINE (AMENDMENT) ORDER IN COUNCIL, 1923

Does not validate any inconsistencies between Succession Ordinance and the Palestine Order in Council, 1922 165

PALESTINE (AMENDMENT) ORDER IN COUNCIL, 1935

Not retroactive in its effect 19

PARTITION

Immovable property, of (SEE IMMOVABLE PROPERTY)

PARTNERSHIP

Court will not interfere with, except for purpose of its dissolution 193

May be declared bankrupt 58

PARTNERSHIP ORDINANCE

S. 19	58
S. 69	58
S. 72	58

PENALTY OR LIQUIDATED DAMAGES

Doctrine of, forms part of the law of Palestine 331

PERJURY

Elements necessary to prove to obtain a conviction for 208
Information charging accused with, must contain an allegation of materiality 208

PERJURY ORDINANCE, 1929

S. 3	208
S. 4	208

PERSONAL STATUS

Alimony, meaning of term as used in the Order in Council 249

Custody of children, within discretion of District Court 195

Maintenance to children, liability of uncles to pay 191
meaning of term as used in the Order in Council 249

Succession to estate of Jew, by his second wife 373
Moslem, within exclusive jurisdiction of Moslem Religious Court 165

PLAN

Produced in evidence, found inaccurate, party producing it not debarred from producing other evidence 73

POLICE

May withhold their approval to issue a trade licence if they suspect that premises will be used for unlawful purposes 259

Statements to, when accused entitled to have access to 221

POSSESSION

Immovable property, claim to ownership of, by, how maintainable 369
delivery of possession of, not an essential condition of sale 73
evidence of possession of, admissible to prove ownership 369

PRESCRIPTION

Bills of exchange, against 146
Does not run between co-heirs or co-owners 178
Immovable property, claim to, by, how maintainable 369
Period of, manner of calculating 73,327
with regard to actions other than those relating to immovable property 327

PRESIDENT DISTRICT COURT

Acts as Chief Execution Officer when functioning under section 14 of the Land Transfer Ordinance 348
Cases in which he may make an order under Section 9 of the Succession Ordinance 378
Power of, to order sale of immovable property 7
Sitting under Section 9(1) of Succession Ordinance sits as a Court 211

PRIOR PURCHASE (SEE AWLAWIYEH)

PROCEEDINGS

Record of, admissibility of, in evidence 208

PROCEDURE

Irregularity of, to give a party who failed to discharge the burden of proof a chance for satisfying that burden 288

PROMISSORY NOTES (SEE ALSO BILLS OF EXCHANGE AND CHEQUES)

Additions to, for payment of damage, loss and interest do not take document out of class of promissory notes 267

PROOF

Burden of, party failing to discharge, should not be given a chance for satisfying it 288

PROVISIONAL ATTACHMENT (SEE ATTACHMENT)

PUBLIC HIGHWAYS (SEE HIGHWAYS)

RABBINICAL COURT (SEE COURT, RELIGIOUS)

RATES AND TAXES (SEE ALSO URBAN PROPERTY TAX)

Exemption from, duty of person entitled to, whose name appears on list of 5

Municipal rates, liability to 367

RECORD OF PROCEEDINGS (SEE PROCEEDINGS)

RELIGIOUS COURT (SEE COURT, RELIGIOUS)

RENT

Arrears in, have special preference over proceeds of sale of goods kept in the leased premises 246

Liability of co-owner for payment of, to other co-owner 364
tenant to payment of, for premises unoccupied owing to status of tenant and not to fault in premises 271

RENOU I

Doctrine of 196

REPEAL

Law, of, does not affect liabilities incurred 26

RES JUDICATA

Action which is 142

R I G H T (S)

Not affected by change in the law unless provided to the contrary 19

R I G H T OF WAY (SEE WAY)

R U L E S OF C O U R T

Chief Justice cannot make... altering the substantive law 187

S A L E

Immovable property, of (SEE IMMOVABLE PROPERTY)

S E N T E N C E (S)

Signature of, by presiding judge, does not cause miscarriage of justice 105

S E T T L E M E N T O F F I C E R (SEE LAND SETTLEMENT OFFICER)

S H A R I A C O U R T (SEE COURT, RELIGIOUS)

S P E C I A L T R E A T M E N T

Court of Appeal cannot order 83

S T A M P D U T Y

Foreign bill, when becomes due on 108

S T A M P D U T Y O R D I N A N C E

S. 27 108

S T A T E M E N T (S)

Police, to, when accused entitled to have access to 221

S U C C E S S I O N (SEE ALSO PERSONAL STATUS)

Appeal lies from order given under Section 9 of Succession Ordinance 316

Gift in respect of, made by will of testator 196

Jew, to estate of, by his second wife 373

waiver of right to 378

S U C C E S S I O N O R D I N A N C E

Mortgage is not a registered interest in land under 43

S. 6	21,165
S. 7	211
S. 9	211,316,378
S. 19	21
S. 21	165
S. 23	373
S. 24	165

S U N

Heat of, compensation not payable for incapacity due to, unless shown that the employment exposed the workman in a special degree to it 51

S U P R E M E C O U R T (SEE COURT)

S Y S T E M

Evidence of, may be admitted in civil cases 154

T E N A N T (SEE LANDLORD AND TENANT)

T O W N P L A N N I N G O R D I N A N C E, 1936

S. 35	247
S. 39	325

T R A D E S A N D I N D U S T R I E S

Licence for, police may refuse their approval if they suspect that premises will be used for unlawful purposes 259

T R A D E M A R K S

Registration of trade mark forming part of the name of a firm 4,61

The trade mark "Maccabiah" 4

The trade mark "Noxzema" 61

T R A D E M A R K S O R D I N A N C E S, 1921-35

S. 8	61
S. 9	4
S. 13	61

T R I A L (S)

Election of, time at which accused should exercise right of 291
Offences, of, upon information where law provides summarily although they are ordinarily triable upon information 83

T R I A L U P O N I N F O R M A T I O N

Law providing that offences ordinarily triable upon information may be tried summarily, such offences may be tried upon information 83

T R I A L U P O N I N F O R M A T I O N O R D I N A N C E

S. 18	262
S. 28	262
S. 34	26
S. 67	293

T R U S T E E

Cannot prove return of goods deposited with him for which he gave receipt by oral evidence 253
Liability of, for loss of attached goods 49

U L T R A V I R E S

Criminal Code Ordinance, 1936, is not 262
Ordinances creating tribunals and appeals from their decisions to a Court existing under the Order in Council are not 10
Rules 4(4) and 13 of the Judgment by Default (District and Land Courts) Rules, 1926, are ultra vires the powers of Chief Justice 187

Section 24(2) of Succession Ordinance in so far as it purports to deal with questions of succession to estates of Moslems is 165

U N D E R T A K I N G

To re-transfer immovable property is not a disposition 42

U R B A N P R O P E R T Y T A X

Exemption from, duty of person entitled to, whose name appears on list of 5

U R B A N P R O P E R T Y T A X O R D I N A N C E, 1928

S. 14	5
-----------------	---

U S U R I O U S I N T E R E S T (SEE INTEREST)

U S U R I O U S L O A N S O R D I N A N C E, 1934

S. 2	154
S. 3	69,154

V E R D I C T

Signature of, by presiding judge, does not cause miscarriage of justice 105

W A I V E R

Conduct, by 161
Succession, of right to 378

W A Q F (SEE ALSO WAQF, LAW OF)

Income of immovable property dedicated for charitable purposes, ineffective if dedication according to personal law of dedicator is ineffective 211
Miri land cannot be dedicated as, by will 211
without consent of competent authority 354
does not by occupation by waqf become waqf 354

WAQF, LAW OF (OMAR HILMI)

Art. 55 354
Art. 330 354

W A Y

Right of, action for non-interference with, within jurisdiction of District Court 227

W I L L (S)

Article 879 of Mejele inapplicable to, unless gifts to non-heirs are to take effect after death 196
Confirmation of, ineffective, if will contains a disposition contrary to law 211
Miri land cannot be dedicated as waqf by 211
cannot be left by 196,211
No inventory necessary in respect of miri land covered by 196

WITNESS(ES)

Expert, reports by, accused entitled to have access to exhibits upon which expert bases his opinion 221
Eye, evidence of one, needs corroboration 254

WORDS AND PHRASES

“Indubitable”, meaning of, in an insurance policy 99
“order” in Section 35(8) of the Town Planning Ordinance, 1936, meaning of 247
“Ordinance” in Article 17(1)(d) of the Palestine Order in Council, meaning of 322
“Practice”, meaning of 187
“Proceedings” in Section 131 of the Municipal Corporations Ordinance, 1934, meaning of 325
“Proceedings” in Section 39(1) of the Town Planning Ordinance, 1936, meaning of 325

WORKMEN'S COMPENSATION

Not payable for incapacity due to the heat of the sun unless shown that the employment exposed the workman in a special degree to it 51

WORKMEN'S COMPENSATION ORDINANCE

Provision in, giving right of appeal to an aggrieved party not repugnant to the Order in Council 10
First Schedule — ploughing land by tractors not one of the employments specified in 51
Third Schedule — para. 3 10

