COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1934 — 1936

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

UNDER THE EDITORSHIP
OF
MAX D. FRIEDMAN, LL. B.
Barrister-at-Law, Solicitor of the Court of King's Bench of Saskatchewan, Canada, Advocate at the Palestine Bar.

COMPILED AND ARRANGED
IN ALPHABETICAL AND CHRONOLOGICAL ORDER
BY
LEON ROTENBERG
Graduate of the Law Faculty of the University of Odessa.

WITH
A COMPREHENSIVE AND DETAILED INDEX
BY THE EDITOR

L. M. Rotenberg—Law Publisher
Tel-Aviv (Palestine)
1937.

COLLECTION OF JUDGMENTS

OF

THE COURTS OF PALESTINE

1934 — 1936

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

UNDER THE EDITORSHIP
OF
MAX D. FRIEDMAN, LL. B.
Barrister-at-Law, Solicitor of the Court of King's Bench of Saskatchewan, Canada, Advocate at the Palestine Bar.

COMPILED AND ARRANGED
IN ALPHABETICAL AND CHRONOLOGICAL ORDER
BY
LEON ROTENBERG
Graduate of the Law Faculty of the University of Odessa.

WITH
A COMPREHENSIVE AND DETAILED INDEX
BY THE EDITOR

L. M. Rotenberg—Law Publisher
Tel-Aviv (Palestine)
1937.

Shoshani's Printing Co. Ltd.
Tel-Aviv, Palestine.

PREFACE.

In preparing this Collection of Judgments and its predecessor, the Collection of Judgments, 1919—1933, it has been my constant object to facilitate reference by the practitioner to judicial decision and with this end in view a scheme of arrangement has been adopted which groups together under various titles cases dealing with particular branches of law. It has not always been possible to conform to this rule since cases containing identical principles often embodied other important questions of law and these have generally been distributed under different titles. Those cases, however, which have obtained some measure of notoriety in the profession as expounding a principle under a certain title have, for convenience of reference, been placed under that title.

Some difficulty was encountered as regards the exclusion of cases which may be considered as obsolete due to the displacement of legislation since the Occupation. I have felt, however, that these have more than historical value as they are still referred to and may have practical utility as showing the state of the law before it was amended and in many instances revealing the reasons for the amendments.

An outstanding feature of this work is that the judgments have been closely indexed in an index to be published at the end of the work so that each principle of law evolved or referred to in any judgment whether it be the principle on which the issue was determined, or whether it be a principle discussed, or mere obiter

dictum, has been made available in accessible form. The importance of this convenience can readily be appreciated in view of the scarcity of indexed reference to legal authority in Palestine. In a country, also, in which the judicial system is newly erected and where there is no body of accumulated legal interpretation to which the practising lawyer can refer, every interpretation of or judicial comment upon a principle of law by a Court is an asset to the lawyer.

This work and the vast amount of labour which it has involved is dedicated to the legal profession in Palestine in the sincere hope and belief that it will lighten the burden of legal research and increase the facility for making authority available to the practitioner.

Max D. Friedman.

Tel-Aviv,
February, 1937.

PUBLISHER'S NOTE.

This publication is arranged along the same lines as the arrangement used by the publisher in his Collection of Judgments, 1919—1933. There has, however, been added in each report a head-note by the editor setting out the facts and synopsyzing the whole judgment in such a manner as to show the result of the judgment in a few sentences. A number of judgments omitted from the Collection of Judgments, 1919—1933, and not available at the time of the publication of that collection have been included here.

Suggestions for the improvement of the work and notices of error will be welcomed.

L. M. Rotenberg.

February, 1937.

ABBREVIATIONS

USED IN THIS WORK:

A.	— Criminal Assize.
A.A.	— Assize Appeal.
C.A.	— Civil Appeal.
C.A D.C.	— Civil Appeal in the District Court.
C.D.C.	— Civil Case in the District Court.
C.E.O.	— Judgment of Chief Execution Officer.
C. of J.	— Collection of Judgments 1919—1933.
C.L.A.C.A.	— Civil Leave Application in the Court of Appeal.
C.L.A.D.C.	— Civil Leave Application in the District Court.
CR.A.	— Criminal Appeal.
CR.A.D.C.	— Criminal Appeal in the District Court.
CR.C.D.C.	— Criminal Case in the District Court.
CR.L.A.C.A.	— Criminal Leave Application in the Court of Appeal.
H.C.	— High Court.
L.	— Land Case.
L.A.	— Land Appeal.
L.A.L.C.	— Land Appeal in the Land Court.
L.S.	— Land Settlement.
M.A.	— Misdemeanour Appeal.
M.A.L.C.	— Misdemeanour Appeal in the District Court.
M.D.C.	— Misdemeanour Case in the District Court.
O.G.	— Official Gazette (until August, 1932).
P.C.A.	— Appeal to the Judicial Committee of the Privy Council.
P.C.L.A.	— Privy Council Leave Application.
P.G.	— Palestine Gazette (after August, 1932).
P.L.R.	— Palestine Law Reports.
S.T.	— Special Tribunal.
W.C.O.	— Workmen's Compensation Ordinance.

ACCOUNT BOOKS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 130/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Baker, J. and Khayat, J.

IN THE CASE OF:

J. P. Vigolik — APPELLANT.

v.

M. Spitzer — RESPONDENT.

Entry in account books as evidence — Master and servant — Employment of person to supervise construction of building — Recovery of remuneration — Plea of payment of lump sum a defence not a counterclaim — Burden of proof.

The appellant employed the respondent at an agreed remuneration to supervise the construction of a building which the appellant was erecting. The appellant gave to the respondent certain lump sums to be used for purposes in connection with the building, including the remuneration due to the respondent. Before the building was completed the appellant dismissed the respondent on the ground that these sums were incorrectly entered in the account book of the respondent and that the respondent had appropriated to himself an amount greater than his remuneration. The account book showed on one side of the account the lump sums received and on the other side the expenditures alleged by the respondent to have been made by him. The respondent having been declared bankrupt the Syndic sued for the balance of remuneration due.

The Magistrate found for the respondent and on appeal the District Court confirmed the judgment. Leave to appeal was granted on the following points of law:

1. Plaintiff was employed by defendant to supervise the construction of a certain building belonging to the defendant. Plaintiff claimed the balance of the remuneration alleged to be due from defendant.

The defendant pleaded that plaintiff used to receive from him lump sums which he was free to apply to any purpose connected with the building, including the remuneration due to himself, and that the said lump sums received by him in fact covered remuneration claimed. Must this plea by defendant be regarded as a defence or as a counterclaim for moneys received and not accounted for which counterclaim is to be admitted before the Bankruptcy Committee?

2. In view of the defendant's having submitted a book of accounts kept by and in the handwriting of the plaintiff showing on one side of the account the lump sums paid to plaintiff and on the other side of the account the expenditures alleged by the plaintiff to have been made by him, does not the onus shift on the plaintiff to prove the items of expenditure, inasmuch as the said entries of expenditure are statements made by the plaintiff in his own favour?

3. Alternatively, the plaintiff not having been exclusively engaged by the defendant and having been dismissed by the defendant after a part of his work had been performed, is he entitled to claim the whole remuneration stipulated or only part thereof, inasmuch as if the dismissal was wrongful, the plaintiff has got a remedy in damages for breach of contract?

HELD: That such a plea was a defence and not a counterclaim, and that the burden was on the respondent to prove that the expenditure was in respect of purposes other than his remuneration.

Appeal from the judgment of the District Court of Jerusalem (C.A.D.C.Jm. No. 119/34) confirming the judgment of the Magistrate in favour of the plaintiff.

I. Olshan — for the appellant.
A. King — for the respondent.

JUDGMENT.

The answers to the first two questions upon which leave to appeal has been granted are:—

1. The appellant's plea is a defence and not a counter-claim.

2. The burden of proving the items of expenditure entered in the respondent's account book is upon the respondent.

The third point of law does not arise upon the facts as found in the judgment of the Magistrate's Court.

We hold, therefore, that it is not for us to give any ruling, at this stage, upon this point.

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

Costs will follow the event.

Delivered the 20th day of December, 1936.

ADMINISTRATION OF ESTATES.

In the District Court of Jaffa.
(Probate Jurisdiction).
C.D.C.Ja. No. 420/28.

BEFORE:

The President (Copland, J.).

In the Matter of the Estate of Baruch Bromberg, deceased.

IN THE CASE OF:

Pearl Bromberg — PLAINTIFF.

v.

The Administrator of the Estate of Baruch Bromberg — DEFENDANT.

and

Sara Bromberg
Israel Bromberg — THIRD PARTIES.

Payment of dowry from estate — Duty of administrator to obtain directions of the Court — Claim for monies due under marriage contract between Jews — Ketuba — Marriage contract amended after execution thereof — Validity of such amendment — Dowry a matter of personal status — Money payable under marriage contract not a gift — Arts. 854, 879, Mejelle.

A contract of marriage made by persons of the Jewish faith contained a stipulation that a sum of £E. 5 was to be paid to the wife as ketuba in the event of separation. Six months prior to the death of the husband he changed the stipulation by an indorsement on the contract providing for a payment of £E. 500 in place of £E. 5. In a claim by the widow for the £E. 500.

HELD: That the indorsement was valid according to Rabbinical law being an addition to and part of the contract. Also, that the stipulation in the contract for payment was in the nature of

dowry and not a gift to which the provisions of Articles 854 and 879 of the Mejelle could be applied.

D. Hatchwell — for one of the third parties.

JUDGMENT.

This is a claim by the widow of the deceased for £E. 5 and £E. 500 as dowry under her marriage contract. The sum mentioned in the contract itself is £E. 5 but by an endorsement executed some 6 months before his death the deceased added a sum of £P. 500 to the amount stated in the contract. The administrator has very properly resisted the claim as it is obviously one on which he must obtain the directions of the Court. The third parties who are children of the deceased have been admitted to this action because if the claim of the widow be allowed their shares in the distribution of the estate will be diminished.

Dowry being a matter of personal status we have taken the opinion of the Chief Rabbinate on the question of the validity of the endorsement on the contract and the reply is that the endorsement is a valid one according to Rabbinical Law and must be read with the contract as one whole, though when it comes to the question of the distribution the endorsement may not rank on the same level as the original contract.

We are of opinion that this endorsement is a part of the marriage contract and that it is in the nature of dowry and is not a gift. The provisions of Article 854 of the Mejelle do not therefore apply. In Sharia Law it would certainly rank as dowry. The provisions of Article 879 also have no application to the present case because they refer only to gifts and we hold that this is not a gift.

It has further been argued that whether this is a gift or dowry it is void in any case because at the time of executing it the deceased was of unsound mind and was under undue influence. Undue influence as such is not recognized in the Mejelle which only deals with force and compulsion and it is not suggested here that such force or duress was used against the deceased by his wife or anyone else. It has been argued that because the deceased married a lady of about 50 who himself was 84 that this is a sign of insanity. It may be an act of extreme foolishness but I can hardly say that it shows an unsound mind. And in any case until

a person has been inhibited from dealing with his property he is fully entitled to do what he wishes. The deceased was never inhibited and we cannot therefore now hold that he was of unsound mind.

We therefore declare that this endorsement is an addition to and a part of the marriage contract and is to be admitted as such by the administrator.

Costs of all parties to come out of the estate. Advocates fees £ 2 to plaintiff, £ 2 to the administrator and £ 1 to Mr. Hatchwell representing one of the third parties.

Delivered the 10th day of October, 1928.

ADMISSIONS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 76/34.

BEFORE:

The Chief Justice (McDonnell, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Zakieh Mulki — APPELLANT.

v.

Bahjat el Issa — RESPONDENT.

Allegation that admission made in notarial power of attorney was false — Right to administer oath as to such falsity — Omission by trial court to award interest — Such omission to be raised in pleadings on appeal — Refusal of Court of Appeal to rectify such omission.

Defendant executed an irrevocable power of attorney before the Notary Public containing an admission that she had received LP. 150 from the plaintiff, and undertaking to repay the said amount in accordance with the terms of a certain agreement. The money not being repaid the plaintiff sued. Plea: that the admission

in the power of attorney was false and that she had in fact received only LP.25.

HELD: That although an oath could not, on the principle established in C.A. No. 306/20[1]) be administered to prove the falsity of an admission in the Land Registry, yet there was no authority for extending this rule to apply to admissions before the Notary Public, in cases in which he, as in this case, merely attested the document, and that therefore an oath in the form prescribed by the Court was to be administered.

HELD FURTHER that where the trial Court omits to award interest to a successful plaintiff, the latter is not entitled on appeal to an amendment of the judgment to include interest unless he has cross-appealed to apply for the interest.

Appeal from a judgment of the District Court of Haifa (C.D.C. Ha. No. 143/32) in favour of the plaintiff in the action.

Abcarius Bey — for appellant.
A. Levin — for respondent.

JUDGMENT.

The judgment in Civil Appeal No. 306/20[1]), Abu Khadra v. Abu Khadra, was concerned with an admission in the Land Registry and we can find no authority for its being extended in its application to admissions before the Notary Public in cases in which he, as in this case, merely attested the document.

The appeal is, therefore, allowed to this extent that appellant can administer to the respondent an oath in the following terms:

> "I swear by almighty God that the admission of Zakieh Mulki, in her Power of Attorney of 18th July, 1931, was not false, and that it is not the fact that she received only LP.25 out of the LP.150 mentioned in the Power of Attorney."

The case is adjourned to Thursday, May 9, for the attendance of the respondent for this purpose[2]).

Delivered the 2nd day of May, 1934.

---

[1]) Reported C. of J. 1919—1933, p. 1129, P.L.R. p. 1.
[2]) See next page for final judgment.

JUDGMENT.

The Respondent having taken the oath in the form prescribed the appeal is dismissed with LP.4 advocate's fee and costs. With regard to the application to amend the judgment of the Court below to include interest in it we hold that an omission of this kind is not one which we can correct in the absence of a cross-appeal concerning it.

Delivered the 9th day of May, 1934.

ADVOCATES.

In the District Court of Jaffa.

C.D.C.Ja. No. 238/28.

BEFORE :

The President (Copland, J.), Mani, J. and Khaldi, J.

IN THE CASE OF :

Selig Axelrod — PLAINTIFF.

v.

Solomon Feingold — DEFENDANT.

Opposition to judgment given by default — Illness of advocate as ground for adjournment — Petition for adjournment — Civil procedure.

An action was set down for hearing on a certain date. Prior to that date the defendant's advocate applied for an adjournment on the ground of his illness and produced a supporting medical certificate. The advocate made no further enquiries as to whether the application had been granted or not and on the day set for hearing the Court gave judgment by default.

HELD: That in these circumstances an opposition to the judgment given by default could not be accepted, that it is the

duty of an advocate to inform his client of his inability to appear on his behalf, and that an advocate has no right to assume that his application for adjournment will be granted as a matter of course.

Opposition to a judgment given by default in the absence of the advocate of the defendant.

Ibrahim Eff. Yousef — for defendant.

JUDGMENT.

The only ground advanced in support of this application is that the defendant's advocate Ibrahim Eff. Yousef was ill on the day fixed for the original trial and that the Court for this reason ought to allow the defence to be heard. The original case was first set down for hearing on the 14th June, 1927, and the defendant's advocate was notified of this on the 3rd June, 1927. On the 5th June the advocate forwarded a medical certificate stating that he was suffering from chronic malaria and dysentry and that he would not be fit to attend Court for a period of 5 days, and in the petition accompanying this certificate he asked for adjournment of the hearing. The matter came before the Court on the day fixed, June the 14th, and the Court declined to adjourn the hearing and decided to proceed in default. It is from that decision that the defendant now makes this application.

It must be observed that advocates have no right to assume that their petitions for adjournment will be granted as a matter of course and this Court declines to have its hand forced in this matter. On his own showing the advocate knew 9 days before the time fixed for the hearing that he would be unable to be present and it was therefore his duty to inform his client accordingly. This he did not do but applied for adjournment and took no steps whatsoever to ascertain if his request was granted. In these circumstances I am of opinion that the Court was perfectly correct in refusing to adjourn and this alone would be a sufficient reason for us to refuse to allow this opposition.

But it is of interest to note that on the afternoon of the 14th or 15th of June when this advocate was supposed to be in Tiberias too ill to travel he in fact appeared in the District Court offices and asked one of my learned colleagues "What is this that you have done by deciding to hear this case in default ?"

We have therefore not the slightest hesitation in dismissing this opposition with costs.

I may also add that it is not far from the truth to say that every practice of obstruction has been pursued in the proceedings between these parties.

Delivered the 18th day of June, 1928.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 139/34.

BEFORE:

The Senior British Judge (Corrie, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Mamur el Awqaf, Jerusalem — APPELLANT.

v.

Syndic of Barsky's Bankruptcy — RESPONDENT.

Authority of advocate to present appeal — Power of attorney signed by officer of Society — Lapse of power of attorney on officer's retirement.

In 1925 an advocate received a power of attorney from the Mamur el Awqaf on behalf of the Waqf Administration. Acting under the power of attorney the advocate filed a claim and appealed from the decision thereof at a time when the Mamur el Awqaf no longer held office. No objection was taken to the power of attorney in the trial Court.

HELD: that in accordance with the rule in L.A. 57/33 the power of attorney was no longer effective on the retirement of the officer holding the position of Mamur el Awqaf, and the advocate had no authority to present an appeal.

Appeal from a judgment of the District Court of Jerusalem (C.D. C.Jm. No. 326/32) in favour of the defendant in the action

Auni Bey Abdul Hadi — for appellant.
M. Eliash — for respondent.

JUDGMENT.

The appeal had been filed by Auni Bey Abdul Hadi in reliance upon a power of attorney given in 1925 by Badr Eff. Yunis, at that time Mamur el Awqaf, Jerusalem.

Before the appeal was presented, however, Badr Eff. had ceased to hold the office of Mamur el Awqaf, hence, in accordance with the rule laid down in LA 57/33, Department of Moslem Waqfs, Jerusalem v. Padre Custode di Terra Santa, Jerusalem, the power of attorney was no longer effective, and Auni Bey had no authority to present an appeal.

There is therefore no valid appeal before this Court and Auni Bey's application is dismissed with costs.

Delivered the 9th day of January, 1935.

In the Supreme Court sitting as a Court of Appeal.

M.A. No. 5/35.

BEFORE:

The Acting Chief Justice (Corrie, J.), Khaldi, J. and Frumkin, J.

IN THE CASE OF:

Michael Neeman — APPELLANT.

v.

The Attorney-General — RESPONDENT.

Petition writer practicing as advocate — Leases, contracts or other documents for submission to the Land Registry are documents of legal nature — Licence to practice as advocate — Secs. 2, 24, Advocates Ordinance, 1922.

A licenced land broker and petition writer was charged with, and admitted, having practised the profession of advocate without a licence, in that he had prepared for remuneration, contracts, mortgages, leases and other documents for Land Registries.

HELD: That the preparation of such documents was work of a legal nature and that the petition writer was therefore practising the profession of advocate without a licence contrary to Sec. 24 of the Advocates Ordinance, 1922.

Appeal from a judgment of the District Court of Jaffa (M.D.C.Ja. No. 102/35) convicting the accused.

M. E. Moghannem — for appellant.

A. Bardaky — for respondent.

JUDGMENT OF THE DISTRICT COURT.

This is a curious case, the first of its kind that has come before this Court since the establishment of the Courts in Palestine after the British Occupation.

The defendant is charged with having practised the profession of advocate without a licence, in that he had prepared and written against remuneration, contracts, mortgages, leases and other documents for Land Registries and other Departments, thus contravening the provisions of the Advocates Ordinance, 1922.

The facts of the case are not disputed in any way. The defendant has gone into the witness box and admitted that he has done all these things. He says, however, that he has never held himself out to be an advocate but he was a petition writer and a broker, pure and simple. He says that he has been a petition writer for four or five years and there are dozens of people who are carrying out the same kind of work scattered all over Palestine, who have been doing so for the last 17 years without the slightest objection by Government, following the state of affairs that had been going on during the Turkish Regime. He further says that many advocates send him work of this nature to do. In fact, one of the advocates defending him in this particular case, Abcarius Bey, had given him such work which he had done. And it is an admitted fact that for many years these petition writers had been carrying out this kind of work, and as far as my recollection goes, no objection had been raised by bringing a criminal prosecution.

The only question, therefore, that arises now is whether this work which has been done is of a legal nature and whether the documents that have been written and prepared and presented to the authorities concerned are or are not of a legal nature.

Section 1 of the Advocates Ordinance, 1922, defines the profession of an advocate. Section 1 (b) says that the profession of an advocate consists "in writing or preparing for remuneration any document intended to be presented to a Court, Registry, or other office, or any other document of a legal nature," and I do not think that there can be any doubt that a person who does these things must be held to be practising the profession of an advocate.

Section 24 of the Advocates Ordinance says "whoever holds himself out to be an advocate or practises as such . .". A distinction is made between "holding out" and "practising".

It is not suggested for one moment that the defendant had held himself out to be an advocate. And the only question for us to decide is whether he had practised as such. I do not think that there can be any doubt that a contract, mortgage, lease, or statement of claim, are documents of a legal nature, and that being so, we have irresistibly come to the conclusion that the defendant has been illegally practising as an advocate, contrary to Section 24 of the Advocates Ordinance, 1922. Speaking for myself, I have come to this result with great regret, because I realise that this decision will cause a revolutionary change of what has been considered to be a legal practice not only during the last 17 years but also during the Turkish days. But according to the present law of the country, I regret that I am unable to come to any other conclusion.

In the circumstances, we find the defendant guilty on the charge as laid down in the Information.

This is, of course, a test case, and the question of penalty is of little importance. The sentence we are passing now should not be considered as a precedent and though the penalty in this case is only nominal, we shall deal more severely in future cases, because this is the law of the country unless and until our decision is reversed.

I issue this warning to all persons concerned who are doing the same work as the defendant and would remind them that the maximum penalty is LP. 500.

The sentence of the Court in your case, Michael Neeman, is that you will be bound over in your own recognizance in the sum of LP.5 for a period of one year, that you will come up for sentence for the present offence at any time within the said period

if called upon to do so, and you will pay the costs of this prosecution.

In the meantime you must cease to exercise your present remunerative work.

JUDGMENT OF THE COURT OF APPEAL.

It is clear that Sections 2 and 24 of the Advocates Ordinance, 1922, prohibit a person who is not a licensed advocate from preparing leases, contracts, or other documents for submission to the Land Registry.

All that may be done by such person is the actual filing in the Land Registry.

The appeal is dismissed with costs.

Delivered the 19th day of June, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 13/35.

BEFORE:

The Chief Justice (McDonnell, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Mordechai Levanon — APPELLANT.

v.

Ishac Muradian

Abraham Epstein — RESPONDENTS.

Remuneration of advocate — Sec. 19, Advocates Ordinance, 1922, applicable only to contentious business — Written undertaking to pay fee of advocate — Fair and reasonable remuneration.

An advocate was instructed to draft a contract for the sale of land for an agreed remuneration part of which was paid and for the balance of which an undertaking in the following form was given:

"We, the undersigned, hereby undertake to pay to advocate Mr. M. Levanon, or to his order, the sum of £P. 150, which is the third instalment in respect of his remuneration for legal services rendered to us up till this day.

Payment will be on the 5th day of November, 1931, or on the date upon which the land of Al-Sadra in the vicinity of Rehovoth will be wholly or partly registered in the name of Mr. Ishac Muradian or in the name of Mr. Nisan Ahronovitz, of Tel Aviv, or in the name of any other person by virtue of an order or transfer by them or one of them. Whichever date be the earlier, shall be the date of this bill.

Payment in Jerusalem.

Jerusalem, 5th February, 1930.

(Sgd.) Ishac Muradian
Abraham Epstein
Witness (Sgd.) N. Ahronovitz"

In an action for recovery under the undertaking it was pleaded that the fee was excessive, and that the Court, in exercise of the discretion conferred upon it by Section 19 of the Advocates Ordinance, 1922, should reduce it.

HELD: Section 19 of the Advocates Ordinance, 1922, was concerned only with the remuneration of advocates in respect of contentious business and did not apply to the undertaking sued upon.

Appeal from a judgment of the District Court of Jerusalem (C.DC. Jm. No. 50/34, dismissing the claim of the plaintiff in the action.

S. Horowitz — for the appellant.
Respondent in person.

JUDGMENT.

Sec. 19 of the Advocates Ordinance, 1922, clearly is concerned only with the remuneration of advocates in respect of contentious business, and in consequence does not apply to the undertaking of the 5th February, 1930, sued upon in the present case.

For this reason, we set aside the judgment of the District Court and give judgment against both respondents, jointly and severally, for the amount claimed, viz: £P. 150 with legal

interest from the date of action, being 6th March, 1934, until payment with costs to include £P. 2 advocate's fees.

Delivered the 8th day of April, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 176/35.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Subhi Ayoubi — APPELLANT.

v.

Ahmed el Habab — RESPONDENT.

Advocate and client — Parol agreement made for remuneration for conducting Court action — Validity of promissory note given under such agreement — Section 19, Advocates Ordinance, 1922.

An advocate made a parol agreement with his client to conduct a case before the Land Court for an agreed fee and took a promissory note for the amount of the fee signed by a third person in his favour as security for payment. The note not having been paid at maturity the advocate brought an action on it before the Magistrate and obtained judgment in his favour. On appeal to the District Court the judgment was reversed on the ground that the parol agreement was unenforceable under Sec. 19 of the Advocates Ordinance, 1922. Upon leave to appeal to the Court of Appeal being granted:

HELD: (a) That the agreement was not enforceable since it had not been reduced to writing, and the promissory note, given under an unenforceable agreement was also unenforceable. (b) That it is immaterial that the note was not made by the client but by a third party.

Appeal from a judgment of the District Court of Jaffa sitting in its appellate capacity (C.A.D.C.Ja. No. 237/35) reversing the judgment of the Magistrate's Court at Jaffa in favour of the plaintiff in the action.

Appellant — in person.
Amin Akel — for respondent.

JUDGMENT.

The promissory note which gave rise to this action is expressed to be made for the following consideration:

"Value: remuneration in respect of action for the cancellation of the sale of Sakhja shares in the Ramlieh lands instituted by Mr. Musa Matalon in the Land Court of Jaffa.

Remuneration agreed upon beforehand.

Written in Jaffa."

Now under Section 19 of the Advocates Ordinance, 1922, an agreement between advocate and client for payment of fees in respect of any proceeding before a Court is unenforceable unless it is reduced to writing and an order for its enforcement is made by the Court before which the proceeding took place.

Hence the agreement between the appellant and Musa Matalon, which the appellant admits, was never reduced to writing and is unenforceable.

It follows that the appellant cannot enforce a promissory note which was given and is expressed to be given in respect of an unenforceable agreement, and it is immaterial that the note was not made by the client but by a third party.

The appeal is dismissed with costs including £P. 1 advocate's fee.

Delivered the 20th day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 177/35.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Khayat, J.

IN THE CASE OF:

Subhi Ayoubi — APPELLANT.

v.

Ahmed el Habbab — RESPONDENT.

Advocate and client — Written agreement made for remuneration for conducting Court action — No order by Court for enforcement of such agreement — Validity of note given under such agreement — Section 19, Advocates Ordinance, 1922.

An advocate made a written agreement with a client to conduct a case before the Land Court for an agreed fee and took a promissory note for the amount of the fee signed by a third person in his favour as security for payment. The note not having been paid at maturity the advocate brought an action on it and obtained judgment in his favour. On appeal to the District Court the judgment was reversed on the ground that since no order had been made by the Court for the enforcement of the agreement the agreement was unenforceable under Section 19 of the Advocates Ordinance, 1922. Upon leave to appeal to the Court of Appeal being granted:

HELD: That the agreement was not enforceable since no order had been made by the Court for its enforcement in accordance with the requirements of Section 19 of the Advocates Ordinance, 1922.

Appeal from a judgment of the District Court of Jaffa sitting in its appellate capacity, reversing the judgment of the Magistrate's Court at Jaffa in favour of the plaintiff in the action.

Appellant in person.
Amin Akel — for respondent.

JUDGMENT.

The facts in this case only differ from those in C.A. 176/35*) between the same parties in that in the present case the agreement between advocate and client was reduced to writing.

No order for the enforcement of the agreement, however, has been made as required by Section 19 of the Advocates Ordinance, 1922.

Following, therefore, the judgment in the case cited, the appeal is dismissed with costs, including £P. 1 advocate's fees.

Delivered the 20th day of November, 1935.

In the Land Court of Jaffa sitting as a Court of Appeal.

L.A.L.C. Ja. No. 230/35.

BEFORE:

The Acting President (Edwards, J.) and Mani, J.

IN THE CASE OF:

David Zelivansky — APPELLANT.

v.

Joseph Shalem

Zwi Aurbach

Shalem Brothers — RESPONDENTS.

Stamp duty on power of attorney to advocate — Procedure where power of attorney found to be insufficiently stamped — Items 31 (1), 31 (4), Schedule to the Stamp Duty Ordinance, 1927.

In an action for eviction before a Magistrate the power of attorney to the advocate contained a power "to submit to arbitration and appoint arbitrators". The power of attorney was stamped with duty of 150 mils. The defendants raised the preliminary objection that the power of attorney was insufficiently stamped because it contained a power to submit to arbitration

*) Ante p. 24.

and appoint arbitrators, and should therefore have been stamped under Item 31 (4) of the Schedule to the Stamp Duty Ordinance, 1927.

HELD: (a) That the power of attorney was insufficiently stamped; (b) that in such event the claim was not to be dismissed, the proper procedure being for an adequate fine to be imposed and the power of attorney accepted.

Appeal from a judgment of the Magistrate's Court at Tel-Aviv dismissing the action of the plaintiff.

P. Goldberg — for appellant.
A. Wilner — for respondents.

JUDGMENT.

In our opinion the Magistrate was wrong in dismissing appellant's action on the ground that the power of attorney held by appellant's advocate was insufficiently stamped. In such a case a fine is to be imposed and the power of attorney accepted.

As to the question of the stamp duty we are of opinion that the power of attorney in question was insufficiently stamped not because it contained the word Land Court, for the intention of the parties is quite clear that the reference is to the Land Court in its appellate capacity, but because it authorizes the advocate to refer the matter to arbitration.

The judgment of the Court below is therefore set aside and the case remitted for hearing after the payment of an adequate fine.

Dated the 3rd day of July, 1935.

In the High Court of Justice.

H.C. No. 13/36.

BEFORE:

The Chief Justice (McDonnell, J.) and Baker, J.

IN THE APPLICATION OF:

Jacob Kost — PETITIONER.

v.

The Chairman and Members of the Legal Board — RESPONDENTS.

Failure of advocate at foreign advocates' examination — Improper exercise of discretion of Legal Board alleged — Application to be re-examined refused — Draft Bill not "law" — Discretion of Court to withhold order where petitioner guilty of delay — Section 26, Advocates Ordinance, 1922 — Rule 2 (2) Advocates Rules, 1926.

The petitioner was qualified abroad as an advocate and as a prospective candidate for the Foreign Advocates' Examination held in April, 1935, obtained a syllabus of the examination, published in November, 1934, which set out that the candidate would be examined in Penal Law which included the Criminal Code Bill, 1933. The petitioner obtained a sufficient general average at the examination, but did not obtain the required minimum in Penal Law. His application to the Legal Board to be re-examined in Penal Law alone having been refused he petitioned the High Court for an order nisi to issue to the chairman and members of the Legal Board to show cause why they should not be required (inter alia) to re-examine him in Penal Law in conformity with Rule 2 (2) of the Rules of 1926 made under the Advocates Ordinance, 1922. Petitioner alleged (inter alia) that the Legal Board had exercised its discretion in an arbitrary and improper manner. An order nisi having been obtained;

HELD discharging the order nisi: (a) That there was nothing to show an absence of the exercise of a proper discretion by the Board involving any breach of duty which imposed upon them a legal obligation which they had to perform as regards the petitioner.

(b) That a syllabus containing a draft Bill is not in conformity with Rule 2 (2) of the Rules of 1926 made under the Advocates Ordinance, 1922, since such Rule requires that a person shall not be deemed to be qualified to practice unless he has passed "an examination in the law and procedure of Palestine", and a draft Bill is clearly not "law", but

(c) That since the petitioner had six months' notice of the inclusion of the draft Bill in the syllabus before the examination and had taken no objection to its inclusion he had been guilty of such a delay as induced the Court in the exercise of its discretion to withhold the grant of an order absolute.

Application to the High Court for an order against the Legal Board as a public body. The facts and arguments appear more fully from the Order Nisi and the Final Order, both of which follow.

Bernard Joseph — for petitioner.
H. Kantrovitch, J.G.A. — for respondents.

ORDER NISI.

The petitioner asks for an order nisi to issue against the Legal Board to show cause:

(a) why they should not review the results of the Foreign Advocates Examination of the year 1935, to determine whether the petitioner passed the examination on the basis of the standard and requirements in force before the examination held in 1935;

(b) why they should not be required to declare the petitioner to have passed the said examination; and alternatively

(c) to show cause why they should not re-examine the petitioner in Penal Law in conformity with the Regulations in force, and take into account the result of such examination in determining whether petitioner passed the Foreign Advocates Examination or not.

As to (a) and (b) we are not satisfied that there is anything to show an absence of the exercise of a proper discretion by the Board, involving any breach of a duty, which imposed upon them a legal obligation which they had to perform as regards the petitioner.

The standard required for passing the examination is not laid down by any statutory authority and there is nothing before us to show that in varying such standard, if in fact there was such variation as the petitioner asks us to infer, the Board exercised its discretion in any improper manner.

In The Queen v. Hertford College (1878) 3 Q.B.D. at p. 701, Lord Coleridge C. J. in delivering the judgment of the Court of Appeal in the case of an application for a Mandamus directed to the electors to fellowships at the College in question said the following:—

> "A court of law can deal only with the acts not the motives of the actors, and if the electors' acts were legal, as where a discretion is left to them, and they act within it, mandamus is inapplicable."

With regard however to the third prayer in the petition which is headed (c), the situation is as follows:—

Under Section 4 (1) of the Advocates Ordinance, 1922, the Legal Board is "charged with the duty of examining applicants for licenses". The only statutory rule relating to the Foreign Advocates Examination is Section 2 (2) of the Rules under the Advocates Ordinance which came into force on the 1st August, 1926.

These Rules, though they do not say so, were clearly made under Section 26 of the Advocates Ordinance, 1922, which entitled the Chief Justice to make rules, inter alia, on "the subjects to be taken at examination."

Section 2 (2) of the Rules says that "no person shall be deemed to be qualified by examination as to his knowledge of the law administered by the Civil Courts unless he has passed an examination in the law and procedure of Palestine, to the satisfaction of the Board (hereinafter called the Foreign Advocates Examination)".

Petitioner's advocate did not draw our attention to the proviso to Section 26 of the Advocates Ordinance, 1922; which nevertheless is of importance. It runs as follows:—

> "Provided that the Chief Justice may delegate to the Legal Board the exercise of his powers so far as they relate to examinations."

It is in the exercise of these powers, no doubt, that the Board issues syllabuses such as that set out on p. 1086 of the

Gazette of the 1st November, 1934, which contains under the heading "Penal Law" the words "the Criminal Law Bill, 1933".

We grant an order nisi in terms of the third prayer headed (c) in the petitioner's application, in view of these provisions, to the petitioner in order that the Board may show cause whether a syllabus including a draft Bill is in conformity with Section 2 (2) of the Regulations of the 1st August, 1926, which requires the examination to be in the law and procedure of Palestine.

Given the 14th day of February, 1936.

ORDER.

This is a return to a Rule Nisi directed to the Chairman and Members of the Legal Board, to show cause why they should not be required to re-examine the petitioner in Penal Law, in conformity with Section 2 (2) of the Rules of 1926 made under the Advocates Ordinance, 1922, and why they should not take into account the result of such re-examination in determining whether or not the petitioner passed the Foreign Advocates Examination.

The matter arises out of some of the questions set in the Foreign Advocates Examination 1935 in the paper on Penal Law. These questions were based upon the Criminal Law Bill, 1933, which had not, at the date of the examination and has still not been passed into law.

It is quite clear that a draft Bill is not "the law administered by the Civil Courts" or "the law . . . of Palestine" upon which candidates have, by Section 2 of the Rules under the Advocates Ordinance of 1st August, 1926, to be examined.

Now, it was proved to us that the Legal Board published a syllabus of the 1935 examination on p. 1086 of the Gazette of the 1st of November, 1934, and that the syllabus was despatched during October, 1934, to every prospective candidate for the examination of 1935.

The Junior Government Advocate, on behalf of the Board, states that the reason for the inclusion of this Bill was that the Board assumed it would have passed into law by the date of the examination which only came on on the 29th of April, 1935. The petitioner did not, at any time before the examination, draw the attention of the Board to the contravention of Section 2 (2) of the Regulations, but it may be said that he, like the Board itself,

laboured under the impression that the Bill would be passed into law before the examination took place.

When the latter event occurred and the Penal Law paper contained questions based upon the Bill, the petitioner still did not point out to the Board the breach of Section 2 of the Regulations in question, nor did he approach this Court for a mandamus, as he has done now.

On the 11th of February, 1936, after the results of the examination were published showing that he had failed in the Penal Law paper he, for the first time, drew the attention of the Board to the breach of Section 2 of the Regulations in question and asked to be allowed to sit in the 1936 examination in Penal Law only. To this he received a reply dated the 14th February, 1936, that his application could not be acceded to and in the meantime he filed his petition in the present proceedings in the High Court.

Now it cannot be said that the petitioner was taken at a disadvantage by the sudden springing upon him of questions which the Board had no right to set. Six months before the examination the "Criminal Law Bill, 1933" appeared in the syllabus published in the Gazette and circularised to candidates. The whole thing it is clear arose from a mistake on the part of the Board in thinking the Bill would shortly become law. It acted in no sense in an arbitrary manner: and the mistake which it made was not one which was concealed but was given every possible publicity.

The candidates for the examination had six months' notice of the inclusion of the Bill in the syllabus and no objection was taken by the petitioner or by anyone else before the examination until the results were published.

It would have been a very different matter if no syllabus had been published and if a question not conforming to Section 2 (2) of the Rules of 1926 had been included.

In The Queen v. All Saints, Wigan (Churchwardens), (1876) A.C. Vol. I. at p. 620, Lord Chelmsford in the House of Lords, speaking of a writ of mandamus, stated that "The Court may refuse to grant writs not only upon the merits, but upon some delay, or other matters personal to the party applying for it, in this the Court exercises a discretion which cannot be questioned"; and in the same case at p. 622 Lord Hatherley said that "upon

a prerogative writ there may be many matters of discretion which may induce the judges to withhold the grant of it — matters connected with delay or possibly with conduct of the parties".

Taking into account the conduct of the Board and of the petitioner and the time at which this petition was filed, in the exercise of our discretion we discharge the Rule Nisi.

Given the 28th day of February, 1936.

APPEAL.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 177/33.

BEFORE:

The Chief Justice (McDonnell, C. J.), Baker, J. and Khayat, J.

IN THE CASE OF:

Eliahu Haskell Tweig — APPELLANT.

v.

Nicola Hawa — RESPONDENT.

Civil procedure — Procedure where leave to appeal obtained — Failure to serve certified copy of leave to appeal on respondent and to file same in Court — Leave to appeal is vital document on appeal—Section 5 (ii) Magistrates' Courts Jurisdiction Ordinance, 1924.

Leave to appeal from a judgment of the District Court having been obtained, the appellant filed in Court a certified copy of the judgment of the District Court but neither filed nor served a copy of the leave to appeal.

HELD: That there was no appeal properly before the Court, the vital document on appeal being the leave to appeal as it defines the limits of the appeal. As such document was not filed in Court the appeal was dismissed. Held further, that Section 5 (ii) of the

Magistrates' Courts Jurisdiction Ordinance, 1924, which provides that if leave to appeal be granted the ordinary procedure on appeal is to be followed does not dispense with the necessity of filing the leave to appeal.

Appeal by way of leave to appeal from a judgment of the District Court of Jerusalem in favour of the respondent.

A. Levitsky — for appellant.
A. Hanania — for respondent.

JUDGMENT.

In this case in which a judgment of the District Court was given on the 14th of August, 1933, and the Acting President of the District Court gave leave to appeal therefrom on the 5th of October, 1933, the appellant filed in Court and served on respondent a certified copy of the judgment of the District Court but neither filed in Court nor served on the other side a certified copy of the decision of the Acting President of the District Court giving leave to appeal.

Section 5 (ii) of the Magistrates' Courts Jurisdiction Ordinance, 1924, provides that if leave to appeal is granted in cases in which it is necessary, the ordinary procedure on appeal shall be followed and this has been taken by the appellant to be satisfied by the filing and service of the judgment of the District Court; but the vital document is the leave granted by the President as that defines the limits of the appeal, and since this has not been filed in Court we hold that the appeal is not properly before us and we dismiss the application with costs to include £P.2 advocate's fees.

Delivered the 8th day of June, 1934.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 123/35.

BEFORE:

Baker, J., Frumkin, J., and Khayat, J.

IN THE CASE OF:

Eliahu M. Hotshe — APPELLANT.

v.

Ephraim Eliahu Cohen et al — RESPONDENTS.

Civil procedure — Leave to appeal — Refusal by President, District Court, to grant leave to appeal — Subsequent reversal by him of his own decision — Court functus officio after delivery of decision — Article 43, Ottoman Magistrates Law, 1913.

A plaintiff whose action was dismissed by a Magistrate appealed to the District Court where the appeal was dismissed in the following words:

"The judgment under appeal was delivered in presence on 7.12.34 by the Magistrate's Court, Jerusalem, whereby the appellant's case was dismissed.

The appeal was accepted in form because it was submitted within legal time and it appears to the Court that Grounds of Appeal were submitted on 17.2.35. Therefore, and in view of the provisions of Article 43 of the Magistrates Law as amended the Court dismisses the appeal with fees, costs and £P. 500 mils advocate's fees."

The plaintiff filed an application for leave to appeal to the Court of Appeal on which the President of the District Court endorsed the word "refused". Subsequently however, the President, on the ex parte application of the plaintiff reconsidered and reversed his previous decision.

HELD: The President of the District Court, having exercised his judicial discretion and refused leave, was functus officio, and having once exercised his discretion, had no power once more to do so and to vary his decision.

Appeal by way of leave to appeal from a judgment of the District Court sitting in its appellate capacity (C. A. D. C. Jm. No. 10/35) dismissing an appeal from a judgment of a Magistrate in favour of the defendant in the action.

A. Levitsky — for appellant.
S. Mizrachi — for respondent.

JUDGMENT.

This is an alleged appeal to this Court by way of special leave.

Application was first made to the President of the District Court which was refused. The President endorsed the word "refused" on the application and the refusal was entered in the Court Register. Subsequently, on the same day, present appellant made an application ex parte to the President requesting him to reconsider his decision. This the President appears to have done and to have reversed his previous decision refusing leave.

We are of opinion that the President of the District Court, having exercised his judicial discretion and refused leave, was functus officio, and, having once exercised his discretion, had no power once more to do so and to vary his decision.

The appeal is therefore dismissed with costs.

Delivered the 8th day of May, 1936.

ARBITRATION.

In the District Court of Jaffa.

C.D.C. Ja. of 1929.

BEFORE:

The President (Copland, J.) and Mani, J.

IN THE CASE OF:

The Committee of the Great Synagogue of Tel-Aviv — PLAINTIFFS.

v.

Arpad Gut — DEFENDANT.

Contract for construction of synagogue — Award of arbitrators — Allegations of misconduct — Arbitrators bound by rules of evidence — Evidence to explain meaning of contract — Evidence of misconduct — Agreement to refer to arbitrator as waiver of right — Estoppel.

By a written agreement, the defendant, a contractor undertook with the plaintiffs, a registered Society to construct a synagogue in accordance with plans and specifications set out in the said agreement. Before the final completion of the synagogue disputes arose between the contractor and the Society over questions of accounts which eventually led to an arbitration and an award of arbitrators. Defendant opposed the application to confirm the award on the grounds, as he alleged, of the following acts of misconduct: (a) that the arbitrators had refused to hear witnesses with regard the meaning of the contract, (b) that defendant's counterclaim for damages was dismissed without reasons being stated, and (c) that the arbitrators ignored the report of the experts appointed by them.

HELD: Confirming the award that in the circumstances of the case none of the objections raised was sufficient for the Court to make a finding of misconduct.

Action to confirm an award of arbitrators.

M. Zeiger — for plaintiffs.
M.L. Gorodissky — for defendant.

JUDGMENT.

This is an application to confirm an award of arbitrators given in a dispute between the parties to this action. The defendant has applied to set aside this award on the ground that the arbitrators have been guilty of misconduct and also have been subject to improper influence though this latter plea has been withdrawn in Court.

Three grounds of misconduct have been alleged. The first is that the arbitrators refused to hear witnesses or the parties to the contract themselves on the nature of the contract. It is a well established rule of law that arbitrators are bound by the ordinary rules of evidence and can only hear witnesses in a case in which a Court could hear them. This arbitration concerned a contract involving the sum of LE. 4673 and though the defendant alleged that the contract is not clear we do not agree with him. The contract sets out in much detail the nature of the work to be done and the quality and amount of material to be used in the construction. Paragraph 1 binds the contractor to execute the works named in the contract. Paragraph 2 lays down that he must not make any alterations in the building which will be in contradiction to the plans of the architects. For the execution of the works named in the contract the contractor was to be paid the sum mentioned above. To my mind it is quite clear that the contractor had to do certain work in a certain manner and to employ in that work certain specified quantities of material. On the completion of this work he was to be paid a certain sum. I cannot adopt the construction placed upon this contract by the defendant that he was entitled to do the work in any manner and use whatever materials he liked when the explicit terms of the contract are the exact contrary. The contract being clear in its meaning, the arbitrators were correct in their refusal to hear the witnesses.

The second ground of misconduct alleged is that the arbitrators refused to give any reason for disallowing the counterclaim of the defendant. This counterclaim was for damages and the arbitrators found that the contractor had not carried out the terms of the contract. No question of damages could therefore arise. I therefore can find no misconduct here.

The third point is that the arbitrators ignored the report of the experts appointed by them. But it appears that there was

referred to the experts only questions of a technical nature and that in their award they took into consideration other matters which had not been referred to these experts which accounts for the difference between the amount of the experts' valuation and that of the arbitrators' award.

We therefore find that there is not such evidence of misconduct as would justify us in setting aside the award.

One further point which has given me some trouble, though it was not pleaded before me, is whether the plaintiffs are not estopped from claiming that the work was not properly done seeing that they paid the defendant for his work though they were only liable to pay after the completion of various stages of the construction and were entitled to supervise the work during the time that it was carried out. But whether they were estopped or not, by agreeing to go to arbitration the defendant must be held to have waived his right, if any, to plead estoppel.

We therefore confirm the arbitrators' award with costs and LP.5 advocate's fees to be paid to the defendant.

Delivered the 17th day of April, 1929.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 144/33.

BEFORE:

The Acting Chief Justice (Corrie, J.), Baker, J. and Frumkin, J.

IN THE CASE OF:

Ephraim Aboutboul — APPELLANT.

v.

Dr. Gabriel Abyad — RESPONDENT.

Arbitration proceedings — Mistake apparent upon face of award — Grounds for setting award aside — Burden of proof of payment of debt — Application of English rule of law of arbitration.

On the plaintiff requiring security from two of his debtors, one of them transferred land into the name of the defendant to be held by the defendant as security for payment, and, in the event of non-payment on a fixed day to be transferred to the plaintiff. Defendant signed a written undertaking to make the transfer as aforesaid. The debtor did not pay and on the plaintiff threatening proceedings the matter was referred to three arbitrators, the plaintiff claiming as damages from the defendant the amount due from the debtors. The majority of the arbitrators dismissed the claim on the ground that plaintiff had not proved that he had not been paid. The third arbitrator held that the burden was upon the defendant to prove that the plaintiff was paid. On an application to set aside the award the District Court divided on the question of the burden of proof and the application was dismissed. On appeal to the Court of Appeal:

HELD: (a) That under the circumstances the burden of proof was upon the plaintiff and he had failed to discharge it. (b) That where an arbitrator has gone wrong in point of law and the error in law appears upon the face of the award the award should be set aside.

Appeal from a judgment of the District Court of Haifa (C.D.C.Ha. No. 235/32) dismissing the application of the plaintiff in the action to set aside an award of arbitrators.

M. Eliash and P. Margolin — for appellant.
M. E. Moghannem and M. A. Tamimi — for respondent.

JUDGMENT.

This is an appeal against the judgment of the District Court of Haifa dated the 9th May, 1933, whereby the Court dismissed an application by the present appellant, Ephraim Aboutboul, to have set aside an award made on the 30th October, 1932, in arbitration proceedings between the appellant and the present respondent, Dr. Gabriel Abyad.

The dispute to which the arbitration related arose out of an undertaking given by the respondent in the following terms:—

> "As from the 16th March, 1925, up to the lapse of fifteen days, I undertake to transfer to Mr. Ephraim Aboutboul the land registered in my name, situated in the Ravel, of an area of 25,000 pics, which was transferred to me by Mr. Petro Abella as a security for the amounts due to Mr. Ephraim Aboutboul, this, in case up to that date, i.e., up to the date of maturity of this promise, he has not received the amount due to him from these two persons, and by agreement with him. The amount due to Mr. Ephraim Aboutboul is from Hassan Eff. Iskeirek and Mr. Abella as stated hereunder.
>
> (Sgd.) Dr. Gabriel Abyad."

Bill on Mr. Abella due 12.3.25.	£E. 440
Bill on Hassan Eff. Iskeirek	£E. 170
	£E. 610

Only six hundred and ten Egyptian Pounds.

Sgd. Dr. Gabriel Abyad."

The appellant claimed that as the bills referred to in that undertaking had not been paid within the period prescribed the respondent was liable upon his undertaking. In support of his claim he produced a letter from Mr. P. Abella stating that he had not paid the amount due from him to the appellant.

The respondent produced another letter from Mr. Abella to the contrary.

The majority of the arbitrators noting that neither side had called Mr. Abella as a witness, and that the appellant had not produced the bills, to which the undertaking related, dismissed his claim for damages.

The third arbitrator, Mr. Kaiserman, dissented, holding, inter alia, that the burden was upon the respondent to prove that the appellant was paid and not upon the appellant to prove that he was no paid.

Upon the appellant's application to the District Court to set aside the award, the judges were equally divided upon the question of the burden of proof and the application was therefore dismissed.

It is against this decision that the appellant is now appealing.

We concur in the view expressed in the judgment of the learned President of the District Court that if the majority of the arbitrators were in error in holding that the burden of proof was on the appellant, that was an error apparent upon the face of the award and would be a ground for setting the award aside.

The English rule was clearly laid down in Landauer v. Asser, (1905), 2. K. B. p. 184, at p. 187 by Lord Alverstone C. J. who said:

> "The only ground on which it is alleged that the award should be set aside is that the arbitrator has gone wrong in point of law, and that the error in law appears upon the face of the award. There is no doubt whatever that if this can be established the award ought to be set aside."

There is nothing in the law of Palestine to render a different rule applicable here.

We have, therefore to determine whether the majority of the arbitrators were or were not mistaken in law.

The appellant's claim rests upon the proof of two facts, namely, that the respondent gave the alleged undertaking, and, that the event upon which the undertaking became enforceable has occurred. The respondent admitted his undertaking. This admission however, did not release the appellant from the obligation of proving that the event upon which the respondent's liability depended, had occurred, namely, that the period of fifteen days from the 16th March, 1925, had elapsed without payment to the appellant of the bills specified in the respondent's undertaking.

We do not take the view expressed in the judgment of Judge Daudi in the District Court, that the appellant could only prove non-payment of the bills by production of the bills themselves. In our view, it was open to him to prove this by other means, and if the letter of Mr. Abella dated 23rd October, 1927, which was submitted by the appellant, had not been contradicted by other evidence, it would have furnished the proof required.

In the circumstances, however, we hold that the majority of the arbitrators were right in their view that the burden of proof was upon the appellant, and that he had failed to discharge it.

The appeal must be dismissed with costs.

Delivered the 17th day of May, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.L.A.C.A. No. 9/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Baker, J. and Frumkin, J.

IN THE CASE OF:

The Palestine Mortgage and Credit Bank Ltd. — APPLICANT.

v.

Lawrence T. Beck and Co. — RESPONDENT.

Arbitration — Refusal by arbitrator to act — Appointment of new arbitrator by District Court — Leave to appeal refused and renewed to Court of Appeal — Secs. 6 (2), 15 (2), Arbitration Ordinances, 1926—1928.

A firm of contractors signed an agreement with a Bank to do certain constructional work. A clause in the agreement providing for the settlement of disputes by an agreed arbitrator having been invoked by the contractors, and such arbitrator having refused to act, the contractors applied to the District Court under Section 6 (2) of the Arbitration Ordinance, 1926, which appointed an arbitrator. The Bank contested the appointment and applied for leave to

appeal from the order of the District Court relying upon Sec. 15 (2) of the Arbitration Ordinances, 1926—1928. The District Court refused leave to appeal and the application was renewed to the Court of Appeal.

Section 15 (2) reads as follows:

> "An application to remove an arbitrator or umpire, to enlarge the time for making an award, or to enforce or set aside an award shall be heard by the Court to which the petition is made. An appeal shall lie from an order of a Magistrate's Court to the District Court of the district in which the Magistrate's Court is situated, and the decision of the District Court shall be final. No appeal shall lie from the order of a District Court, except by leave of the Court or of the Court of Appeal."

HELD: Dismissing the application for leave to appeal that Section 15 (2) of the Arbitration Ordinances, 1926—1928, did not apply to a judgment of a District Court appointing an arbitrator.

Application for leave to appeal from an order of the District Court appointing an arbitrator.

Bernard Joseph — for applicant.
J. Henigman — for respondent.

JUDGMENT.

In accordance with the judgment of this Court in the Latin Patriarch v. Ahmad Jaber, Civil Leave Application No. 39/30[1]), and Cornu v. Ali Ahmad Sheikh Ali, C.A. No. 105/32[2]), we hold that Section 15 (2) of the Arbitration Ordinance, 1926, as amended, does not apply to a judgment of a District Court appointing an arbitrator.

The application for leave to appeal is therefore dismissed with costs.

Delivered the 3rd day of May, 1935.

---

[1]) C.L.A.C.A. No. 39/30, PLR p. 570.
[2]) C. of J. p. 1172, PLR p. 810.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 13/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Morris Poller — APPELLANT.

v.

G. A. Schutz — RESPONDENT.

Arbitration award confirmed in default — Opposition to such judgment — Judgment "capable of appeal" not appealed against within thirty days — Time for appeal from judgment appealable by leave only — Art. 181 and Art. 22, Addendum, Ottoman Code of Civil Procedure — Sec. 15, Arbitration Ordinance, 1926.

An award of arbitrators was confirmed in the District Court by default in the absence of the appellant. An opposition to the judgment confirming the award was dismissed by a judgment given in the presence of the parties and stated to be "capable of appeal". No appeal was made but some seven months later leave to appeal was obtained and this appeal filed. It was argued on appeal that since Sec. 15 (1) imported the ordinary rules of procedure, the appeal should have been filed within thirty days from the delivery of the judgment of the District Court. Sec. 15 (1) reads as follows:

> "All applications to the Court under this Ordinance shall be made by petition in accordance with the rules of procedure prescribed for civil actions."

HELD: dismissing the appeal on the ground that it was filed out of time, that the provision in Sec. 15 (1) of the Arbitration Ordinance, 1926, importing the rules of procedure prescribed for civil actions require that appeals from applications under the Ordinance should be brought within thirty days.

Appeal from a judgment of the District Court dismissing an opposition to a judgment confirming an award of arbitrators.

A. Levitsky — for appellant.

JUDGMENT.

On the 7th September, 1932, the District Court gave judgment in the absence of the appellant confirming an arbitration award.

On the 22nd February, 1933, the District Court gave judgment dismissing an opposition by the appellant to the judgment of the 7th September, 1932. Judgment was given in the presence of the parties and was stated to be "capable of appeal".

On the 11th September, 1933, the appellant applied to the District Court for leave to appeal. Leave was granted by the District Court on the 16th November, 1933, and notified to the appellant on 1st December, 1933. On 30th December, 1933, the appellant filed this appeal.

Having regard to the judgment of this Court in Shpigel v. Shpigel, C.A. No. 4/28 *), it is immaterial whether the judgment of the District Court was only appealable by leave, or was, as the respondent contends, appealable as of right; for whichever be the case no step was taken by the appellant to bring an appeal before this Court until long after the period of thirty days from delivery of the later judgment of the District Court.

The appeal is therefore out of time and must be dismissed with costs including LP.2.500 advocate's fees and expenses.

Delivered the 11th day of January, 1935.

---

*) C. of J. p. 150.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 93/35.

BEFORE:

Baker, J., Frumkin, J. and Khayat, J.

IN THE CASE OF:

Joseph Weiss — APPELLANT.

v.

Israel Shulman — RESPONDENT.

Appeal by way of special leave — Confirmation of arbitration award — Preliminary objection not made in pleadings — Leave to appeal refused by District Court and renewed to Court of Appeal — Enlargement of period for making of award — Estoppel by conduct — Recognition of authority of arbitrator as continuing — Sec. 15 (2), Schedule, para. (c), Arbitration Ordinances, 1926—28.

A dispute having arisen out of an agreement signed by the parties it was submitted to an arbitrator for decision. Confirmation of the decision of the arbitrator was opposed in the District Court on the ground, inter alia, that it was made after three months from the date of the submission and was therefore invalid. The District Court refused the application to confirm on this ground and dismissed a subsequent application for leave to appeal from its decision. Special leave to appeal was granted by the Court of Appeal under Section 15 (2) of the Arbitration Ordinances, 1926—28. The arbitration award was as follows:

AWARD.

On the 15th day of October, 1933, the plaintiff and defendant submitted to me as single arbitrator their disputes arising out of an agreement dated the 26th April, 1933. The pleadings of the parties are contained in the minutes of the arbitration proceedings and also in the written pleadings submitted to me by both parties. The last attendance of both parties took place before me on the 8th March, 1934.

Defendant in his written pleadings dated the 21st January,

1934, and the 8th February, 1934, requested me to state a case to the Court on the following questions of law, viz:

(1) Is it possible to modify or vary a written agreement by a subsequent verbal agreement of the parties?

(2) Could a person who is not a party to a contract and who has no authority in that behalf from the defendant order documents or do any other act which could bind the defendant?

(3) That there is insufficient evidence before the arbitrator to warrant a finding that the defendant committed a breach of the agreement.

(4) That in the absence of an agreed extension in writing by both parties as required by Clause 15 of the agreement, such extension cannot be required by a notarial notice given after the original date had expired.

(5) That, if any breach was committed, it was committed by both parties and therefore no question of damages can arise."

I had to reject the request of the defendant for the following reasons, viz:

Question 1. This is not a question arising out of the arbitration as I am satisfied that no verbal agreement had been made to modify or vary the written agreement of the parties. Moreover, Clause 18 of the original agreement expressly provides that any clause or provision may be changed by a written agreement.

Question 2. This question has no bearing at all upon my decision which is not based upon the action of either Mr. Kaplan or the Palestine Trust Co. Ltd., to which it refers.

Question 3. This is not a question of law.

Question 4. This question has no bearing upon my decision. No extension of time was demanded by the plaintiff in his notarial notice but on the contrary the object of the notarial notice was to give time and an additional chance to the defendant in accordance with the Ottoman Civil Procedure Code for his fulfilment of the agreement.

Question 5. This is not a question of law.

After having heard the parties and their counsel and witnesses and having read their written pleadings and after having considered the allegations and claims of both parties and the evidence submitted in support thereof I hereby make and publish my award as follows:

I award and direct that the defendant do pay to the plaintiff the sum of £P. 1000 as liquidated damages as I am satisfied that the defendant has committed a breach of his agreement and has persisted in refusing to fulfil the conditions of the said agreement after a notarial notice was sent to him. And I do further award and direct that the said defendant do pay the costs of this my award amounting to £P. 57.150 as arbitrator's fees and expenses and £P. 25 as plaintiff's advocate's fees and 685 mils expenses incurred by architect Mr. Richard Kauffmann.

In witness whereof I have hereunto set my hand this 19th day of March, 1934.

(Sgd.) I. Braude
Arbitrator.

HELD: that since the parties had appeared at a hearing subsequent to the expiration of the three months allowed by the Arbitration Ordinance they had by implication enlarged the time for making the award for a further period of three months and were estopped from denying the validity of the award.

HELD ALSO that a request to the arbitrator to reconsider or take some new matter into his consideration, after the case had been closed on both sides and the time for making the award had expired is such a recognition of the authority of the arbitrator as continuing, that the consent of the party making it to an extension of time may be fairly implied.

Appeal by way of special leave from a judgment of the District Court (C.D.C.Ja. No. 234/34) dismissing an application for confirmation of an award in favour of the applicant. The facts and pleadings are more completely set out in the judgment.

Bernard Joseph — for the appellant.
M. Seligman — for the respondent.

JUDGMENT.

(Delivered by McDonnell, C. J.).

This is an appeal by way of special leave granted by this Court under Section 15, Sub-Section 2, of the Arbitration Ordinance, 1926 (as amended), against the order of the Jaffa District Court of 9th October refusing present appellant's application to confirm an arbitration award.

A dispute having arisen between the parties to this appeal, on 15th October, 1933, they submitted their dispute to an arbitrator. On 19th March, 1934, the arbitrator made and published his award and on the 7th May, 1934, present appellant applied to the Jaffa District Court for its enforcement. The present respondent opposed the application alleging, inter alia, that as the award was made out of time it was bad. Appellant contended that the conduct of the parties during the arbitration proceedings constituted a parol consent to the extension of the period of arbitration. The Court, however, dismissed this contention and gave the following judgment thereon:—

JUDGMENT OF THE DISTRICT COURT.

"This is an application to confirm an award arising out of a contract, which is opposed by the defendant on several grounds.

As to the first point raised by the defendant, that the award bears insufficient stamps, the Court refuses this opposition for the reason that the defendant should have mentioned it in his written reply. (Russell, 12th Ed., page 460).

As regards the second point, that the arbitrator refused to submit legal points to the Court for opinion. The Court also refuses this. The last application made to the arbitrator to do so was on 8th February, 1934. The arbitrator had full power to grant or refuse it, and the applicant could have applied to the Court to instruct the arbitrator to grant it. The defendant had sufficient time to make an application to the Court to instruct the arbitrator to submit to the Court legal points but he never did so and now gives excuses which are inadmissible.

As regards the third point, that the arbitrator gave a decision on a legal point whilst he had no jurisdiction to do so. The Court finds that there is nothing which would prevent him from doing that. It is not unusual that persons who are appointed as arbitrators sometimes have a better legal knowledge than advocates.

Another objection is made, that the arbitrator did not give detailed reasons as to the conclusion he arrived at. The Court finds that the arbitrator was wise in not giving the detailed reasons. The duty of the arbitrator is to give a

decision directly on the matters before him and the conclusions he arrives at. The more precise his judgment, the better.

We come now to the important and serious point of law to be discussed, viz: whether the award was given after the legal period or not.

It is admitted that the arbitration deed was drawn on 15th October, 1933, and since no mention was made as to the period for giving the award it should have been given on 15th January, 1934. The plaintiff stated and argued before us that the conduct of both parties in the arbitration proceedings show that there was a verbal consent to extend the period of arbitration.

The Court finds that there was such a consent on the part of the parties up to the date of 8th February, 1934, when the last written pleading was submitted by defendant. It was stated, and the arbitrator mentioned it in his award, that the last sitting was on 8th March, 1934. As to whether there was a sitting on that date or not, is a question of fact, and the Court is of the opinion that it is not necessary, in view of the circumstances of the case, for the Court to decide this question of fact.

If we presume that there was a verbal consent for the extension of the period to the 8th March, 1934, we cannot presume or think that it was extended to the 19th March, 1934, when the arbitrator made his award. In case the period of arbitration was extended to the 8th March, 1934, the award should have been made on the 8th or two or three days later. But the award was only made on the 19th March, 1934, and the Court decides that there was no extension to that date.

The Court, therefore, is of the opinion that the award was made after the expiry of the period of arbitration and for this reason dismisses the application for its confirmation with costs."

Appellants, on the 16th October, 1934, applied to the District Court for special leave to appeal upon the grounds therein stated: namely, that the Court erred in holding that the authority conferred upon the arbitrator by the parties appearing before him on the 8th of March did not entitle the arbitrator to make an award later than two or three days thereafter, and, relying on the authority of Tyerman v. Smith (English & Empire Digest, Vol. 2,

p. 416), averred that any award made within thirty days from that date would have been a valid and enforceable award.

Respondents opposed the application, and on the 13th December, 1934, the Jaffa District Court refused the application stating the following reasons for doing so in their judgment:—

> "1. What is a 'reasonable' time is a question of fact to be determined in the light of all the relevant circumstances. In Bedwas Navigation Colliery Co. (1921) Ltd. v. South Wales Coal Mines Executive (151 L.T. Reports at p. 423) Scrutton L.J. used these words:— "Now, 'reasonable necessity' after considering all the facts, is not a question of law; it is a question of degree, which is a question of fact", and it seems to me that the same reasoning applies here. In this case the trial Court has found that eleven days was not a reasonable period.
>
> 2. It is settled law that an arbitrator has no power to extend time when the period for making an award has expired. See Russell on Arbitration, 12th Edition, pp. 355 et seq.".

As stated above, this Appeal Court granted leave to appeal on the 22nd day of May, 1935, and similar grounds to those presented to the Jaffa District Court by appellant were again advanced as reasons for leave being granted.

With regard to the reasons for the refusal to grant leave to appeal by the Jaffa District Court, the first reason quotes the dictum of Scrutton, L.J. in the case of Bedwas Navigation Colliery Co. v. South Wales Mines Executive, 151 L.T. Reports, at page 423. This case had reference to a contract to supply small coal to a company which was engaged in coal carbonization. Small coal cannot be produced by itself, and to do so, you must produce large coal, and the appellants, in attempting to fulfil their contract to supply small coal, exceeded their permitted output or quota under the Coal Mines Act of 1930, and the question then arose whether it was reasonably necessary for the appellants to exceed their statutory output or quota to fulfil their contraact to supply small coal to the Coal Carbonization Company, and it was with reference to the reasonableness of the excess that the dictum of Scrutton L. J.'s judgment is quoted — a dictum admirable in itself, but of no material help to our present case, dealing, as it does, with a conclusion of fact by an arbitrator arising out of a contract and not

with what was a reasonable extension of time when an award of arbitration has been enlarged.

As regards the second ground for refusal, I cannot see how it can be rendered applicable; for provision (c) of the Schedule to the Ordinance provides:—

> "(c) The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award",

and in this appeal we have to deal not with the arbitrator extending the time for the granting of an award, but with the parties extending the time by implication.

Appellant in this appeal contends that the District Court erred in refusing to confirm the award because it was made eleven days after the parties appeared before the arbitrator on the 8th March; that by virtue of the fact that the parties appeared before the arbitrator on the 8th March, the time for the giving of the arbitrator's award was by the conduct of the parties impliedly extended and enlarged for a further three months.

Respondent has contended that the proceedings on the 8th March were no proceedings at all and were in fact a trick to enlarge the arbitrator's time.

A copy, however, of the proceedings has been called for by the Court and put in by the arbitrator which is as follows:—

"ARBITRATION PROCEEDINGS

in the case of

J. Weiss v. I. Shulman

on the 8th March, 1934.

Mr. Seligman representing Mr. Shulman.
Mr. Weiss appeared in person.

Mr. Seligman: Clause 18 of the agreement says "may be changed in writing" it does not mean it shall be in writing.

Point 2 of para. 24 of my pleadings refer to Mr. Kaplan of the Trust Co. or the Trust Co. who had no authority to order statutes or call upon Shulman to do anything.

Point 3 means that the arbitrator is to submit to Court and ask whether the evidence is sufficient.

(sgd) M. Seligman.
Joseph Weiss."

In view of these proceedings, I must conclude that the conduct of the parties was such, that it must be taken to amount to a consent on their part to an enlargement of the time, and a consequent continuation and revival of the arbitrator's authority, and that they are now estopped from denying the validity of the award by their attendance before him (after the time when his powers came to an end), for a request to the arbitrator to reconsider or take some new matter into his consideration, after the case has been closed on both sides and the time for making the award had expired, (which I am satisfied from the report of the meeting of the 8th February was indeed a fact), is such a recognition of his authority as continuing, that the consent of the party making it to extend the time may be fairly implied, for it manifestly refers to an award which the arbitrator has still to make (see R. v. Hill, (1819), 7 Price, 636).

Counsel for respondent has argued that the principle of estoppel laid down in several cases, referred to by Counsel for appellant and cited in support of this contention, can no longer be applied since the said cases were prior in date to the Arbitration Act of 1899.

The statute, however, does not exclude the common law principle of estoppel, and this argument cannot be sustained.

In the alternative he has contended that if the meeting of the 8th February be held to be an enlargement of the time in which the arbitrator might make his award, then such enlargement was an enlargement to the 8th February only, and in support of this contention he quotes Russell on Arbitration, 12th Edition, page 357, where under a paragraph headed "How enlargement should be made", it states: —

"Unless the submission prescribes the mode in which the enlargement is to be made, the arbitrator may, it seems, adopt any mode that expresses his intention of enlarging the

time. A verbal appointment made to both parties for a future meeting to be held on a day beyond the limit of the original period, to which neither party objected, was considered a sufficient enlargement to that day, and the award made on that day was sustained as made within due time (Burley v. Stephens (1836), 1 M. & W. 156; 5 L.J. (n.s.) Ex. 92)."

The present case, however, I am of opinion, is entirely different to that of the case quoted, for in that case a verbal appointment was made to both parties for a future meeting to be held on a day beyond the limit of the original period to which neither party objected, and the award was made on that day and held to be within due time.

In the appeal before us, we have reference by the respondent on the 8th February, 1934, to written pleadings of the 21st January, 1934, where he requests the arbitrator to state a case for the opinion of the Court on certain questions, and in such reference he states that one of the said pleadings must be construed to mean that the arbitrator is to submit to Court and ask whether the evidence is sufficient; thereby, in my opinion, manifestly consenting to an enlargement and a revival of the arbitrator's authority for at least a sufficient time to obtain the opinion of the Court.

The next question to which we must direct our attention is the limit of time we must allow for the making of the award after the implied extension, and in the absence of any agreed limit by the parties and any provision contained in the Arbitration Ordinance with regard to the limit of time upon an enlargement, I am constrained to hold that it must be considered as a new submission and taken to be an enlargement for a further period of three months; the time limited by the Ordinance for the making of an award after entering on the reference.

Accordingly, I am of opinion that the appeal must be allowed, the judgment of the lower Court must be quashed, and the award of the arbitrator of the 19th March, 1934, enforced.

Costs to be paid by respondents including LP.2 advocate's fees.

Delivered the 26th day of June, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 174/35.

BEFORE:

The Chief Justice (McDonnell, C. J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Ahmad Musa el Ja'ouni et al — APPELLANTS.

v.

Taju As'ad el Ja'ouni — RESPONDENTS.

Arbitration award submitted for confirmation — Power of Court to remit award — Remission by Court of own motion — Judgment remitting to arbitrators is final judgment and subject to appeal — Section 12 (1) Arbitration Ordinance, 1926 — Rules 2 (6), (7), Arbitration Rules, 1928.

An award of arbitrators was submitted to the District Court for confirmation but was remitted by the Court of its own motion to the arbitrators for reconsideration in order to hear the claims and evidence of both parties and deliver a new award. Leave to appeal to the Court of Appeal having been obtained it was argued on appeal that the Court could not of its own motion remit the award as no application for remission had been made and no fees paid therefor.

HELD: Dismissing the appeal that under Section 12 (1) of the Arbitration Ordinance, 1926, the Court had a discretion of its own motion and independently of an application by one of the parties to remit the matters to the arbitrators.

HELD ALSO by an Interlocutory Order that the judgment of the District Court was subject to leave to appeal, that it was not necessary for a point of law to be set out upon which such leave was given and that the judgment was not an interlocutory but a final judgment.

HELD FURTHER that although fees had been paid only for opposition to confirmation and not for setting aside the award yet since the applicant for confirmation had not appealed from the judgment setting it aside he was estopped from arguing as to

whether the Court was right in accepting the petition as one for setting the award aside.

Appeal from a judgment of the District Court (C.D.C.Jm. No. 66/35) remitting an award to the arbitrators for reconsideration.

M. Kehaty — for appellant.
E. D. Goitein — for respondent.

INTERLOCUTORY ORDER.

We are satisfied that the judgment in this case was subject to leave to appeal, that it was not necessary for a point of law to be set out upon which such leave was given, and that the judgment was not an interlocutory but a final judgment.

The last preliminary question raised by respondent arising out of the terms of the petition of February 26, 1935, is as to whether the Court was right in accepting it as a petition to set aside the award, in accordance with the prayer at the close thereof, although the fee paid was not the fee prescribed by Section 2 (6) of the Arbitration Rules, 1928, to be paid on an application to set aside an award, but half the fee payable on an opposition to enforcement as laid down in Section 2 (7) of the Arbitration Rules, 1928.

The respondent in his application of the 19th February, 1935, applied to enforce the award. He did not appeal from the judgment setting it aside. He is therefore estopped from raising the point above referred to now.

The preliminary objections are therefore overruled.

JUDGMENT.

We are satisfied that under Section 12 (1) of the Arbitration Ordinance, 1926, which empowers the Court from time to time to remit matters referred to the reconsideration of the arbitrators, the Court has a discretion of its own motion and independently of an application by one of the parties to remit the matters to the arbitrators.

For this reason we dismiss the appeal with costs to include £P. 2 advocate's fees.

Delivered the 19th day of May, 1936.

BILLS OF EXCHANGE.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 30/33.

BEFORE:

The Chief Justice (McDonnell, C.J.), Khaldi, J. and Frumkin, J.

IN THE CASE OF:

A. Nasser — APPELLANT.

v.

Shalhoub Brothers — RESPONDENTS.

Promissory note executed prior to enactment of Stamp Duty Ordinance, 1927 — Insufficient stamp duty on document — Fine levied as at date of first reception in Palestine — Ottoman Stamp Law, 1906 — Section 5 (1) (b), Interpretation Ordinance, 1929.

A promissory note made in Egypt before the date of the enactment of the Stamp Duty Ordinance, 1927, was sued upon by the plaintiff after the enactment of the said Ordinance. Defendant pleaded that the note was improperly stamped in accordance with the law of Palestine. The issue before the Court was whether the fine payable was that prescribed under the Ottoman Stamp Law, 1906, or under the Ordinance. Upon evidence being tendered to the Court to the effect that the note was made prior to the Ordinance the Court held the old Ottoman Stamp Law to be applicable and levied the fine under it. On appeal:—

HELD: setting aside the judgment of the court of trial that the relevant date was not the date of making of the promissory note but the date of its first reception in Palestine.

Appeal from the judgment of the District Court of Jerusalem.

A. Hanania — for appellant.
N. Abcarius Bey — for respondent.

JUDGMENT.

The judgment of the District Court says that it was decided to apply the Ottoman Stamp Law because of the promissory note having been written before the coming into force of the Stamp Duty Ordinance, 1927, and that therefore a fine under the old law must be paid.

We set aside the judgment of the District Court because we hold that the relevant date is not the date of the making of the promissory note but of the reception of it in Palestine: and therefore we remit the case to the District Court to make a finding whether the note was received into Palestine before the coming into operation of the Stamp Duty Ordinance, 1927, and to give judgment accordingly.

Costs to follow the event.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 49/33.

BEFORE:

The Chief Justice (McDonnell, C.J.), Baker, J. and Frumkin, J.

IN THE CASE OF:

Anglo-Palestine Bank Ltd. — APPELLANT.

v.

The Committee of the Great Synagogue of Tel-Aviv — RESPONDENTS.

Signature of Society on promissory note — Plea of incorrect signature — Admission of liability contained in submission to arbitration — Estoppel.

A registered Society having overdrawn its bank account gave notes to the Bank as security, signed by the Society through two of its members. In an action upon the notes the Society pleaded that according to its Rules three members were obliged to sign all undertakings obligatory upon the Society. The trial court found

for the Society on this ground and dismissed the action. On appeal to the Court of Appeal, attorney for appellant did not confine himself to the plea in the court of trial, but produced a submission to arbitration signed by the parties as evidence that the matter was under arbitration and should not be dealt with by the Court of Appeal. The submission to arbitration, signed by the Society contained a preamble admitting the correctness of the signature on the notes in suit. The submission was in the following form:

"Whereas the Anglo-Palestine Bank Ltd., Jaffa, claims from the Great Synagogue, Tel-Aviv, the sum of £P. 3230.680 according to the notes signed by the Great Synagogue and which are detailed as follows: (here follow details of the notes),

and whereas the Great Synagogue of Tel-Aviv has claims against this debt,

"Both parties have agreed to refer the matter to arbitration. The Anglo-Palestine Bank Ltd. has appointed Mr. S. Saltzman as arbitrator on its side, and the Great Synagogue, Mr. S. Ashkenazi as arbitrator on its side. And both parties have appointed by mutual agreement, Mr. Joseph Kodranski as deciding arbitrator and as chairman of the arbitration. If one of the arbitrators will resign or will not be able to continue with his task before the award will be given, the party that appointed him will then appoint another one within one month; and if the umpire resign or will not be able to continue with his task before the award is issued, both parties will then, by mutual agreement, appoint another umpire within one month.

"The arbitrators will settle the said dispute and will issue a final decision by majority without right to appeal.

(Sgd) Committee of the Great Synagogue:

D. Z. Pinkas
I. M. Sacharoff
H. Churgin
A. Chalfin

(Sgd) Anglo-Palestine Company Limited:

Ben Tovim, Chason

HELD: by majority of the Court, setting aside the judgment of the Court of trial and giving judgment for the Bank that the submission to arbitration involved the adoption by the Society of the signatures by only two members of the Committee on the bills and that in consequence the Society was estopped from their defence.

Appeal from a judgment of the District Court of Jaffa in favour of the Defendants in the action.

S. Horowitz — for appellant.
M. Zeiger — for respondent.

JUDGMENT.

The Court unanimously holds that the submission to arbitration of 28th July, 1930, involves the adoption by the respondents of the signatures by only two members of the Committee on the bills and that in consequence the respondents are estopped from their defence: the Court by a majority sets aside the judgment of the District Court and gives judgment for the appellant for the amount in the claim with costs in this Court and the District Court and £P. 4 advocate's fees.

JUDGMENT OF FRUMKIN, J.

I concur in that part of the judgment dealing with the question of the signatures on the bills, and that the judgment of the District Court cannot stand; but since that judgment was based on a technical point without going into the defence on its merits, I hold that the case must be remitted for trial on the merits.

In the Privy Council sitting as a Court of Appeal from the Supreme Court of Palestine.

P.C. No. 101/33.

BEFORE:

Lord Atkin, Lord Alness and Lord Maugham.

IN THE CASE OF:

Adib el Hinnawi — APPELLANT.

v.

Ya'qoub Abu el Huda el Faruqi — RESPONDENT.

Promissory note of deceased person—Past services as consideration—Inadequacy of consideration not a defence — Proof of execution of note — Onus on party alleging to prove defence of no consideration.

A promissory note for £P. 4000 was made by a woman in favour of her husband in consideration of work previously performed in "the administration of my real properties, by building, selling, letting out and repairing, estimated between us, agreed upon and accepted by me". Shortly after having made the note the woman died without having paid it. In an action on the note by the husband against the heir of the woman's separate estate, the heir pleaded, inter alia, that no consideration was given for the note. The trial court held that no real consideration was given and that the services rendered to the deceased were not equivalent to the value of the note. The Court of Appeal reversed this decision holding that there was consideration and that the question of adequacy of consideration was not a question for the trial court to consider. On appeal to the Judicial Committee of the Privy Council:—

HELD: confirming the judgment of the Supreme Court of Palestine

(a) that there was consideration for the note and that having regard to the terms of the note the alleged inadequacy of consideration afforded no relevant answer to a demand made upon it,

(b) that it was not the duty of the Court to enquire into the adequacy of consideration, and

(c) that the burden of establishing a plea of no consideration was on the defendant.

Appeal from a decision of the Supreme Court of Palestine sitting as a Court of Appeal, (C.A. No. 141/31, see Collection of Judgments 1919—1933, p. 252) in favour of the plaintiff in the action. The facts and pleadings are more fully set out in the judgment.

JUDGMENT.

(Delivered by Lord Alness).

This is an appeal from a judgment of the Supreme Court of Palestine, dated 5th April, 1932 [1]), reversing a judgment of the District Court of Jaffa, dated 9th November, 1931, and entering judgment for the respondent against the appellant for the equivalent in Palestine currency of £E. 4000, with interest and costs.

The action out of which the appeal arises was begun on 7th February, 1928, in the District Court of Jaffa by the respondent, who was the widower of one Fatmeh Mohamad el Hinnawi, against the appellant, as the heir of Fatmeh, claiming payment of the said sum of £E. 4,000 which was alleged to be due to the respondent upon a promissory note, dated 7th November, 1926, and interest. The defence offered by the appellant, called his "statement of reply" was in substance (1) that the promissory note was not executed by the said Fatmeh, and (2) that there was no consideration for the note.

On 18th March, 1928, the action was heard before the District Court of Jaffa, when it was dismissed on the grounds (1) that the promissory note was invalid, and (2) that in law the respondent was not entitled to establish that the deceased had made the note.

On 21st May, 1928, the respondent appealed from the said judgment to the Supreme Court of Palestine. On February 5, 1929, that Court unanimously allowed the appeal, and set aside the judgment of the District Court. They remitted the action to the District Court for comparison of the finger prints of the deceased, and for hearing evidence with regard to the making of the note; and they further ordered that, in the event of the District Court being satisfied that the note was duly executed, the question

[1]) See C. of J., p. 252.

whether consideration was given therefor or not should be taken into account, and a fresh judgment given.

On 31st March, 1929, the case again came on for hearing before the District Court of Jaffa, when evidence and argument were duly heard. On 25th July, 1929, the District Court found as a fact that the finger print on the note was that of the deceased Fatmeh, and they entered judgment for the respondent against the appellant for £E. 4.000 and costs. The District Court, however, omitted to deal with the question of whether consideration had been given for the note, as, in the circumstances, they were directed to do.

On 3rd February, 1930, the appellant appealed from that judgment to the Supreme Court of Palestine. He pleaded inter alia that no consideration for the promissory note had been given, and pointed out that no decision on that matter had been given by the District Court. On 26th May, 1931, the appeal was heard by the Supreme Court of Palestine when they remitted the case to the District Court of Jaffa, in order that the question whether consideration had been given for the promissory note might be considered, and, after evidence being given, if that should be thought necessary, be determined. The District Court heard evidence on the matter, and, on 9th November, 1931, they delivered judgment. They held that there was no real consideration for the promissory note, and, being of opinion that the services rendered to the deceased by the respondent were not equivalent to the value of the note, they dismissed the action.

The respondent appealed to the Court of Appeal, and, on 5th April, 1932, that Court allowed the appeal, set aside the judgment of the District Court, and entered judgment in favour of the respondent with costs. The Court of Appeal held that the burden was on the appellant to show that no consideration had been given by the respondent for the note and that that defence had not been made out. They further held that it was not for the Court of first instance to enquire into the adequacy of the consideration for the note, but to consider whether there had or had not been any consideration given.

By orders dated 26th May, 1932, and 7th September, 1932, the appellant obtained leave to appeal to His Majesty in Council, and the appeal has now been heard.

The Appellant's counsel argued (1) that there was no consi-

deration given for the promissory note, and (2) that the promissory note was obtained by undue influence on the part of the respondent—particularly in view of the relationship of husband and wife which subsisted at the date when the note was made between the respondent and the deceased Fatmeh.

With regard to the first ground of appeal, their Lordships are satisfied that consideration was given for the promissory note, and that the judgment of the Court of Appeal on that point is unassailable. They are further of opinion that, having regard to the terms of the promissory note, the alleged inadequacy of consideration affords no relevant answer to a demand made upon it. With regard to the plea of undue influence, their Lordships are of opinion that, inasmach as the plea was not pressed in the Courts below, with the result that there is neither specific evidence nor any direct finding with regard to it, they are absolved from the necessity of dealing with the matter in detail now. It is manifest from the proceedings that it was open to the appellant to have urged the plea in the Courts below to an issue — in other words, to have claimed and obtained a judicial decision upon it. The appellant omitted to do this, and it is therefore quite impossible, in their Lordships' opinion, on the materials available to them, to set aside the judgment appealed against, and to affirm the plea of undue influence. Their Lordships are further of opinion that, having regard to the sum at stake between the parties, and to the protracted character of the litigation regarding it which ensued, it would not be reasonable or proper for the Board now to make a remit for enquiry into the question of undue influence, as they were invited by the appellant to do, and they must accordingly decline to take that course. In the circumstances recited, the appeal fails, and the appellant must pay the costs of it. Their Lordships with humbly advise His Majesty accordingly.

Delivered the 27th day of February, 1936.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 3/34.

BEFORE:

The Senior Puisne Judge (Corrie, J.), Khaldi, J. and Abdul Hadi, J.

IN THE CASE OF:

Maria Tagger — APPELLANT.

v.

The Arab Bank Ltd. — RESPONDENT.

Liability of guarantor of promissory note — Validity of promissory note made by bankrupt — Discharge of guarantor by failure of principal indebtedness — Liability of bankrupt towards creditors — Arts. 153, 156, 157, Ottoman Commercial Code.

A promissory note was made by a bankrupt and signed by his wife as guarantor. In an action in the Magistrate's Court by the payee against the bankrupt and the guarantor the claim against the bankrupt was withdrawn and the claim against the guarantor dismissed on the ground that she had guaranteed a note made by a bankrupt and which was null and void. On appeal to the District Court the judgment dismissing the claim against the guarantor was set aside and judgment entered against her for the amount of the note. On leave to appeal to the Court of Appeal being granted:—

HELD: dismissing the appeal, (a) that a bankrupt could validly make a promissory note, (b) that under Arts. 153, 156 and 157 of the Ottoman Commercial Code, the note is invalid against the syndic and the creditors in bankruptcy, but it does not follow that the note is invalid against the bankrupt, who would be liable thereon to the extent of any assets not included in the bankruptcy, and (c) that since the principal debtor could be held liable on the note the guarantor was also liable.

Appeal from a judgment of the District Court of Jerusalem (C.A.D.C. Jm. No. 55/33) setting aside the judgment of the Magistrate in favour of the defendant in the action.

M. Grossman — for appellant.
Suleiman Eff. Salah — for respondent.

JUDGMENT.

The appellant, Maria Tagger is asking the Court to hold that she is not liable upon a promissory note in favour of the respondent, the Arab Bank Ltd., which she signed as guarantor for Nessim Tagger.

The ground of her appeal is that as Nessim Tagger was bankrupt at the time he made the promissory note, his signature was invalid; and that as the principal debtor was not liable upon the note, the guarantor could not be made liable thereon.

The appellant, however, has not been able to cite authority for her argument that a bankrupt cannot make a promissory note.

Under Articles 153, 156 and 157 of the Ottoman Commercial Code, upon which the appellant relies, it is clear that the note is invalid against the Syndic in bankruptcy and the creditors in bankruptcy; but it does not follow that the note is invalid against the bankrupt; who would be liable thereon to the extent of any assets not included in the bankruptcy.

It follows that the guarantor is also liable.

The appeal is dismissed with costs including LP.6 advocate's fees.

Delivered the 14th day of November, 1935.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 182/34.

BEFORE:

Baker, J., Frumkin, J. and Abdul Hadi, J.

IN THE CASE OF:

Fayez Mohamad Sakallah — APPELLANT.

v.

Adel Esh-Shawa — RESPONDENT.

Allegation of failure of consideration for promissory note — Statement in note of value received — Admissibility of oral evidence to contradict document — Evidence of parties to the action — Administration of decisive oath.

Plaintiff undertook to deliver a certain specified quantity of barley to defendant and took a promissory note from him stating that it was in consideration of barley received and accepted by defendant. In fact, at the time of the making of the note plaintiff had merely instructed his agent to deliver, but defendant had not, as yet, received the barley. In an action on the note before the District Court, defendant pleaded that he never received the barley whereupon the Court heard witnesses in addition to the parties and came to the conclusion after hearing such witnesses that defendant had never received the barley and that there was therefore a failure of consideration. On appeal:—

HELD: quashing the judgment of the District Court (a) that the District Court erred in calling witnesses in support of defendant's allegation that there was a failure of consideration (b) that evidence cannot be heard to contradict a written document and that the trial Court was wrong in hearing evidence other than the evidence of the parties, and (c) that the case should be remitted for a new judgment and to allow the defendant, should he so desire, to administer the decisive oath to the plaintiff.

Appeal from a judgment of the District Court of Jaffa (C.D.C. Ja. No. 51/34) in favour of the defendant in the action.

E. D. Goitein — for appellant.
Fuad Nashashibi — for respondent.

JUDGMENT.

The appellant is the holder of a promissory note for £P.135 wherein the respondent states that it is in consideration of barley received and accepted by him. The appellant sued for the value of the note and the respondent alleged he had never received the barley and produced in support thereof a delivery order addressed by the appellant to one Yusef Abu Shaban.

The lower Court then, in our opinion quite erroneously, allowed witnesses to be heard in support of the respondent's allegation that there was a failure of consideration.

The law is quite clear that evidence cannot be heard to contradict a written document and the lower Court was wrong in hearing evidence other than the parties to the action: and this evidence does not contradict the contents of the promissory note.

The judgment of the lower Court must be quashed and the case returned for a fresh judgment to be given, after, if the respondent so desires, administering the decisive oath to the appellant.

Costs to be costs in the cause.

Delivered the 18th day of November, 1935.

In the District Court of Jaffa.

C.D.C.Ja. No. 313/34.

BEFORE:

The President (Copland, J.) and Shehadeh, J.

IN THE CASE OF:

Shlomo Jamil — PLAINTIFF.

v.

The Palestine Gas Co.,

Brown and Sacks — DEFENDANTS.

Co-operative Society as Bank — Stamp duty on cheque on co-operative society—Exemption from stamp duty—Item 6(8), Schedule, Stamp Duty Ordinance, 1927.

A company which had a bank account with a Co-operative Society Bank issued an unstamped cheque for £P. 250 which was endorsed by the payee to the plaintiff. The cheque not having been met on presentation to the Bank, the plaintiff brought this action. Plea — that the cheque was unstamped and inadmissible in evidence.

HELD: dismissing the action that the cheque did not fall within the exemption provided by Item 6 (8) of the Schedule to the Stamp Duty Ordinance, 1927, since it was not given in respect of money payable by virtue of the Rules of the Society, nor was it a bill given by or to a registered Co-operative Credit Society.

Dr. M. Gershman — for plaintiff.
P. Goldberg — for defendants.

JUDGMENT.

In this case the plaintiff is suing the defendant company now in liquidation on a cheque for £P. 250 drawn by the defendants in favour of Sacks and endorsed to the plaintiff. The cheque was drawn on an account of the defendants in the Ashrai Bank, and was not met on presentation, there being no funds available.

The first point in the defence is that the cheque is not stamped as required by law. The exemption given by Item 6 (8) of the Schedule of the Stamp Duty Ordinance, 1927, says:

> "A bill given by or to a registered co-operative Agricultural Society or a registered Co-operative Credit Society... in respect of money payable by virtue of the Rules of the Society."

In our opinion this cheque does not fall within this exemption because it is not in respect of money payable by virtue of the Rules of the Society nor is it a bill given by or to a registered Co-operative Credit Society.

It is a cheque drawn in the ordinary course of banking business, and must bear a stamp just as any cheque drawn on any regular bank must. It cannot, if not stamped, be sued on.

The action therefore fails and is dismissed with costs and £P. 2 advocate's fees.

Delivered the 8th day of November, 1934.

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

C.A.D.C.Ja. No. 104/36.

BEFORE:

The Relieving President (Edwards, J.) and Mani, J.

IN THE CASE OF:

Pawel Belke — APPELLANT.

v.

Felix Karp — RESPONDENT.

Promissory notes made in Poland — Limitation of actions a matter of procedure — Application of lex fori — Limitation of actions on promissory note — Section 95, Bills of Exchange Ordinance, 1929.

In February, 1931, seven bills for a total amount of 2400 Polish zlotys were made in Poland in favour of the plaintiff, maturing on dates between 28th August, 1931, and 30th April, 1932. On the 24th day of January, 1936, action was brought on the notes before the Magistrate at Tel Aviv. Defendant pleaded that according to Polish law which was applicable, the bills were prescribed. The learned Magistrate in giving judgment for the plaintiff found that it was immaterial whether Polish or Palestine law was applied since in either case the period of prescription had not elapsed. Defendant appealed and the District Court remitted the case for further evidence to be heard on the Polish law. The learned Magistrate, on the re-hearing, heard expert witnesses on the Polish law and allowed the claim in part holding that the balance was prescribed in accordance with Polish law. On appeal from this decision:—

HELD: setting aside the judgment of the Magistrate and entering judgment for the plaintiff for the entire amount claimed that a question of limitation of actions is a matter of procedure and as such to be governed by the local law of the country where the action is brought and that since under the Bills of Exchange Ordinance, 1929, the period of prescription was five years and the period had not elapsed the claim was in time.

Appeal to the District Court from a judgment of the Magistrate dismissing in part an action on promissory notes made in Poland.

M. Kirschenbaum — for appellant.
Philip Joseph — for respondent.

JUDGMENT.

This is an appeal from a judgment of the Tel-Aviv Magistrate's Court dismissing a claim on promissory notes on the ground of prescription according to the Palestine law. The bills in question were drawn in Poland and according to the finding of the Magistrate, the Polish law on this matter is that the period of prescription is one of three years after maturity.

In our opinion, the matter of limitation of actions is a question of procedure and is to be governed by the local law of the country before which the action is brought. (Dicey's Conflict of Laws, — Limitation of Actions). In this country Section 95 of the Bills of Exchange Ordinance, 1929, fixes at five years the period of prescription. This period has not yet elapsed with regard to the bills in question.

The judgment of the Court below is therefore set aside and judgment entered for the appellant for the sum of 2400 Polish zlotys to be paid in Palestine currency at the rate of exchange on the day of payment with costs and £P. 4 advocate's fees.

Delivered the 24th day of May, 1936.

BROKERS.

In the Supreme Court sitting as a Court of Appeal.

C.A. No. 121/34.

BEFORE:

The Chief Justice (McDonnell, C. J,), Frumkin, J. and Khayat, J.

IN THE CASE OF:

Aziz Lammam — APPELLANT.

v.

Hanna Asfour — RESPONDENT.

Validity of agreement to pay brokerage for sale of house — Functions and licensing of broker — Plea by signatory of illegality of contract — Licence not required by land broker — Ottoman Brokerage Regulations, 1st Safar, 1306, held repealed — Repeal of law by implication where reading of prior statute leads to absurdity — Interpretation of Statutes — Recourse to preamble of Ordinance in case of ambiguity — Government notices in Official Gazette held void of legal effect — Legislation in pari materia — Sec. 8, Brokers Ordinance, 1919.

The plaintiff, a licenced broker entered into a written agreement with the defendant, an advocate, whereby the broker was granted the right of selling a house for the defendant for a sum of £P.3665 on specified conditions amongst which were stipulations that the right to sell was to terminate at a certain time and that if the broker sold the house for more than £P.3665 he was to be entitled to keep the surplus over that sum. The broker, within the period stipulated, sold the house for £P.4000 which sum the purchaser paid to the defendant. Defendant refused to pay tbe broker the excess of £P.335 and action was filed in the District Court to recover this sum. The defendant, relying upon the Brokers Ordinance, 1919, and certain articles of the Ottoman Brokerage Regulations, 1st Safar, 1306, pleaded that the agreement was illegal and unenforceable. The plaintiff replied that the Ottoman Brokerage Regulations were repealed by implication by the Brokers Ordinance, 1919, and that the Ordinance did not,

in any event, apply to land brokers. The District Court held that the Ottoman Brokerage Regulations were repealed but that the plaintiff was a broker, and as such, was prohibited by Section 8 of the Ordinance from taking part in commercial affairs on his own account and dismissed the action. On appeal to the Court of Appeal:—

HELD: setting aside the judgment of the District Court and giving judgment in favour of the plaintiff for the amount of his claim that (a) since the effect of holding the Ottoman Brokerage Regulations to be still in force would, on such Regulations being read together with the Brokers Ordinance, 1919, lead to wholly absurd consequences, the Regulations must, in spite of the absence of any express repealing provision be taken to be repealed, (b) the legislator, in drafting the Brokers Ordinance, 1919, had deliberately omitted a provision for brokerage fees on land transactions. A land broker was therefore not a broker within the meaning of the Ordinance, and the transaction giving rise to the action was not, therefore, a transaction prohibited by the Ordinance.

Appeal from a judgment of the District Court of Haifa, (C.D.C. Ha. No. 41/34) in favour of the defendant in the action. The facts and pleadings are more fully set out in the judgments of the District Court and Court of Appeal, both of which are reported below.

E. D. Goitein — for appellant.
Moghannem Moghannem — for respondent.

JUDGMENT OF THE DISTRICT COURT.

We agree with the plaintiff's contention that the Regulations of the 1st Safar, 1306, in so far as they related to brokers were repealed by implication by the Ordinance of 15th January, 1919. It is not necessary to give reasons for this conclusion because we are against the plaintiff on another ground.

The last paragraph of Section 8 of the Ordinance (Section 10 in Bentwich, Vol. 1, p. 52) states in unequivocal terms:

> "A person carrying on the business of a broker is forbidden to take part in commercial affairs in his own name or on his own account".

There is no definition of a broker in the Ordinance. Can it be said that the Ordinance only applies to brokers whose operations

are concerned with merchandise (including cereals), freight and insurance, i.e. the items mentioned in the tariff annexed to the Ordinance? We think not. The more reasonable construction in our view is to say that the provisions of the last paragraph of Section 8 apply to brokers indiscriminately whatever their line of business may be and that if there be no provision in the tariff for their fees, that is merely a lacuna in the Ordinance. Actually, it can be understood why immovable property was omitted from the tariff — it was because transactions in immovable property (save leases for a period not exceeding three years) were prohibited when the Ordinance was promulgated by the terms of the Proclamation of 15th November, 1918.

In coming to the conclusion set forth above we are not influenced by the Notice dated 18th February, 1924, signed by the Director of Customs and published in Official Gazette No. 110 nor by the Notice signed by the Chief Secretary, and published in the Official Gazette some time in the year 1925. In our view neither of these notices has any legislative value.

The plaintiff is admittedly a broker and as such is prohibited from taking part in commercial affairs on his own account. Therefore, he cannot succeed in this action which must be dismissed with costs.

Judgment given in presence of the parties, subject to a right of appeal.

Delivered the 25th day of June, 1934.

JUDGMENT OF THE COURT OF APPEAL.

In this case the appellant, a licensed broker, entered into an agreement with the respondent whereby the appellant was granted by the respondent the right of selling a house in Haifa for a sum, exclusive of charges, and commission, of LP. 3665 on condition that the appellant paid the respondent LP.100 forthwith, LP.900 on the execution of the contract of sale, and the balance at the time of transfer. The right to sell, granted to the appellant, was to remain in force until 8 p.m. on the 4th November, 1933, and if no contract of sale was executed by then, the sum of LP.100 paid by the appellant to the respondent was to be forfeited.

In the event of the respondent revoking the agreement before the same hour on the same day, the respondent was to return to

the appellant the sum of LP.100 paid on the execution of the agreement together with LP.100 as liquidated damages.

Finally, by Clause 7 of the agreement, it was provided that "any increase you may obtain in the price shall be yours without any argument whatsoever", in other words, if the appellant sold the house for more than LP.3665 he was to be entitled to keep the surplus over that sum.

This is in fact what happened: the house was sold within the prescribed period, through the intervention of the appellant, for LP.4000 and this sum was paid by the purchaser to the respondent who then refused to pay to the appellant the sum of LP.335 the excess obtained over the LP.3665 which was provided for as the price of the house in Clause 2 of the contract.

It is for the recovery of this sum of LP.335 that the action has been brought by the Appellant.

The respondent who is an advocate has repudiated liability on the ground that the action was based on an illegal contract. We need merely state this fact without comment and need not elaborate our strong disapproval of the ethics of such a defence being put forward in such an action by a lawyer who was himself the party to be charged under the contract.

In finding a legal basis for this defence the respondent attempts to ride two horses at once and bases himself upon both the Ottoman Brokerage Regulations of the 1st of Safar, 1306, and upon the Brokers Ordinance, 1919, the latter of which he claims did not repeal the former.

The District Court held the Ottoman Brokers Regulations were repealed by implication by the Brokers Ordinance, 1919, but that in view of the provisions in the last paragraph of Section 8 of that Ordinance that "a person carrying on the business of a broker is forbidden to take part in commercial affairs, in his own name or on his own account", the plaintiff could not succeed in his claim, and therefore gave judgment for the defendant.

The Ottoman Brokerage Regulations of 1st Safar, 1306, are printed in French on page 14 of Volume IV of Young's Corps de Droit Ottoman. The Palestine Brokers Ordinance is to be found on page 1 of the Official Gazette of the 16th October, 1919.

There is certainly no express declaration in the Ordinance that the Ottoman Brokers Regulations shall no longer be in force,

but it must be obvious that the Ordinance was settled by a draftsman who had the Ottoman Regulations under his eyes and adopted some of their provisions, in certain cases in full, in others with alterations and, that on the other hand, he omitted to enact yet others of the provisions contained in the Regulations.

Article 1 of the Regulations defines brokers. There is no such definition section in the Ordinance, a fact which, as we shall see, is of some importance.

Article 2 of the Regulations is reproduced as Section 3 of the Ordinance with this omission that a Chamber of Commerce is under the Ottoman Regulations to be the recipient of the testimonials as to the character of the would-be broker.

Articles 3 and 13 of the Regulations provide for different classes of brokers, who shall pay different fees to the Chamber of Commerce while section 2 of the Ordinance prescribes only one uniform fee of one pound which all brokers must pay to the Government.

Article 4 of the Regulations is reproduced as Section 4 of the Ordinance with these additions that an unlicensed person practising as a broker is made liable to a fine as is provided in different terms in Article 14 of the Regulations, and an unlicensed person is expressly prevented from recovering his fees in Court; a matter which is not provided for in the Ottoman Regulations.

Article 5 of the Regulations allowing a bankrupt when discharged to be licensed as a broker is not reproduced in the Ordinance.

Article 6 of the Regulations is also not reproduced.

Article 7 of the Regulations finds its counterpart in Section 5 of the Ordinance, with these additions that a broker who loses his book is fined ten pounds if he does not report the loss immediately and is fined two pounds if he does report it on application for a new book.

Articles 8 to 11 of the Regulations are not reproduced in the Ordinance. Article 12 of the Regulations is reproduced as Section 6 of the Ordinance. Article 13 of the Regulations has been dealt with in connection with Article 3. Articles 14 and 15 of the Regulations are not reproduced save to the extent referred to already in dealing with Article 4. Article 16 of the Regulations finds its counterpart in Section 7 of the Ordinance. Article 17 of the Regu-

lations is not reproduced. Articles 18 and 19 are reproduced in Section 8 of the Ordinance.

The tariff of brokerage fees attached to the Regulations is, with some alterations, summarised in the tariff affixed to the Ordinance.

There are, however, alterations. In the Regulations the brokerage fee on the sale of certain silks is one per cent payable by the purchaser and not one per cent payable by the vendor, as is prescribed in the Ordinance for articles of merchandise other than cereals.

Again, under the Regulations the vendor alone pays on a sale of coal, and he pays two per cent; on a sale of wool or mohair, moreover, the vendor and purchaser are, under the Regulations, each liable to pay one per cent.

Finally, under the Regulations the vendor has to pay one-eight per cent on a foreign exchange and the vendor and purchaser have each to pay two per cent on a sale or lease of immovable property. There are no charges similar to these last two in the Ordinance.

In view of the numerous inconsistencies which we have spoken of between the Ordinance and the Regulations, we have no hesitation in saying that in spite of the absence of any express repeal of the Regulations and of the fact that repeal by implication is never to be favoured, in the present case the Regulations must be taken to be so repealed on the authority of Dr. Lushington in The India (1864) 33 L.J. Adm. 193 who is quoted on p. 312 of the third edition of Craies on Statute Law as saying "the prior statute would I conceive be repealed by implication . . if the two statutes together would lead to wholly absurd consequences".

The consequences, if we were to hold the Regulations still in force, would undoubtedly be absurd. To take two instances, the Government would licence brokers under the Ordinance while under the Regulations brokers would be licensed by the Chambers of Commerce, which have now been re-established; secondly a broker might sue for fees on a percentage payable under one of the enactments and the vendor or purchaser whom he sued might reply that only a lesser percentage was payable, or that he was not liable to pay any percentage, as the case might be, under the other of the enactments.

Shoshani's Printing Co. Ltd.
Tel-Aviv, Palestine.