ANNOTATED
LAWS OF PALESTINE

A STATEMENT OF THE STATUTE LAW OF PALESTINE IN ALPHABETICAL ORDER WITH CROSS-REFERENCES, ANNOTATIONS TO DECIDED CASES, NOTES ON PRACTICE, ETC.

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ARBITRATION

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tutes a new agreement (*vide* C. D. C., T. A. 319/43(172) and title *STAMP DUTY*). In C. D. C., T. A. 319/43 (*supra*) extensions of time had been endorsed, on the submission by agreement of the parties, but the extensions had not been stamped. After delivery of the award and in connection with Court proceedings, one of the parties caused the extensions to be stamped under the provisions of sec. 17 of the Stamp Duty Ordinance. The Court held that the stamping had retroactive effect and that the arbitrators were therefore deemed to have acted under a valid submission (173).

A submission made in Court should also be stamped (*ante*, p. 60).

Termination of Submission: A submission being, by definition, an agreement to refer, the ordinary rules obtaining in the case of other agreements may be applied to determine whether a submission lapses, is revoked, or terminates in any particular instance. The provisions of sec. 3 are of little assistance as the word "submission" is used therein in a different sense. See notes to that section.

Although a contract does not generally expire on the death of one of the parties thereto (*vide* e. g., C. A. 55/30; C. A. 157/32)(174), it will not be enforceable by or against the personal representatives of the deceased party if it relates to a personal undertaking, such as (*semble*) an agreement to refer to arbitration (175).

C. A. D. C., Ja. 233/32 (176), which provided that the death of one of the parties avoids arbitration proceedings, does not deal with the effect of the death upon the submission. See *Revocation* in the notes to sec. 3.

In the unreported case C.D.C., T.A. 229/44, the Court held that an arbitration clause in a contract subsisted between the parties although the contract itself might have expired.

The removal of an arbitrator under sec. 11 does not terminate the submission. See note *Effect of Removal of Arbitrator* in the notes to sec. 11.

It is submitted, from a comparison with English decisions, that the setting aside of an award does not revoke a submission, though the authority of the arbitrator is revoked (177) *i. e.*, the "submission" within the meaning of sec. 3. (See notes to sec. 3.) The District Court judgment resulting in C. A. 131/30 (178) is consistent with this view as the Court, after setting aside the award, revoked the reference (*i. e.*, the authority of the arbitrator), leaving the agreement to refer unaffected.

In C. D. C., T. A. 44/40 (179) the Court appears to have confused the

(172) 1944, S. C. D. C. 276.

(173) The Court also overruled the stamp objection on the ground of estoppel: *Ante*, p. 62. C.B.M., Ja. 1601/37 (P. P. 5.1.38.) provides another instance of stamping a submission after execution.

(174) Both cases not reported.

(175) There are no local decisions to support this view and it is submitted that English Law would apply, and not the *Mejelle*. See titles *INTERPRETATION* and *PALESTINE ORDER IN COUNCIL* (Art. 46). *Sed quaere.*

(176) 1, R. 193 and see note *post*.

(177) Or, more accurately, not revived, as the arbitrator becomes *functus* after delivering his award. See heading (*Arbitrator Functus Officio*) in notes to sec. 13, under title INHERENT JURISDICTION.

(178) 5, R. 1810.

(179) 1940 T. A., 166 (*in Hebrew*).

distinction between *submission* as the term appears in sec. 3, and as it is defined in sec. 2. In refusing to appoint an arbitrator under sec. 7 and in holding that,

> "After the arbitrators have given an award and the award was finally set aside by the Court, the deed of submission is of no effect and the respondents cannot be compelled to proceed with the arbitration".

It is respectfully submitted that the Court misdirected itself.

The parties may always revoke a submission by mutual consent (e. g., C. D. C., T. A. 88/42, 139/42) (180).

"Submission" in different Contexts: The expression bears a different meaning from that defined, when used in sec. 3, 5, 9, 11 and 20.

This is the wide import of the limitation appearing at the beginning of sec. 2: "Unless the context otherwise requires". The advice given by Russell that the object of each section in which the term occurs should be considered in order to ascertain the meaning of "submission" has been followed in the notes to the various sections.

See also the following paragraph, notes to sec. 3 and notes to *Submission, passim.*

Foreign Submissions: See sec. 20 and notes.

Submission to be irrevocable.

3. A submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court or agreement of the parties, and shall have the same effect in all respects as if it had been made an order of court.

Source: The Arbitration Act, 1889, sec. 1. The Ordinance differs from the Act in that leave to revoke may, under the Act, be granted by a judge as well as by the Court.

Court: The jurisdiction of the Court is defined in sec. 2. See notes to that section. Local jurisdiction is defined in the Arbitration Rules, *post.* r. 2.

Submission: The word "submission" in sec. 3 differs from the definition of "submission" in sec. 2, *supra* (*q. v.*):

> "It is well established that the word 'submission' in this section means, not the agreement to submit differences to arbitration but the actual submission to a specific arbitrator. In *re* Smith & Service & Nelson & Sons [1899] 24 Q. B.D. 545, at 553) Bowen, L. J., said:
>
> > "The language of sec. 1, 'A submission shall be irrevocable', is ambiguous, it is applicable, not to the agreement to refer but to the authority of the arbitrator."
>
> "Now, in the present case the authority of the arbitrator was exhausted when he made his award, he was then *functus officio.* There can, therefore, be no question of revoking his authority." (C. A. D. C., T. A. 40/41) (1).

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(180) *Not reported.*
Sec. 3.

(1) 1941-2, T. A. 7. The correct reference to the English case is [1890] 25 Q.B.D. 545 and not as quoted in the judgment.

A revocation of the submission therefore means a revocation of the authority given to the arbitrators to enter upon or proceed with the arbitration, not a revocation of the arbitration clause in the agreement, as this is irrevocable (C.A. 65/42)(2). See note *Revocation, infra.*

The distinction between the expression as defined in sec. 2 and as it appears in this section, may be illustrated by cases where an arbitration clause (*i. e.,* a "submission" within the meaning of sec. 2) provides for a written submission to be signed by the parties before the inception of the arbitration proceedings. Such a clause is referred to in C. A. D. C., T. A. 65/39 (3). The authority of the arbitrators under the latter submission *i. e.,* the reference, may be revoked, leaving the former — the agreement to refer — valid. This was done in C. A. 131/30 (4).

See also notes to secs. 5, 9 11 and 20 under the heading *Submission,* for the same or (in the case of sec. 5) a similar reading of this word.

See also notes to the definition of "Submission" in sec. 2, and cross-references therein.

Order of Court: Where the submission, or any award thereunder, has been made an order of Court then both are, *semble,* irrevocable (*per* Gordon Smith, C. J. in C. A. 65/42)(5).

Procedure: Applications for the revocation of submissions are made by notice of motion (see notes to sec. 15(1)).

Evidence: A perusal of the conditions which the Court will take into account in determining whether to revoke the submission (*Revocation, infra*), will indicate the evidence which the applicant should lead on the application to revoke. On evidence by affidavit see sec. 15(1) and notes.

Fees: See r. 5, Arbitration Rules, *post* and notes.

Costs: See sec. 18 and notes.

Revocation: The section contemplates a revocation of the submission either by consent of the parties or by leave of the Court. For an example of revocation by consent see C. D. C., T. A. 88/42, 139/42 (6). In accordance with the provisions of English Law before the Amendment to the Arbitration Act (see notes to sec. 1), it was held in C. A. D. C., Ja. 233/32 (7), that in matters of arbitration the death of one of the parties to the submission avoids the arbitration and all proceedings after the death unless the submission otherwise provides (C.A.D.C., T.A. 45/41)(8). As to the effect on the submis-

(2) 9, P. L. R. 392; 1942, S. C. J. 429.
(3) 1939, T.A. 15; P. P. 28.11.39.
(4) 5, R. 1810. Judgment of the District Court.
(5) Note 2 *supra.* But how can a submission be made an order of Court in Palestine? The award may be so made under certain statutory references (*supra*) sec. 2. No question of revocation of the submission can, however, arise when an award under the Ordinance is enforced or when an award in a statutory reference is made an order of Court.
(6) *Not reported.*
(7) 1, R. 193. The report of the case is inaccurate: The words "avoids the arbitration" should be inserted, at p. 194, three lines from the top, after the words "to the submission".
(8) 1941-2, T. A. 212 (*in Hebrew*).

sion of an award being set aside, see note *Termination of Submission*, in sec. 2.

> "Now, as to when a Court will grant the leave as provided under section 3, I refer to what is stated by Hogg on Arbitration at pp. 44-45. He points out there that the modern practice is very largely to limit the discretion to grant leave to revoke and that the following general considerations apply: that the main principle which will control the exercise of the discretion is that the Court will grant leave to revoke when, and only when, it is made apparent that that has happened which makes it certain that the award if made will be set aside, or further proceedings for some other reason will prove abortive. The learned author points out that the tendency is against leave and that the Court will exercise great caution in giving leave and will not, in the absence of peculiar circumstances, exercise its discretion. I have been referred to similar reference to the practice in both Russell and Halsbury." (Mo. D. C., Jm. 465/43, 479/43) (9).

Leave to revoke a submission will therefore not be granted where it is apprehended that a unanimous award, necessary under the terms of the submission, may never be reached, as two arbitrators have failed to agree before appointing a third arbitrator; particularly if the arbitrators, all experienced advocates, have not jointly considered the dispute referred. (Mo. D. C., Jm. 465/43, 479/43) (*supra*).

On the other hand, a submission may be revoked if a party, by delaying tactics, turns the arbitration proceedings into a farce (C. A. 65/42) (10).

Where there is no dispute, an arbitrator may not enter on the "submission" within the meaning of this section: See the unreported case quoted in note 13 to sec. 5.

See also note *Submission* in this section, *supra*.

Appeals: For appeals see sec. 15(3) and notes.

Provisions implied in submission.

4 A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the Schedule to this Ordinance, so far as they are applicable to the reference under the submission.

Source: This section is taken from sec. 2 of the Arbitration Act, 1889.

Submission: This term is defined and discussed in sec 2.

Implied Terms: The provisions in the Schedule apply when no contrary intention appears from the submission (C. D. C., T. A. 241/38) (1). If the submission does not specify the arbitration tribunal and does not enumerate the arbitrators, the provisions of the Schedule apply (C.D.C., T.A. 149/38) (2).

Compare secs. 6 and 7. The latter does whilst the former does not provide for certain remedies to be exercised unless the submission otherwise provides.

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(9) 1944, S. C. D. C. 172 at pp. 173-4.
(10) Note 2 *supra*.
Sec. 4.
(1) 1938, T. A. 133. See heading *Time, infra*.
(2) 1938, T, A. 102.

Powers: "The powers of arbitrators are derived from legal sources and from the submission which sets out the intention of the parties who signed it". (C. D. C., T. A. 155/44) (3). If the submission is general, all disputes between the parties on a contract may be heard (*vide* C. D. C., T. A. 157/37; C. A. D. C., T. A. 53/39) (4), but the submission may provide for certain disputes only to be heard by the arbitrators (*vide* C.A.D.C., T.A. 335/38) (5). Again, the arbitrators may be *entitled*, on the terms of the submission, to deal with particular disputes (C. D. C., T. A. 241/38) (6).

It was held that it is for the arbitrator to decide whether to accept from an advocate a power of attorney not authenticated by a Notary Public (H. C. 100/30) (7).

See note *Cross-References, infra.*

Qualifications: The submission may impose special qualifications on the arbitrators, in which case the award may be set aside on the application of a party who was not aware of the lack of qualification (see Jungheim Hopkins & Co. *v.* Fonkelmann [1909] 2 K. B. 948; 78 L. J. K. B. 1132. Quoted in C. D.C., T. A. 193/38) (8).

Authority: The authority of arbitrators begins from the time they enter on the reference (C. D. C., T. A. 363/43) (9) and expires on the delivery of the award (*vide* C. D. C., T. A. 292/39) (10), so that the award cannot extend to matters subsequent thereto (*ibid*).

Jurisdiction: Reference should be made to English authorities (11) in order to determine how far arbitrators may determine questions relating to jurisdiction or to their competence to deal with disputes referred to them. The question was raised in C. A. 374/43 (12) but the appeal was decided on other grounds.

Procedure: The submission may provide a special procedure (*cf.* C. A. D. C.,T. A. 65/39) (13). It is not necessarily bad if it provides that the arbitrator need not be bound by law (C. A. 135/37) (14), or that he may decide the case on his own knowledge of the facts obtained in abortive proceedings under a former submission (C D. C., T. A. 88/42, 139/42) (15), or that he may rely on what he considers is fair between the parties, without regard to rules of strict law (*ibid.*); and the award will be upheld so long as the arbitrator is not guilty of misconduct (C. A. 135/37) (*supra*). But the arbitrator cannot follow

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(3) 1944, S.C.D.C. 321. The *dictum* is translated from the judgment in Hebrew.
(4) 1937, T. A. 74 and 1940, T. A. 18.
(5) 1939, T. A. 45.
(6) 1938, T. A. 133.
(7) 1, P. L. R. 540; 1, R. 82. But see the context in which this case is first quoted in the title *ADVOCATES*, Vol. I, at p. 192.
(8) 1939, T. A. 133.
(9) 1944, S.C.D.C. 192.
(10) *Not reported.*
(11) These are best outlined in Hogg.
(12) *Not reported.*
(13) 1939, T. A. 15; P. P. 28.11.39.
(14) 1937, S. C. J. (N. S.) 115; 2, Ct. L. R. 104.
(15) *Not reported.*

procedure other than that obtaining now in Palestine (C.D.C., T.A. 215/39)([16]), or base his award on vague moral principles which cannot be enforced by the civil Courts (C.D.C., T.A. 201/38)([17]), or disregard a law out of which the parties may not contract (C.D.C., T.A. 141/39)([18]).

See *Construction of Submission, supra.*

Time: A clause in the submission reading, "The time of the arbitration is in the following terms *viz.*: fixed for ten days from the date of this submission" is not in itself sufficient to preclude the arbitrators from enlarging the time in accordance with the terms of the Schedule, especially when the parties continue to appear after the expiration of the ten days (C.D.C., T.A. 241/38)([19]). Nor are arbitrators precluded from enlarging the time after it has been extended by the Court (C. D. C., Ja. 133/43, 147/43([20])); and see notes to clause (*c*) of the Schedule).

See *Cross-References, infra.* See also heading *Acquiescence, Estoppel, Waiver* in the notes to sec. 13.

Only One Award: A submission presupposes, in the absence of an express or implied agreement to the contrary, that there is to be only one award (C.D.C., Ja. 187/37([21]); C.A. 247/38([22]); C.A. 117/39([23]); C.A.D.C.,T.A. 169/39([24])). Such award must be an instrument entire and complete within itself, so that if it is made partly on one day and partly on another, it will be a nullity, although both parts may have been completed before the expiration of the time limited for delivery of the award (C. D. C., Ja. 187/37) (*supra*). But see C. D. C., Ja. 392/31 ([25]) and C. D. C., T. A. 363/43 ([26]).

Unanimous Award: When the reference is to arbitrators, the award to be valid must be unanimous, unless otherwise provided in the submission (United Kingdom Mutual Steamship Assurance Association *v.* Houston [1896] 1 Q. B. 567, followed in C. L. A. 7/33 ([27]); Mo. D. C. Jm. 465/43, 479/43 ([28])).

Signature: When the reference is to two arbitrators and an umpire, the umpire may sign the award alone (see, Schedule *post,* clause (e)). In C. D. C., T. A. 137/39([29]) the Court was asked to set aside an award on a submission which provided for a decision by majority on the ground that the award had only been signed by two arbitrators. It appeared that the arbitrators had drawn up and signed separate awards and that the third arbitrator had prepared a new award on the basis of the former three. One of the arbitrators refused to sign

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([16]) 1940, T. A. 170 (*in Hebrew*). But see note — to sec. 13.
([17]) *Not reported.*
([18]) 1940, T.A. 174 (*in Hebrew*). See *supra* pp. 78-9.
([19]) 1938, T. A. 133.
([20]) 1944, S. C. D. C. 309.
([21]) *Not reported.*
([22]) 6, P. L. R. 31; 1939, S. C. J. 13; 5, Ct. L. R. 39; P. P. 27.1.39.
([23]) 7, P. L. R. 47; 1940, S. C. J. 50; 8, Ct. L. R. 129.
([24]) 1940, T. A. 22. As to the effect of the second award, see notes to sec. 13, *Excess of Jurisdiction, Nullity.*
([25]) 1, R. 193.
([26]) 1944, S.C.D.C. 192. The 1934 Arbitration Act, in England, specifically authorises the arbitrators to make interim awards (clause (h) of the Schedule).
([27]) 2, P. L. R. 297; I, R. 196; P. P. 9.5.34.
([28]) 1944, S. C. D. C. 172.
([29]) 1940, T. A. 172 (*in Hebrew*).

this award which was nevertheless upheld by the Court. The Court held that further discussions between the arbitrators had not been necessary before signature of the award.

See also notes to the Schedule, *post*.

Duties of Arbitrators: This note should be read subject to the following heading.

Arbitrators should ascertain what sum is claimed in the arbitration (C.A.D.C., T.A. 211/38)([30]). The provisions of the Defence (Courts Applications) Regulations (No. 2) 1944, are made specifically applicable to arbitration proceedings and arbitrators should ensure that these provisions are observed. Arbitrators should also comply with sec. 16 of the Stamp Duty Ordinance and refuse to accept in evidence a document which is not properly stamped, unless they comply with the procedure outlined in that section. A record of the proceedings should be kept (C. D. C., Ja. 392/31)([31]).

In C. D. C., T. A. 319/43([32]) the Court refused to set aside an award, although allowing that the record had been improperly kept and that this deficiency might perhaps afford a ground for setting aside an award. But the Court held that an arbitrator should endeavour to keep as complete a record as a Court ought to do: "That is a high standard to require of persons who may be devoid of legal training, and to fall short of it is not necessarily a ground for upsetting the award, provided that no injustice is done to either of the parties." The defects noted in this case by the Court were that the record did not contain the dates of the majority of the hearings, that it was not signed by the arbitrators, that the attendance of the parties had not been recorded, that insufficient note had been made of the arguments and objections of counsel and that the record did not always show which of the witnesses' answers had been given in examination in chief and which in cross-examination. But for the above defects, the Court considered the record to have been very full and complete.

Cross-References: The following duties of arbitrators are specifically mentioned in the Ordinance:

Arbitrators must state a case on a point of law if called upon by the Court to do so (sec. 8 (2)). In cases of remittal, they must, unless the Court otherwise directs, make their award within three months from remittal (sec. 12(2)). The award should be made in writing and signed within three months after entering on the reference or after having been called upon to act by notice in writing (Schedule, clause (c))([33]). They may, however extend the time (*ibid.*). These duties are further described in the notes to these sections. In addition to these duties, it is clear from secs. 11 and 13 that arbitrators must not be guilty of misconduct. See below in this heading.

Arbitrators must have regard to legal objections as to the admissibility of evidence (Schedule, clause (g)).

The following rights are conferred by the Ordinance on arbitrators:

([30]) 1938, T. A. 78.
([31]) 1, R. 193.
([32]) 1944, S. C. D. C. 276.
([33]) As to the umpire, see clause (e) thereof.

Arbitrators may administer oaths or take the affirmation of parties and witnesses (sec. 8(1) (a); Schedule, clauses (f) and (g)). They may reserve questions of law in the award (sec. 8 (1) (b)) and correct clerical mistakes or errors therein (sec. 8(1) (c)). They may apply to the Court to issue summons for the attendance of any witness or the production of any document (sec. 9(1)), enlarge the time of the arbitration (Schedule, clause (c)) and award costs etc. (*ibid.*, clause (i)). As regards umpires, see the Schedule, *passim*.

As regards privileges of arbitrators in actions for civil wrongs, see title *CIVIL WRONGS*.

The above powers are further described in the notes to the various sections quoted.

In addition to the rights and duties of arbitrators as set out in the Ordinance, case law has provided detailed provisions as to the manner in which arbitrators should conduct the references.

When an arbitrator exceeds his powers or commits a breach of duty, his award will not be enforced and is likely to be set aside. On the other hand, when an award is enforced notwithstanding the defendant's contentions that the arbitrator committed irregularities or was guilty of misconduct, the inference is (except for cases of estoppel which are separately considered in the notes to sec. 13) that the acts complained of were within the competence of the arbitrator. The notes to sec. 13 on setting aside awards, and sec. 14 on the enforcement of awards, therefore contain a guide, complete as regards local case law, on the duties of arbitrators. These notes read together with the commentaries on the definition of "Submission" in sec. 2, detail the rights and powers of arbitrators acting under a submission.

To avoid a repetition of the principles therein outlined the cases set out in secs. 2, 13 and 14 are not inserted in the notes to this section and reference should be made to the notes following the above sections for further particulars relating to rights and duties of arbitrators.

Reference should be made to the various headings under the note *Statutory References*, in sec. 2, to determine how far the provisions of the Schedule apply to such references. See also notes to the Schedule.

Form of Award: For forms of awards see A. Liphschitz *Arbitration Law* ([34]), pp. 44 - 5.

Proceedings contrary to submission may be stayed.

5. If any party to a submission or any person claiming through or under him commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may, at any time after appearance and before taking any other steps in the proceedings, apply to the Court to stay the proceedings; and the Court or a judge thereof, if satisfied that there is not sufficient reason why the matter should not be referred to arbitration in accordance with the submission, and that the applicant was at the time when the proceedings were

([34]) *In Hebrew.* Haifa, 1939.

commenced and is still ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.

Source: This section is taken from sec. 4 of the Arbitration Act, 1889. As there are verbal divergences in the texts, sec. 4 of the Act is set out hereunder:

> 4. If any party to a submission or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Court: See notes to sec. 2, for the material jurisdiction of the Courts. For the local jurisdiction see r. 2 of the Arbitration Rules, *post*.

Judge: See definition in sec. 2.

Submission: This expression is defined in sec. 2. From the context, however, it appears that the expression as used in sec. 5 includes both a submission as defined and a submission within the meaning of sec. 3. See note *"Submission" in different Contexts*, sec. 2, and notes to sec. 3.

As regards foreign submissions, see notes to sec. 20.

Construction: "The law on this subject is very strict, and the reason for it is this, that where there is an agreement to refer to arbitration parties are not necessarily compelled to go to arbitration unless one of them so wishes, but that if they do so wish, they must draw the attention of the Court to this provision and make the application to stay proceedings at the earliest possible moment and they must not take any other step in the litigation since this may involve the other side in unnecessary expense." (C.A. 90/39)(1).

As regards contracting out see note SOURCE, INTERPRETATION, following sec. 1. And see note 112 to sec. 2, *ante* p. 73.

Procedure: Applications for stay under this section are made by notice of motion (sec. 15 (1) and see notes thereto) after entering an appearance (C. A. 90/39(1) and see Ad. 1/39(2)). The application cannot be made in the defence (C. A. 90/39) (*supra*). In the Magistrates' Courts, where the rules do not provide for entry of appearance, application for stay may be made together with the defence, though the better practice would appear to be an application for stay filed before delivery of the defence. If the hearing of the application is not fixed before the time allowed for filing the defence, the defence may be filed after the filing of the application for stay, or application

(1) 6, P. L. R. 458; 1939, S. C. J. 415; 6, Ct. L. R. 113.
(2) 6, P. L. R. 540; 1939, S. C. J. 537.

may be made for an extension of time within which to file the defence (see title *CIVIL PROCEDURE*). An application made in the Magistrate's Court, for stay under this section, after witnesses have been examined and cross-examined, is certainly not made "before taking any other steps in the proceedings", and is out of time (C. A. D. C., T. A. 213/37)([3]). The defence itself, at any rate in the District Court, constitutes a "step in the proceedings" and so does an application for leave to defend (Carbide Trading Co. Ltd. *v.* Charles Bingham & Co. [1915] *not reported,* quoted in C. A. 90/39)([4]).

Note that although application should be made to the Court, a judge thereof may give the order of stay.

Evidence: Before the Court or judge can make an order of stay, the applicant must, by the terms of the section, establish the following matters:

(a) that there is valid submission
(b) that proceedings in Court have been commenced
(c) that the proceedings refer to a matter covered by the submission
(d) that the proceedings involve parties to the submission or parties claiming under them (see *"Any Person claiming through or under..." infra*)
(e) that no steps have been taken by the applicant in the proceedings other than entering an appearance
(f) that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, *and*
(g) that the applicant was, *at the time when the proceedings were commenced,* and is still ready and willing to do all things necessary for the proper conduct of the arbitration([4a]).

In applying for stay the applicant should therefore lead evidence, whether by affidavit or otherwise (see notes to sec. 15 (1)) that all the above requirements apply.

Fees: See r. 5, Arbitration Rules, *post* and notes.

Costs: See sec. 18 and notes.

Discretion: The power of the Court to stay proceedings is discretionary and an appellate Court will not interfere with the exercice of discretion by the lower Court (C.A.D.C., T.A. 29/37([5]); C.A.D.C., T.A. 333/37([6])).

If there is any doubt as to whether a valid submission exists between the parties, the Court need not stay the proceedings (C.A.D.C., T.A. 239/39)([7]).

([3]) 1937, T. A. 36.
([4]) Note 1 *supra.*
([4a]) A party's conduct during the period immediately preceding the date of the lodging of the action is very relevant to show whether or not he was ready and willing to arbitrate "at the time when the proceedings were commenced": Hodson *v.* Rlwy Passengers' Assurance Co. ([1904] 2 K.B. 833; 73 L.J.K.B. 1001; 91 L.T. 648 (C.A.)), followed in Mis. Aplic. D.C., T.A. 126/44 (1944, S.C.D.C. 393).
([5]) 1937, T. A. 7.
([6]) 1937, T. A. 94. It was argued that as the applicant for stay had failed to appoint an arbitrator when called upon by the other party, he could not be considered "ready and willing" to go to arbitration within the meaning of the section.
([7]) 1940, T. A. 131 (*in Hebrew*).

Statutory References: Sec. 5 refers to proceedings as between parties to a submission and this would normally exclude statutory references. See this heading in the notes to sec. 2.

The referring statute should, however, be scrutinized and if it can be construed, as most such statutes can be, as making the provisions of the Ordinance apply "as though there were a submission within the meaning of the Ordinance", then the provisions of sec. 5 would apply.

But even where the machinery of the section cannot be applied, a statutory reference may exclude the jurisdiction of the Court. See *Powers of Court, infra,* and cross-references.

Compare sec. 12 which applies "in all cases of reference to arbitration".

"*Any person claiming through or under...*": No local cases are available on the interpretation of this expression. It is doubtful, in view of the remarks set out in the heading *Termination of Submission,* in the notes to sec. 2, whether these words enable the personal representative of a party to avail himself of the provisions of section 5.

Powers of the Court: Before the Court can make an order of stay, it must be satisfied that an application has been made (C. A. 90/39 ([8]); C. A. D. C., T.A. 213/37([9]), in accordance with the prescribed procedure (note *Evidence, supra*).

An arbitration clause may sometimes operate not only as a submission, but as a condition precedent to filing a claim in Court, as when the amount to be claimed must, failing agreement, be ascertained by means of an award (C. A. 96/35([10]); C. A. 60/37([11]) *et vide* C. D. C., T. A. 459/36([12])). Such clauses are perfectly valid (C. A. 96/35 (*supra*), following English authorities) and are usually contained in insurance policies. The same may apply to statutory references. See *Effect of Submission; Submission not within the scope of the Ordinance* in sec. 2 and *Statutory Reference, supra.* The defendant's remedy in such cases is not to apply for stay but for the dismissal of the action, as no cause of action can be said to have arisen before the condition precedent (such as the ascertainment of an amount) has been complied with. To hold otherwise would result in the plaintiff getting something else from what he bargained for (Scott *v.* Avery [1856] 5 H. L. C. 811 followed in C. A. 96/35) ([13]).

([8]) Note 1 *supra.*
([9]) Note 3 *supra.*
([10]) 1937, S. C. J. (N. S.) 60.
([11]) 1937, S. C. J. (N. S.) 309; 2, Ct. L. R. 30.
([12]) 1938, T. A. 55.
([13]) Note 10 *supra.* See the case mentioned in the annotations to C. A. 60/37 at 1937, S. C. J. (N. S.) on p. 310. For an analysis of case law on this question see L.X. L. Q. R. p. 77 (*The Doctrine of Repugnancy* by G. L. Williams).

In the unreported case C.D.C., Ja. 227/33, the Court dismissed a claim under an insurance policy in the following circumstances: The policy provided, as a condition precedent to a claim in Court, that the amount of the loss should be ascertained by agreement or, failing agreement, by arbitration. An award had been given *ex parte* the defendant, purporting to ascertain the amount of the damage. The Court held that the award was of no effect as the arbitrator had acted before a dispute had arisen between the parties regarding the amount of the loss.

Again, if the dispute is *chose jugée* by reason of a previous award, the Court has no discretion but must non-suit the plaintiff as the power to order stay can be exercised only before an award has actually been delivered between the parties. (C.A.D.C., T.A. 31/40) (14).

Where there is a conflict of jurisdiction between the District Court and a statutory arbitration tribunal, the former may, by injunction, restrain the latter from dealing with the dispute until judgment of the Court (C. A. 154/41 (15); C. A. 247/41 (16)). This may be done by the Supreme Court on appeal from the District Court (C. A. 247/41) (*supra*).

In the case of references to a foreign Court, these may or may not amount to submissions to arbitration, depending on the effect of the foreign law. This question is discussed, *supra*, in note *Who may be appointed*, under the definition of *Submission* in Sec. 2. See also note *Effect of Award* in sec. 14.

Where there is an agreement to refer the parties are not necessarily compelled to go to arbitration, unless one of them so wishes, in which case his decision is subject to the remedies set out in the Ordinance in favour of a party willing to go to arbitration, as against another refusing to comply with the submission (C. A. 90/39 (17); C. A. D. C., T. A. 213/37 (18)).

The proper order is an order to stay the proceedings: the Court may not order the parties to go to arbitrators (C. A. D. C., T. A. 213/37) (19), nor strike out the action (*ibid.*).

In C. D. C., T. A. 154/37 (20), the Court ordered a stay of proceedings conditionally upon the arbitrators delivering their award within four months.

After making an order of stay the Court should not then and there ask the parties to appoint their arbitrators and, upon their failing to do so, proceed to appoint an arbitrator for them (C. A. 183/35) (21), or fix the conditions of the award, unless there is a special application or a compromise of the parties made in Court and recorded in the minutes (C. A. D. C., T. A. 274/37) (22). The appointment of an arbitrator or umpire is in the first in-

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(14) 1940, T. A. 167 (*in Hebrew*).
In H.C. 90/41 (1941, S.C.J. 497), the parties had agreed to submit to arbitration certain disputes relating to the sale of a mortgage in process of being realised through the Execution Officer. It was held that the Chief Execution Officer should, in these circumstances, granted a stay of the sale proceedings.

(15) 8, P. L. R. 375; 1941, S. C. J. 397; 10, Ct. L. R. 138.

(16) 8, P.L.R. 618; 1941, S.C.J. 633; 10, Ct. L. R. 202. See also note *Unauthorised Tribunals* in the notes to sec. 130.

(17) Note 1 *supra*.

(18) 1937, T. A. 36.
It has recently been held that arbitrators are bound by the provisions of art. 106 of the Ottoman Code of Civil Procedure relating to notarial notices: C.A. 126/42 (1942, S.C.J. 621).

(19) Note 18 *supra*. The distinction made in that judgment between an order to strike out temporarily and an order to stay is mostly obsolete since the enactment of the Magistrates Courts Procedure Rules (see title *CIVIL PROCEDURE*).

(20) 1937, T. A. 19.

(21) 1937, S. C. J. (N. S.) 96; 2, Ct. L. R. 15.

(22) 1937, T. A. 77. But *cf.* C. D. C., T. A. 154/37, *supra*.

stance a matter for the parties themselves. If they fail to agree then the procedure laid down in sec. 6 has to be followed (*ibid.*).

See also notes to sec. 15(1), heading *Unauthorised Tribunals, Conflict of Jurisdiction.*

See also notes *Effect of Stay; Ancillary Remedies. infra.*

Counterclaim: When the defendant to a counterclaim applies for stay of proceedings the Court must deal with the application separately and not connect both the claim and the counterclaim and remit both to arbitrators (C. A. D. C., T. A. 213/37) ([23]).

Parties: Where all but one of a number of parties to an agreement apply to Court, the remaining party may apply for stay against all other parties (C. A. 251/40) ([24]).

Effect of Stay: *Ancillary Remedies*; A stay of proceedings under sec. 5 is not of the same effect as an order to strike out an action. In C. A. D. C., T. A. 213/37 (*supra*), the Magistrate had struck out the case "temporarily" under the provisions of rules now repealed. The District Court held, on appeal, that the Magistrate had no power to make such order under sec. 5.

A stay of proceedings leaves the position of the parties as it was at the time of the grant of the order, and does not involve a cancellation of what has already been done (Ad. 1/39) ([25]). Thus in Admiralty actions, a stay of proceedings does not involve a release of arrest of a ship made before stay (*ibid.*, following *The Cap Blanco* [1913] P. 130).

In C. D. C., T. A. 154/37 ([26]), the Court, whilst ordering a stay of proceedings, made an order appointing a receiver; but expressed doubts as to whether it could grant an injuction at that stage.

As regards ancillary remedies within the jurisdiction of the Court otherwise than under this section, see notes to sec. 15(1).

Stay under International Protocol on Arbitration Clauses: See sec. 20 and notes.

Crown Actions: As the Crown may be a party to a submission and to arbitration proceedings (see *Statutory References,* in sec. 2 and see sec. 19), Crown Actions may also be stayed under this section.

Appeals: See sec. 15(3) and notes.

Power of Court to appoint arbitrator, etc.

6.(1) In any of the following cases—

(*a*) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not concur in the appointment of an arbitrator;

(*b*) if an appointed arbitrator refuses to act or is incapable of acting or dies, and the parties do not supply the vacancy;

(*c*) where the parties or the arbitrators are at liberty to

([23]) Note 18 *supra*. Note, however, that the judgment relies on the *Mejelle* and on a decision pre-dating the present rules of Civil Procedure in order to determine the exact effect of a counterclaim.

([24]) 8, P. L. R. 26; 1941, S. C. J. 30; 9, Ct. L. R. 67,

([25]) Note 2 *supra*.

([26]) Note 20 *supra*.

appoint an umpire or an additional arbitrator, and do not appoint him;

(*d*) where an appointed umpire or additional arbitrator refuses to act or is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators with a written notice to appoint such arbitrator or umpire.

(2) If the appointment is not made within fifteen days after the service of the notice, the Court or a judge thereof may, on application by the party who gave the notice, appoint an arbitrator or umpire who shall have the like powers to act and make an award as if he had been appointed by consent of all the parties.

Source: The section is taken from sec. 5 of the Arbitration Act of 1889. and sec. 16 of the Administration of Justice Act, 1920. As there are verbal divergences between the two texts, the sections in the English Acts are set out hereunder:

5. In any of the following cases: -

(a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not after differences have arisen concur in the appointment of an arbitrator:

(b) If an appointed arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy:

(c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him:

(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy:

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator.

If the appointment is not made within seven clear days after the service of the notice, the Court or a judge may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

16. – (1) Where a submission to arbitration provides that the reference shall be to three arbitrators, one to be appointed by each party and the

third to be appointed by the two appointed by the parties, then, unless the submission expresses a contrary intention --

(a) If one party fails to appoint an arbitrator for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and the award of the arbitrator so appointed shall be binding on both parties as if he had been appointed by consent:

(b) If after each party has appointed an arbitrator the two arbitrators appointed fail to appoint another arbitrator within seven clear days after the service by either party of a notice upon them to make the appointment, the Court or a judge may, on an application by the party who gave the notice, excercise in the place of the two arbitrators the power of appointing the third arbitrator:

(c) If an arbitrator, appointed either by one of the parties, by the two arbitrators, or by the Court or a judge, refuses to act, or is incapable of acting, or dies, a new arbitrator may be appointed in his place by the party, arbitrators, or Court or judge, as the case may be.

(2) The Court or a judge may set aside any appointment of a person to act as sole arbitrator made in pursuance of this section.

(3) This section shall be construed as if it were included in the Arbitration Act, 1889, and that Act shall have effect accordingly.

It will be noted that sec. 6 combines, with variations, the provisions of both sections applying in England. Sec. 16 was repealed by the 1934 Arbitration Act which also amended sec. 5 (c) of the 1889 Act by adding the words "or where two arbitrators are required to appoint an umpire" before the words "and do not appoint him."

Cross-Reference: This section, and the notes thereto, should be read together with sec. 7.

Effect of divergence in Texts: *Sec.* 5 of the English Arbitration Act mentions differences which have arisen. The omission of this phrase in sec. 6 would, on a strict reading (1), enable a party to a submission to ask for the appointment of an arbitrator independently of the existence of a dispute. It is doubtful whether the Courts will accept this interpretation and it is submitted that the section should be read as though the words "after differences have arisen" formed part of the text. This assumption has been acted upon in the Summary, *infra.*

Again, the words "the submission does not show that it was intended that the vacancy should not be supplied", in sec. 5(b) of the Act, do not appear in the corresponding passage of sec. 6(1)(b). The effect of the divergence is noted in C.A.D.C., T.A. 203/43 (*infra*).

Cf. sec. 7 in this respect.

(1) See C.A. 135/33 (2, P.L.R. 110; 2, R. 708) and note SOURCE, INTERPRETATION to sec. 1. Note also that sec. 6 compares, in this respect with sec. 16 of the Administration of Justice Act, *supra.*

Summary: The following is a summary of the requirements of the section for the Court to make an appointment:

Sub-sec. (1) (a): 1. That there is a valid submission,
2. Which provides for a single arbitrator,
3. That a difference has arisen (2) *and*
4. That all the parties do not concur in the appointment of an arbitrator; *or*

(b) That in the case 1, 2 (3) and 3 above, an arbitrator (3) has been appointed, *but*
5. He refuses to act, *or*
6. Is incapable or acting, *or* dies, *and*
7. The parties do not supply the vacancy; *or*

(c) That in the case 1 and 3 above
8. Arbitrators have been appointed, *and*
9. An additional arbitrator, *or*
10. Umpire may be appointed
11. By the arbitrators *or*
12. The parties, *and*
13. Is not appointed, *or*

(d) That in the case 1, 3, 8-12 above,
14. An umpire, *or*
15. Additional arbitrator
16. Was appointed, *and*
17. Refuses to act, *or*
18. Is incapable of acting, *or*
19. Dies, *and*
20. The submission does not provide that he should not be replaced, *and*
21. He is not replaced

IN ALL ABOVE CASES

22. Any party
23. May serve
24. The other parties, *or*
25. The arbitrators
26. With a written notice
27. To appoint
28. Such arbitrator, *or*
29. Additional arbitrator, *or*
30. Umpire

Sub-sec. (2) When all conditions have have been complied
31. In either(a), *or*
32. (b), *or*
33. (c), *or*
34. (d), *and*
35. All relevant conditions 22-30, *and*

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(2) See *Effect of divergence in Texts, supra.*

(3) Or, where more than one arbitrator are provided for in the submission, arbitrators appointed by concurrence of the parties.

36. No appointment is made
37. Within fifteen days
38. From service of notice
39. A party
40. Who served the notice
41. May apply
42. To the Court, *or* Judge
43. And an order may be made
44. Appointing
45. An umpire, *or*
46. An arbitrator, *or*
47. Additional arbitrator

IN THE CASE OF ANY APPOINTMENT

48. The arbitrator, *or*
49. Additional arbitrator, *or*
50. Umpire
51. Have the same powers
52. As though appointed by consent of all parties.

See also the following notes for judicial interpretation and comments.

Court: For the jurisdiction of the Court under this section, see notes to sec. 2, under this title. The local jurisdiction is defined in the Arbitration Rules, *post*, r .2. Note that an order under this section may be made by a Court or judge (see sec. 15(2)) compare sec. 7.

Judge, Submission: These expressions are defined in sec. 2. See notes thereto.

Procedure: Applications to Court under this section are made by notice of motion. See sec. 15(1) and notes.

Evidence: Compliance with the requirements of the section (*Summary, supra*) has to be established by evidence. See also sec. 15(1) and notes.

Fees: See r. 5 of the Arbitration Rules, and notes.

Costs: See sec. 18 and notes.

An arbitrator appointed *by* the submission is "an appointed arbitrator". (C. A. D. C., T. A. 203/43) (*infra*).

Powers of the Court: The Court may appoint an arbitrator or umpire, but, when doing so, may not define his functions (C. D. C., T. A. 53/39(4)). The appointment may be made only when the Court is seized with an application under the section, and after the formalities of sub-sec. (2) have been complied with (C. A. 183/35) (5); and sub-sec. (2) *infra*. The Court should not, when dealing with an application for stay of proceedings under sec. 5, appoint an arbitrator upon failure by the parties there and then to agree to an arbitrator (*ibid.*, and see notes to sec. 5, *sub. tit., Powers of Court*). But where the defendant to an application under sec. 6 did not oppose the ap-

(4) 1940, T. A. 18.
(5) 1937, S.C.J. (N.S.) 96; 2, Ct.L.R. 15.

plication but only discussed the question who should be appointed, leave to appeal the order of appointment was refused (C.L.A. 9/33)([6]).

The section applies and the Court may make an appointment where two arbitrators cannot agree as to the necessity of appointing an additional arbitrator (C.A. 149/37)([7]).

The Court has a discretion to make an appointment: "The advocate for the appellant has submitted that it is not a question of discretion on the authority of *re* Eyre & Leicester Corp. [1892] 1 Q. B. 136, where it was said that once the conditions brought a case within the section the Court not merely 'may' but *must* appoint under the section. As is pointed out, however, by Hogg on Arbitration at p. 78 this would appear from Bjornstad *v.* Ouse Shipping Co. Ltd. [1924] 2 K. B. 673 to be an overstatement of the law. I think unquestionably it is a matter of discretion." (C.A.D.C., T.A. 203/43)([8]).

Before making an appointment, the Court should be satisfied that there is a valid submission (C. A. 105/32 ([9]); C. A. 37/34 ([10]); C. L. A. 6/36 ([11]); C. D. C., T. A. 44/40 ([12]); C. A. D. C., T. A. 160/42 ([13])) which leaves the parties no alternative remedy of applying to Court (*cf.* C. D. C., T. A. 2/38)([14]), and that a dispute has arisen (C. D. C., T. A. 53/39)([15]).

The powers of the Court must be found in the wording of the section (and see sec. 7). If the Ordinance does not cover the particular facts of a case, the Court has no power to make the appointment (C. A. D. C., T. A. 40/41) ([16]).

Where an award is remitted, the authority of an arbitrator is revived. But, where the award is set aside, the arbitrator becomes *functus officio* and the provisions of sec. 6 cannot be invoked (C.A.D.C., T.A. 40/41)([17]).

Sub-sec. (1) (*a*): If the submission does not state how many arbitrators are to act the reference is, by clause (a) of the Schedule, to one arbitrator (C. D. C., T. A. 149/38) ([18]) and this sub-section applies.

Sub-sec. (1) (b): The filling of a vacancy caused by the arbitrator ceasing, for any reason, to act, can be effected either by virtue of express provisions in the

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([6]) 1937, S.C.J. (N.S.) 80.
See, *per contra,* C. D. C., T. A. 53/39 (1940, T. A. 18) where the advocate agreed to the arbitrator appointed, whilst contesting the right of the Court to make the appointment.
([7]) 1937, S.C.J. (N.S.) 79; 2, Ct.L.R. 106.
([8]) 1944, S.C.D.C. 6. See also this heading in the notes to sec. 7.
([9]) 1, P. L. R. 810; 3, R. 1172; P. P. 14.12.32; 8.5.33.
([10]) 2, P. L. R. 205. But this appears only from the judgment of the District Court in 7, R. 693.
([11]) 1937, S. C. J. (N. S.) 71.
([12]) 1940, T. A. 166 (*in Hebrew*).
([13]) 1941-2, T. A. 156 (*in Hebrew*).
([14]) 1938, T. A. 19.
([15]) Note 4 *supra.*
([16]) 1941-2, T. A. 7.
([17]) Note 16, *supra,* and see C.D.C., T.A. 44/40 (note 12 *supra*). But in C. A. 131/30 (5 R. 1810), District Court proceedings, an arbitrator was appointed by the Court notwithstanding the fact that the award was set aside. The Court acted on the original agreement to submit set out in a deed of partnership. See *ante,* p. 83.
([18]) 1938, T. A. 102.

submission, by subsequent agreement, or by virtue of the statutory authority of the Court under this section (C. A. D. C., T. A. 40/41)([19]). The words "shall have the like powers, etc." in sub-sec. (2) contemplate an arbitrator ceasing to function while still clothed with his authority when matters are pending before him, whether prior to a first award, or after reference back to him by the Court (*ibid*). See also *infra* heading under the title of the words quoted.

The sub-section applies when an arbitrator has been agreed upon by the parties in the submission but refuses to act (C.A.D.C.,T.A. 203/43) (8, *supra*).

> "The words 'an appointed arbitrator' in sec. 5(b) of the Arbitration Act, 1889, which corresponds with some difference to sec. 6(1)(b) of the Arbitration Ordinance, must mean an appointed single arbitrator... I do not see... that because there are other provisions empowering the Court to appoint where there has been nomination subsequent to and in pursuance of the submission, that it follows that sec. 6(1)(b) does not allow the Court to appoint where there has been nomination by the submission." (*Ibid.*).

In deciding whether to exercise its discretion to make the appointment the Court may take into account the fact that the submission showed the intention that a particular person should be appointed (*ibid.*).

"Additional Arbitrator": This expression was substituted for "third arbitrator" which, following the text of the English Act, appeared in the draft of the Ordinance. The present wording contemplates the possibility of more than two arbitrators being originally appointed, as when the submission is tripartite. Sec. 7 was also altered from the draft to the same effect. Clause (b) of the Schedule, which was not altered, is now at variance with secs. 6 and 7, as it contemplates not more than two arbitrators.

Third Arbitrator, Umpire: Where the words in a reference to two arbitrators with power to them, if they should not agree, to appoint a third person, were, "to be umpire in or to concur and join them in considering and determining all or any of the matters referred", the Court held that the third person was an umpire and not a third arbitrator (Winteringham *v.* Robertson [1858], 27 L. J. Ex. 301, followed in C. A. 164/37([20])).

So in C. A. 164/37 (*supra*) it was held that the Hebrew expression *"borer makhriya"* which, in the Hebrew text of the Ordinance, appears for "umpire", when used in a submission together with the word *"shlishi"* (third), referred to an umpire and not to a third arbitrator.

The difference is of importance as umpires have functions which are not the same as those of arbitrators. For the difference between an additional or a third arbitrator, and an umpire, see clause (b) of the Schedule and note *Umpire, Additional Arbitrator, post.*

See also previous note.

The Notice in Writing: See sub-sec. (2), *infra.*

([19]) Note 16 *supra.*

([20]) 1937, S. C. J. (N. S.) 123; 2, Ct. L. R. 194.

Sub-sec. (2) :- *The notice*: The appointment of an arbitrator or umpire([21]) is in the first instance a matter for the parties themselves, but if they fail to agree the procedure laid down in this sub-section regarding notice and time must be followed, after which the authority of the Court may be invoked (C. A. 183/35) ([22]).

If the reference provides for a single arbitrator, the notice should ask for the concurrence in the appointment of a single arbitrator and not name an arbitrator and ask the addressee to nominate his arbitrator. The latter notice would be invalid (C. D. C., T. A. 149/38) ([23]).

In C. B. M., T. A. 7636/37 ([24]) an application was made for the appointment of an arbitrator under this sub-section. After filing the application the applicant received a communication from the other party, notifying him of the appointment of the respondent's arbitrator. The notice, though sent within fifteen days, was received two days late. The Court, on the authority of Russell, held that the appointment of an arbitrator pursuant to a notice under sec. 6(1) differs from the acceptance of a contract by post. In the latter case, the time the letter is posted is the time of acceptance; in the former, the appointment of an arbitrator is not complete without communication thereof to the other party. But see C.A.D.C., T.A. 40/41 ([25]).

In calculating the period of fifteen days the provisions of sec. 24 of the Interpretation Ord. apply so that the day of the appointment is excluded (sec. 24(a)) and the period is not interrupted or affected by the fact that the last day is a legal holiday or the day of rest of any community (sec. 24(b)) — C.B.M.,T.A. 7636/37 (*supra*).

In the circumstances of the case outlined above, it was also held in C. B. M., T. A. 7636/37 that the applicant had not waived his rights under the section by notifying his arbitrator after filing the petition, that the respondent had named an arbitrator.

See also *Sub. sec.* (1)(b), *supra.*

"Who shall have the like powers to act and make an award as if he had been appointed by consent of all parties": The effect of this phrase is discussed in the ante-penultimate paragraph of the note *References by Order of Court,* following the definition of "Submission" in sec. 2. See also notes to sub-sec. (1)(b) *supra.*

Section 7 Compared: This section should be read together with sec. 7, which contains similar provisions where the reference contemplates more than one arbitrator, of whom one or more are to be appointed by each party.

Appeals: C.A. 105/32 and C.L.A. 39/30([26]) which decided that appeals under this section could only lie by leave, are both obsolete as all appeals under the Ordinance now require leave.

([21]) If so provided in the submission. If no special provision is made authorising the parties to appoint an umpire, this is a matter for the arbitrators (Schedule, clause (b), *post*).

([22]) 1937, S. C. J. (N. S.) 96; 2, Ct. L. R. 15.

([23]) 1938, T. A. 102.

([24]) P.P. 9.6.37.

([25]) 1941-2, T. A. 7.

([26]) 1, P.L.R. 810; 3, R. 1172; P.P. 14.12.32; 8.5.33 and 1, P.L.R. 570.

Power to supply vacancy.

7. Where a submission provides that the reference shall be to two or more arbitrators, of whom one or more are to be appointed by each party, then, unless the submission expresses a contrary intention—

(*a*) if any of the appointed arbitrators refuses to act or is incapable of acting or dies, the party who appointed him may appoint a new arbitrator in his place;

(*b*) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, within fifteen days after the other party, having appointed his arbitrator, has served the party, making default with a notice to make an appointment, the party who has appointed an arbitrator may apply to the Court to appoint an arbitrator to act with the arbitrator already appointed.

Source: The section follows sec. 6 of the Arbitration Act of 1889. As there are divergences between the two texts, the section in the English Act is set out hereunder:

> 6. Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention -
>
> (a) If either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;
>
> (b) If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.
>
> Provided that the Court or a judge may set aside any appointment made in pursuance of this section.

Cross-Reference: This section should be read together with sec. 6 and the notes thereto.

Divergence in Texts: The second paragraph differs in the two enactments as no reference need be made to the Court, under the Act, for the appointment of an arbitrator. Sec. 7(b) is similar in its provisions to the provisions of sec. 6(2) of the Ordinance and reference should also be made to the notes under that section. See heading *Sec. 7 compared,* in the notes to sec. 6.

It will be noted that the Court makes the appointment in Palestine whereas, under the English Act, the appointment is made by the party asking for the appointment, subject to the power of the Court to remove the person so appointed.

The words "or more" appearing at the beginning of the section did not form part of the draft. As to the effect of the change, see title *"Additional Arbitrator"* in the notes to sec. 6.

Summary: The following is a summary of the requirements of the section for the Court to make an appointment:

Preamble: 1. That there is a valid submission
2. Which provides for a reference to
3. Two, *or*
4. More arbitrators
5. Of whom one, *or*
6. More
7. Must be appointed
8. By each party, *and*
9. The submission does not express a contrary intention.

IN ALL SUCH CASES.

Clause (a): 10. If arbitrators are appointed, *and*
11. Any of them
12. Refuses to act, *or*
13. Is incapable of acting, *or*
14. Dies
15. He may be replaced
16. By the party who appointed him, *or*

Clause (b): 17. If one party
18. Has not appointed an arbitrator
19. Originally, *or*
20. In replacement (as in 11-15 above)
21. Within fifteen days
22. After service of a notice
23. In writing
24. By the other party
25. Who has already appointed his arbitrator
26. Calling for an appointment
27. The party who has appointed
28. May apply to the Court to make the appointment.

See also the following notes for judicial interpretation and comments.

Court: For the material jurisdiction of the Court under this section, see notes to sec. 2 under this heading. The local jurisdiction of Courts is defined in r. 2 of the Arbitration Rules, *post*. Note that, unlike in the case of sec. 6, the appointment cannot be made by a judge. There appears to be no reason for this distinction between the two sections. See also *Evidence, infra*.

Submission: This expression is defined in sec. 2. See notes thereto.

Procedure: Applications to Court should be made by notice of motion, see notes to sec. 15(1). As to consolidation of applications, see note under this heading in sec. 15(1).

Evidence: Compliance with the requirements of the section (*Summary, supra*) has to be established by evidence. As to the manner of leading evidence, see notes to sec. 15(1). In the unreported case C.D.C., T.A. 229/44, an allegation in the petition (supported by affidavit) that the petitioner proposed to claim

a sum of LP. 100.- was accepted by the Court as sufficient to establish the fact that the Court was competent, the respondent contesting the fact.

Fees: See r. 5 of the Arbitration Rules, *post*, and notes.

Costs: See sec. 18 and notes.

Powers of the Court: The Court has a discretion in making or refusing to make an appointment (C. A. D. C., T. A. 206/42)(1), but it is a discretion which will be exercised with considerable care, and only after consideration of all other circumstances, that is to say, circumstances other than the fulfillment of the prerequisite conditions laid down in sec. 7(b) (C. A. 269/42(2), following *in re* Bjornstad & The Ouse Shipping Co., Ltd. [1924] 2 K. B. 673; 93 L. J. K. B. 977; 131 L. T. 663; distinguishing *in re* Eyre and Leicester Corporation [1892] 1 Q. B. 136; 61 L. J. Q. B. 438; 65 L. T. 733). In the above case, where numerous disputes had arisen between the parties and the District Court found that other arbitration proceedings had taken place under the same arbitration clause, with no definite results, that the validity of the contract containing the arbitration clause had expired and that the appellant had refused to go to arbitration on another occasion, but had gone to Court; the Court of Appeal found that there had been just sufficient material to have enabled the District Court to exercise its discretion in refusing to make an appointment.

The Court has no discretion to make an appointment unless there is a valid submission (C.A.D.C., Jm. 140/33)(3). If, therefore, the submission is void for being set out in a void contract (C.A. 88/29)(4), or lapses by reason of an award given thereon having been set aside (C.D.C., T.A. 44/40)(5), or is invalid for lack of stamps (C.A.D.C., Jm. 140/33) (*supra*); an appointment cannot be made.

See also note *"Unless the Submission expresses a contrary intention", infra.*

"If any of the appointed arbitrators": The draft read "If either of the appointed arbitrators". As for the effect of the change, see note *Additional Arbitrator*, following sec. 6.

"Served... a Notice": This, from the wording, appears to necessitate writing as a verbal notice is *given*, not *served*.

If a notice is not complied with and an action subsequently filed, the Court will not grant a stay of proceedings in favour of the party failing to comply (Misc. Aplic. D.C., T.A. 126/44)(5a).

"Two arbitrators, one appointed by each party": An agreement to refer matters in dispute to two arbitrators mutually decided upon by the parties, does

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(1) 1941-2, T. A. 193 (*in Hebrew*). And see this heading in sec. 6.

(2) 10, P.L.R. 199; 1943, A.L.R. 334. But see C.A.D.C.,T.A. 203/43 in the corresponding heading following sec. 6. The application to Court should be made within a reasonable time (C.D.C., T.A. 229/44 (*not reported*)).

(3) 8, R. 563.

(4) 1, R. 188. And see heading *Void and invalid Submission* in the notes to sec. 2. But the contract may have been expired and the submission therein remain subsisting: C.D.C., T.A. 229/44 (*not reported*).

(5) 1940, T. A. 166 (*in Hebrew*).

(5a) 1944, S.C.D.C. 393.

not fall within the above words (Yeates *v.* Carueth [1895] 2 Ir. R. 146, referred to in C.A.D.C., T.A.40/41)([6]).

"Unless the submission expresses a contrary intention": If the submission shows a clear intention that certain arbitrators, named therein, should act, and one of the arbitrators retires, the Court has no jurisdiction to appoint a new one (C.D.C., T.A. 287/42)([7]).

Note that these words do not appear in sec. 6. See second paragraph of heading *Effect of divergence in Texts* to that section.

"Who shall have the like powers etc.": See this heading in the notes to sec. 6.

Sec. 6 compared: See *note sec. 7 compared,* following sec. 6.

Appeals: See sec. 15(3) and notes. See also this heading in sec. 6.

Powers of arbitrator and duty of arbitrator to state a case.

8(1). The arbitrator or arbitrators or umpire acting under a submission shall, unless the submission expresses the contrary intention, have power—

(*a*) to administer oaths or to take the affirmation of the parties and witnesses appearing;

(*b*) to reserve any question or questions of law arising out of the arbitration for the opinion of the Court, in which case the award shall be stated in such form as to constitute a finding of facts and a decision of the points in issue between the parties, subject to the decision of the Court upon the points of law reserved;

(*c*) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

(2) The arbitrator or arbitrators or umpire shall, if so directed by the Court or a judge thereof, state in the form of a special case for the opinion of the Court any question of law arising out of the arbitration.

Source of sub-sec. (1): Sub-sec. (1) is adopted from sec. 7 of the Arbitration Act, 1889. There being verbal divergences between the text of the first two clauses in sub-sec. (1) of the Ordinance, and sec. 7 (a) and (b) of the Act, the latter are set out in full:

> 7. The arbitrators, or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power -
>
> (a) to administer oaths to or take the affirmations of the parties and witnesses appearing; and
>
> (b) to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court; and
>
> (c) (*Same as in the Ordinance*).

Clause (b) is now repealed by the 1934 Act.

([6]) 1941-2, T. A. 7.
([7]) 1941-2, T. A. 146 (*in Hebrew*).

Divergence in Texts: Sec. 8(1)(b) is more detailed than the corresponding provision in the old Act, though the import of the two enactments appears to be the same in this respect. This section has been frequently considered by the local courts and the interpretation thereof appears to be sufficiently clear, so that no reference need be made to English authorities.

Source of sub-sec. (2): This sub-section was not included in the draft. In the original text of the Ordinance it appeared as sec. 9(3). It is taken from sec. 19 of the Act which reads as follows:

> 19. Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

This section of the Act was also repealed by the 1934 Act.

Sec. 8(1)(b) and 8(2) compared: Under 8(1)(b) the arbitrators have a discretion to state a question of law in the award *i. e.*, at the conclusion of the proceedings. Sub-sec. (2) imposes a duty on arbitrators to state a case on a question of law arising out of the arbitration if called upon to do by the Court or a judge. This, unlike in the case of sub-sec. (1)(b), may be done during the course of the proceedings and not necessarily at the close thereof. Sub-sec. (2) differs from sec. 19 of the Act, on which it is modelled, as the latter also conferred upon arbitrators a discretion to state a case during the course of the proceedings. The difference between these two enactments has not come before the Courts for consideration and if strict effect should be given to that difference (1) it would follow that arbitrators may not state a case before the conclusion of the proceedings unless called upon by the Court or a judge to do so.

See *infra, Reserving a Question of Law, Stating a Case.*

Administration of Oaths, etc. (sub-sec. (1)(*a*)): See also the provisions of clauses (f) and (g) in the Schedule, *post,* and notes as well as heading *Hearing the Evidence* (and cross-references therein) in notes to sec. 13, setting out decided cases on this question. If a witness is objected to, as when he is called by the arbitrator *proprie motu,* the proper time to object is when the witness comes to the box to be sworn, and before he is sworn (C.A. 228/41)(2).

As to the manner in which the oath should be administered or the affirmation taken, and as to the difference between the two, see title *CIVIL PROCEDURE.*

C.D.C., Ja. 133/43, 147/43(3), quoted in the note *Partiality,* to sec. 13, shows how an arbitrator may be accused of showing animosity or bias to a party by the manner in which he administers the oath to that party. But see C.D.C., T.A. 319/43 in the notes to clauses (f) and (g) of the Schedule.

See sec. 9(3) and notes for false evidence.

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(1) See C. A. 135/33 (2, P. L. R. 110; 2, R. 708) and title *INTERPRETATION.* See also notes to sec. 1, SOURCE, INTERPRETATION.

(2) 8, P. L. R. 624; 1941, S. C. J. 570; 11, Ct. L. R. 222. And see note 95 to sec. 2.

(3) 1944, S. C. D. C. 309.

When an action before a Court is referred to arbitration the arbitrators may, by consent of the parties, rely on the evidence heard by the Court instead of hearing witnesses (C.A. 206/37) (4).

Correction of Errors, etc. (*sub-sec.* (1)(*c*)): In C.A. 247/38(5), where the arbitrator, after making his award, thought that he had not awarded a sufficient amount to one of the parties and thereupon proceeded to issue a second award, the Court held that the powers given to arbitrators under this clause empower them to correct any clerical error or accidental slip or omission in the award. If an arbitrator exercises these powers it must be clear to the Court that he exercises them by amending the award in whatever way it needs amendment. The clause does not empower an arbitrator to cancel his first award and to issue a second award. The correction of a clerical error or the remedying of an accidental slip or omission, it was further held, should be made on the award itself.

Where an error was pointed out to an arbitrator who admitted it, but the party to whose disadvantage the error was made refused to allow the arbitrator to reconsider the award, and the error did not appear on the face of the award, the Court refused to set it aside (Phillips *v.* Evans [1843] 13 L.J.Ex. 80, cited in C.A. 2/35)(6).

In C.A. 104/38(7), an error in an addition was corrected by the Court when seized with the award on an application to enforce.

For authorities material in determining what corrections come under this heading, reference should be made to the "slip rule" in the title *CIVIL PROCEDURE*, under C.P.R. 358.

See also note *Power of the Court* in secs. 13 and 14.

Reserving a Question of Law, Stating a Case: Sec. 8(1)(b) gives the arbitrator the power, not the duty, of reserving a question of law for the opinion of the Court. The arbitrator may, however, be compelled, under sub-sec. (2), to state a case. These two enactments are discussed in the note *Sec.* 8(1) (*b*) *and* 8(2) *compared, supra.* Unless an application is made under sub-sec. (2), the arbitrator has full powers to refuse to state a case and an award will not be set aside for such refusal, even if the arbitrator is a layman (C.D.C., Ja. 234/34)(8). But where a party to an arbitration asks the arbitrator to state a case and this is not done (9) the party should be given time to apply to the Court under sub-sec. (2) (C.D.C., T.A. 12/40) (10).

The postion differs in Workmen's Compensation cases. See that heading in *Statutory References,* following sec. 2. *supra.* But apart from the question of procedure, the Arbitration Ordinance is made to apply. Workmen's compen-

(4) 1937, S. C. J. (N. S.) 106.

(5) 6, P. L. R. 31; 1939, S. C. J. 13; 5, Ct. L. R. 39; P. P. 27.1.39.

(6) 1937, S. C. J. (N. S.) 69.

(7) 1938, 1 S. C. J. 319; 3, Ct. L. R. 276. (*Leave application*).

(8) Quoted in the judgment on appeal, C.A. 93/35 (7, R. at p. 51) set aside on another point.

(9) And may probably not be done: *Sec.* 8(1)(*b*) *and* 8(2) *compared, supra.*

(10) 1940, T. A. 170 (*in Hebrew*).

sation cases are therefore quoted in this heading as authorities. See *Workmen's Compensation Cases, infra.*

The practice in the Haifa jurisdiction of stating a case under rule 257 of the Civil Procedure Rules was approved in Mis. C.A.D.C., T.A. 78/41 ([11]). It is sufficient if the arbitrator signs the case, instead of the parties (*ibid.*). The respective contentions of the parties should be detailed in Form 19 C.P.R., rather than in an appendix to the award (*ibid.*). Generally, it is the better practice to formulate and to submit the questions of law separately, together with the record and findings, without further comment (C.A. 48/40) ([12]). The facts found by the arbitrator may also be inferred from the form in which he propounds the special case (C.A.32/40 *infra, vide* C.A. 218/42) ([13]). The book by A. Liphshitz on Arbitration law([14]) sets out, at pp. 45-6 an award in the form of a case stated on a point of law.

The questions reserved for the Court must be questions of law and not of fact (C.A. 32/40) ([15]), but the question whether there was evidence on which the arbitrator could make a finding of fact is a question of law (*ibid.*; Mis. C.A.D.C., T.A. 78/41) ([16]). On the other hand, a question whether the evidence points to a certain finding, is one of fact (Mis. C.A.D.C., T.A. 78/41) (*supra*). So is the reliance by the arbitrator on inadmissible evidence, such as a medical certificate (*vide* w.c., Ja. 2/33) ([17]).

An arbitrator who has stated a case is still seized with the proceedings([18]).

Sub-sec. (2) : See note *Reserving a Question of Law, Stating a Case, supra.*

Court: For the material jurisdiction, see notes following the definition of this term in sec. 2. For the local jurisdiction see r. 2 of the Arbitration Rules, *post.*

Judge: See the definition in sec. 2. Note that an order under this sub-section may be made by a Court or judge.

Applications to Court under this sub-section are made by notice of motion. See notes to sec. 15(1).

Time to Apply: Application may be made at any time before the completion of the arbitration (C.A. 117/39) ([19]) *i.e.*, if the award has not been delivered (C.A. 186/40) ([20]), or where only an interim decision on a preliminary point has been given (C.A. 117/39) (*supra*). Once the arbitrator has given his

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([11]) 1941-2, T. A. 112. (Workmen's Compensation Case). See notes to this rule in title *CIVIL PROCEDURE.*

([12]) 7, P. L. R. 163. 1940, S. C. J. 385; 7, Ct. L. R. 170.

([13]) 1942, S. C. J. 873.

([14]) Haifa, 1939. (*In Hebrew*).

([15]) 7, P. L .R. 143; 1940, S. C. J. 338; 7, Ct. L. R. 95. (Workmen's Compensation Case). See also C.A. 85/33 (2, P.L.R. 90; 4, R. 1413; P.P. 8.5.34.

([16]) Note 11 *supra.*

([17]) 5, R. 1881. (Workmen's Compensation Case). And *vide* C. A. 34/38 (5, P.L.R. 234; 1938, 1 S.C.J. 196; 3, Ct.L.R. 147), another Workmen's Compensation case, where the Court, on a case stated, refused to interfere with findings of fact.

([18]) 2, P. L. R. 127; 5, R. 1882; 9, R. 917; P. P. 6.7.34. (Workmen's Compensation Case).

([19]) 7, P. L. R. 47; 1940, S. C. J. 50; 8, Ct. L. R. 129.

([20]) 1940, S. C. J. 336; 8, Ct. L. R. 157.

award he is *functus officio* and the Court will not order him to state a case (C.A. 208/38) ([21]) even if the award was made pending an appeal on a refusal by the Court to issue an order (*ibid.*).

Who may apply: When proceedings between one party and a number of other parties are held jointly by consent, the various parties may file a joint application under sec. 8(2) (C.A. 117/39) (*supra*).

Evidence: The necessary considerations submitted to the Court for the exercise of its discretion to give an order under the sub-section should be proved, either by affidavit or otherwise. See notes to sec. 15(1) under this heading.

Fees: See r. 5 of the Arbitration Rules, *post*, and notes.

Costs: See sec. 18 and notes.

Powers of the Court: The Court has discretionary powers under this subsection to order the arbitrators to state a case (*in re* Gray, Laurier & Co. and Boustead & Co. [1892] 8 T.L.R. 703, followed in C.A. 146/42 ([22]); C.A. 63/28 ([23])) and the Court of appeal will not interfere with the exercise of that discretion (C.A. 146/42) (*supra*). If the Court is satisfied that there is a material point of law on which it should give an opinion (C.A. 186/40) ([24]), or where a serious point of law arises upon the construction of a contract (*in re* Nuttall and Lynton and Barnstaple Rly. Co. [1900] 82 L.T. 17, quoted in C.A. 63/28) (*supra*), the Court will direct the arbitrator to state a case. In deciding whether a case should be stated the Court will take into account the qualifications of the arbitrator — whether he is a layman or not (C.A. 63/28) ([25]), but there is no rule that the Court should not direct an arbitrator who is a qualified lawyer (*in casu*, a judge) to state a case on a point of law (*ibid.*). See also C.D.C., Ja. 234/34 ([26]).

The question whether a submission to arbitration *per se* excludes the right to raise a defence in an arbitration which would be raised in a civil Court, was held in C.A. 63/28 (*supra*) to be an important legal question which should have been reserved.

When the Court refuses, on application, to order the arbitrator to state a case on a particular point of law, this need not prohibit the applicant from raising that point when the award is before the Court for confirmation or setting aside (*vide* C.A. 63/28) (*supra*) and the award may be challenged on the ground that the arbitrator misapplied the law (C.A. 146/42) ([27]).

When deciding whether to order an arbitrator to state a case, the Court should avoid expressing any opinion, or giving any reason for its judgment which might even in a remote way influence the arbitrator who has to give his award (C.A. 63/28) (*supra*).

On an application to set aside an award, the Court may, instead of sett-

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([21]) 1938, 2 S. C. J. 106; 4, Ct. L. R. 145; P. P. 11.11.38.
([22]) 1942, S. C. J. 718.
([23]) 1, P. L. R. 389; 1, R. 183
([24]) Note 20 *supra*.
([25]) Note 23 *supra*. But see last paragraph to note *Who may be appointed* and second paragraph to note *What may be submitted*, sec. 2. See also notes to sec. 13.
([26]) Note 8 *supra*.
([27]) Note 22 *supra*.

ing aside, remit the award to the arbitrator with directions to state a case (C.D.C., T.A. 12/40)([28]). An opportunity should be given by the arbitrator to apply to the Court, where a party has expressed his desire to have a question of law reserved (*ibid.*).

Workmen's Compensation Cases: The law differs in arbitration proceedings under the Workmen's Compensation Ordinance. See note under that subject in sec. 2, heading *Statutory References*. Apart from that difference the Arbitration Ordinance applies (C.A. 1/34)([29]).

See second paragraph of heading *Reserving a Question of Law, Stating a Case, supra.*

Appeals: When a point of law is taken to the Court on a case stated and an appeal is subsequently filed from the order of the Court, this does not determine the arbitration proceedings. The arbitrator is still seized with the arbitration and the opinion of the Court, when finally decided, is remitted to the arbitrator to enable him to make his final award. (C.A. 1/34) (*supra*). See also notes to sec. 15(3).

Witnesses may be summoned, etc.

9(1). Any party to a submission or any arbitrator or umpire may apply to the Court to issue a summons for the attendance of any witness or the production of any documents required for the arbitration proceedings, but no person shall be compelled under any order of court to produce any document which he could not be compelled to produce on the trial of an action.

(2) The Court shall have the same power to issue a commission to take evidence abroad for the purpose of an arbitration as it has in the case of an action.

(3) Any person who wilfully gives false evidence on a material point before any arbitrator or umpire will be guilty of false evidence as if the evidence had been given before a court of competent jurisdiction and may be dealt with, prosecuted and punished accordingly.

Source:

(*Sub-sec.* (1)): This sub-section differs in many respects from sec. 8 of the Arbitration Act, 1889, from which it is taken. The following is the text of sec. 8:

> 8. Any party to a submission may sue out a writ of *subpoena ad testificandum*, or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

The last part of the sub-section, beginning with the words "but no person", was not included in the draft.

(*Sub-sec.* (2)): Compare sec. 18(1) of the 1889 Act:

([28]) 1940, T .A. 170 (*in Hebrew*).
([29]) Note 18 *supra*.

18(1). — The Court or a judge may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before any arbitrator or umpire, of a witness wherever he may be within the United Kingdom.

See note to this sub-section, *infra.*

(*Sub-sec.* (3)): Sec. 22 of the Act made provision against false evidence before arbitrators. That section was repealed by sec. 67 of the Perjury Act, 1911, and replaced by sec. 1 thereof. The text of sub-sec. (3) was adopted from the latter statute. See note (*Sub-sec.* (3)). — *False Evidence, infra.*

Sub-sec. (1):

Court: See notes to sec. 2, under that heading, for the material jurisdiction. As regards local jurisdiction, see r. 2 of the Arbitration Rules, *post.*

Submission: This expression is defined in sec. 2 and the definition is followed by a commentary. It bears therein the meaning of an agreement to refer whilst, when used in sec. 3, it implies a reference to agreed arbitrators. In this sub-section, a reference to arbitrators is contemplated and the same meaning as in sec. 3 must, it is submitted, attach to the term in this context. The parties to the submission mentioned in the first line of the sub-section therefore refer to parties to the proceedings and not parties to the agreement to refer. See notes to sec. 3.

Procedure: Applications to Court are made by notice of motion. See sec. 15(1) and notes.

Fees: See r. 5 of the Arbitration Rules, *post.*

Costs: See sec. 18 and notes.

Appeals: See sec. 15(3) and notes.

Summons, (*sub-secs.* (1), (2)): For the manner in which summons may issue to witnesses under sub-sec. (1) and commissions under sub-sec. (2), see title *CIVIL PROCEDURE.*

Workmen's Compensation: For the special powers exercisable by an arbitrator in Workmen's Compensation arbitrations, see this title in heading *Statutory References* in the notes to *Submission,* following sec. 2.

Sub-sec. (2): See *Source, Sub-sec.* (2), *supra* and compare the two texts. Whilst, therefore, the sub-section empowers the Court to issue a commission to take evidence abroad for the purpose of an arbitration reference, no such powers can be found under the Arbitration Act. These powers could be exercised in England, in the case of references by order of the Court(1), which are outside the scope of the Arbitration Act (see *Statutory Submissions* in the notes to sec. 2). The 1934 Act has now brought references by consent in line with reference by order of Court (sec. 8(1) and the first Schedule (4) thereof) and the same powers may be exercised by the Court in the case of either kind of reference.

See *Fees, Costs, Appeals* in the notes to sub-sec. (1), *supra.*

Sub-sec. (3). — *False Evidence*: This sub-section has been rendered obsolete since the enactment of the Criminal Code Ordinance, 1936, which

(1) See Russell, *Arbitration and Awards,* 13th ed. p. 134.

provides against false evidence in arbitration proceedings: Sec. 117 of that Ordinance makes the giving of false testimony, knowingly, in any judicial proceeding, punishable if the testimony touches a matter material to any question depending in that proceeding; whilst sec. 5 defines judicial proceedings as including any proceeding taken before a person before whom evidence may be taken on oath a matter which, under sec. 8(1) (a) of the Arbitration Ordinance, arbitrators may do. See notes to that sub-section.

But by virtue of sec. 25 of the Interpretation Ordinance an offender may be prosecuted under both sections provided he is not punished twice for the same offence.

The expression "false evidence" has a special meaning in Criminal Procedure and is therefore misleading. See Criminal Procedure (Evidence) Ord., sec. 4 and sec. 56 of the Criminal Procedure (Trial upon Information) Ord. "Perjury" would be more applicable.

See title *CRIMINAL LAW* for false evidence and perjury.

Enlargement of time for making an award.

10. The time for making an award may from time to time be enlarged by an order of a Court or a judge thereof whether the time for making the award has expired or not.

Source: The Arbitration Act, 1889, sec. 9. The Ordinance differs from the Act by the addition of the word "thereof" which does not appear in the corresponding section of the Act. The difference in the wording does not appear to be material.

Court: The material jurisdiction of the Court is defined in sec. 2. See notes to that section under the title *Court*. The local jurisdiction of the Courts is set out in r. 2 of the Arbitration Rules (*post*).

Procedure: Applications for an order to enlarge the time for making awards, are made by notice of motion (see notes to sec. 15(1)).

Fees: See r. 5 of the Arbitration Rules, *post*.

Costs: See sec. 18 and notes.

Discretion: The power of the Court under this section is absolutely (Mo. D.C., Jm. 465/43, 479/43)(1) discretionary (C.A.D.C., T.A. 237/38(2); C. A. D. C., T. A. 206/42(3)) and the appellate Court will not interfere with the discretion even if it is of the opinion that it would have reached a contrary decision (C. A. D. C., T. A. 206/42) (*supra*). The discretion will not be exercised unless the Court thinks fit in the particular case (Mo. D. C., Jm. 465/43, 479/43) (*supra*).

In C.D.C., T.A. 227/41(4), where the application for extension had been made by the defendant in the proceedings after action had been filed in the Court following upon the expiration of time; and upon the Court being satisfied that the applicant's refusal to alter the terms of the submission, which

(1) 1944, S. C. D. C. 172.
(2) 1939, T. A. 12. *Vide* C. A. 42/39 (at 6, P. L. R. 229; 1939, S. C. J. 286; 5, Ct. L. R. 189) where leave to appeal that judgment was refused.
(3) 1941-2, T. A. 193 (*in Hebrew*).
(4) 1941-2, T. A. 192 (*in Hebrew*).

required a unanimous award, made it unlikely that a final award would be reached; the Court refused to exercise its discretion. Inexcusable delay in applying to Court, or applying only after the opposite party has applied for revocation of the submission will result, as a rule, in the refusal of the application (*ibid.*). But where the delay is due to the ignorance of the applicant that the time has not been extended by the arbitrators (*ibid.*) or is partly due to the fact that negotiations were pending between the parties for an amicable settlement (C.D.C., T.A. 237/38; C.A. 42/39)(5), the Court may use its discretion to enlarge the time.

In exercising its discretion the Court will have regard to the terms of the submission and see whether the conditions as to the time for making the award were an essential element of the submission, or merely regulations for the observance of the arbitrator, as when the submission does not fix a particular time (and see *infra*), thus making apparent the intention that the time for making the award is not an essential element of the submission (Mo. D. C., Jm. 465/43, 479/43) (*supra*). The Court will also take into account the qualifications of the arbitrators to deal with the questions referred (C. A. D. C., T. A. 206/42) (*supra*) the fact that the arbitrators were not guilty of negligence and the fact that the parties preferred to go to arbitration after an application for stay under sec. 5 (C. D. C., T. A. 237/38) (*supra*). The above cases should not be taken to decide that the discretion of the Court to grant the remedy may be precluded or curtailed. See note SOURCE, INTERPRETATION, sec. 1. See next note.

The powers of the Court may be invoked any time after the expiration of time or extended time within which the arbitrators or umpire may make an award (C. A. 60/37)(6).

Length of Time: When no particular time is fixed in the submission the provisions of the Schedule apply (Mo. D., Jm. 465/43, 479/43) (*supra*). Under the provisions of the Schedule the arbitrators or the umpire may themselves enlarge the time if it has not expired, (see notes to the Schedule, *post*) and if there is no limitation in the submission (C. D. C., T. A. 122/38)(7). The following clause in a submission is not, in itself, sufficient to preclude the arbitrators from enlarging the time according to the Schedule: "The time of the arbitration is in the following terms *viz.*: fixed for ten days from the date of this submission." (C. D. C., T. A. 241/38)(8).

The time may also be extended by implied consent of the parties, if they appear before the arbitrators after the expiration of the statutory period (C.A. 93/35(9); C.D.C., T.A. 241/38(10) and see notes to clause (c) of the Schedule, *post*).

Practice: As to consolidation of applications, see notes to sec. 15(1).

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(5) Same case: Note 2 *supra*. Delay had been caused in the arbitration proceedings, not in applying to the Court. *Semble* that the same considerations apply in both instances.

(6) 1937, S. C. J. (N. S.) 309; 2, Ct. L. R. 30.

(7) 1938, T. A. 128. Leave to appeal was refused in C. A. 12/39 (6, P. L. R. 119; 1939, S. C. J. 92; 5, Ct. L. R. 119; P .P. 11.4.39).

(8) 1938, T. A. 133.

(9) 7, R. 48.

(10) Note 8 *supra*.

When an application for enlargement of time is pending before the Court together with an application to revoke the submission, it is advisable to hear the latter first as it might, if successful, dispose of both applications (C. A. 65/42) (11).

An affidavit filed in support of an application for enlarging the time cannot be taken as an affidavit filed in opposition to an application for the revocation of the submission (*ibid.*).

Powers of the Court: The Court may, on an application to set aside or enforce an award delivered out of time, enlarge the time and remit (C.D.C., T.A. 122/38) (12) or enforce the award (C.D.C., T.A. 241/38) (13), or appoint an arbitrator in lieu of one who resigned (*vide* C.A.D.C., T.A. 206/42) (14).

Extension of Time by Arbitrators: The powers of arbitrators and umpires to extend the time under clauses (*c*) and (*e*) of the Schedule may be exercised during the period provided in the submission or extended by them, or by the Court under this section (C. D. C. Ja. 133/43, 147/43) (15).

Appeals: See sec. 15(3) and notes.

Removal of arbitrator for misconduct or neglect.

11. Where an arbitrator or umpire has misconducted himself, or has wilfully neglected to act upon the submission after having been requested so to do by written notice served upon him by a party to the submission, the Court may remove him and may, in default of appointment by the party or arbitrators who originally appointed him, appoint another person in his place.

Source: Sec. 11(1) of the Arbitration Act, 1889, which reads as follows:

> 11(1). — Where an arbitrator or umpire has misconducted himself, the Court may remove him.

This section was amended by the 1934 Act.

Effect of divergence in Texts: A comparison of sec. 7 with the corresponding section (sec. 6) of the Act (*supra*, p. 101) shows that the English section gives the Court a power to set aside appointments made thereunder. This power could be invoked in Palestine under the provisions of Sec. 11, which is wider than sec. 11(1) of the Act. Sec. 11(2) of the Act corresponds with sec. 13 of the Ordinance.

Court: See notes to sec. 2 for the material jurisdiction of the Courts. As regards local jurisdiction, see Arbitration Rules, r. 2. *post.*

Submission: See the definition in sec. 2. The word appears, however, to be used in two different senses and the meaning of the word as first used is that which it bears in sec. 3. See notes thereto.

Procedure: Applications under this section are made by notice of motion (see notes to sec. 15(1)).

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(11) 9, P. L. R. 392; 1942, S. C. J. 429.
(12) Note 7 *supra.*
(13) Note 8 *supra.*
(14) Note 3 *supra.*
(15) 1944, S. C. D. C. 309.

Evidence: The facts relied upon in support of the application should be established, whether by affidavit or otherwise: See notes to sec. 15(1).

Fees: See r. 5 of the Arbitration Rules, *post* and notes.

Costs: See sec. 18 and notes.

Misconduct: This term is fully discussed in the notes to sec. 13.

Neglect: There are no local cases on the removal of arbitrators for neglect. When referring to English authorities, the divergence between the texts should be noted. (See *Source, supra,* and SOURCE. INTERPRETATION, following sec. 1).

Powers of the Court: The power of the Court to remove an arbitrator under this section overrides any power which the person who appointed the arbitrator, when such person is a public officer, may have under sec. 19(2) of the Interpretation Ord. to cancel the appointment (H. C. 98/34)(1).

The powers of the Court are also wider than those which it may exercise under sec. 13 to set an award aside for misconduct (C.D.C., T.A. 155/44)(2). After an act of misconduct has been committed a party need not wait until the award is given and then seek to set it aside, but may forthwith invoke the powers of the Court under sec. 11 to remove the arbitrator (*ibid.*). Failure to do so may sometimes be taken as waiver of the misconduct when application is subsequently made under sec. 13 to have the award set aside (*ibid.*).

In the case quoted above, although application had been made to remove the third arbitrator only, the Court held that misconduct had also been committed by the remaining arbitrators who had concurred in delivering an offending ruling, and removed all three arbitrators.

Particular Cases: In C. A. 69/36(3) an arbitrator who had private meetings with one of the parties, when questions pertaining to the controversy had been discussed, was removed under this section.

In C. D. C., T. A. 155/44 (*supra*) arbitrators were removed on the ground that they had called witnesses without the consent of the parties and that they had wrongly delegated their powers.

Insufficient Misconduct: Where the misconduct is of a technical nature (see notes to sec. 13) an award may be remitted to the arbitrator (*vide* C. A. 5/37)(4) but an award will not be remitted to the arbitrator if the misconduct is such as to disqualify the arbitrator from acting (*vide* C. A. 17/35)(5). A judgment of remittal therefore implies that no such disqualifying misconduct was committed and no such misconduct may be alleged as having occurred before the remittal, on an application, made subsequently thereto, to have the arbitrator removed (*ibid.*).

Effect of removal of Arbitrator: It will be noticed that the removal of an arbitrator or umpire for misconduct or neglect does not result in the

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(1) 2, P. L. R. 231; 9, R. 922; P. P. 3.1.35.
(2) 1944, S.C.D.C. 321.
(3) 9, R. 726; 1, Ct. L. R. (N. S.) 48.
(4) 1937, S. C. J. (N. S.) 74. A case under sec. 14.
(5) 1937, S. C. J. (N. S.) 83.

revocation or termination of the submission, as the section provides for the appointment of other persons to replace those so removed.

Appeals: C. A. 105/32(6) which decided that appeals under this section could only lie by leave, is obsolete as this is now the case for all appeals under the Ordinance. See sec. 15(3) and notes.

Power to remit award.

12.(1) In all cases of reference to arbitration the Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

Source: Arbitration Act, 1889, sec. 10. The powers of the Court under this section are similar to the powers of the Court in England to remit the award (C. A. 21/38)(1).

"In all cases of reference": This wording appears to include statutory references as set out in the notes to sec. 2.

Quaere whether it does not include references on verbal submissions. See note to sec. 14 under heading *Effect of Divergence in Texts.*

Court: For the jurisdiction of the Courts, see definition in sec. 2 and notes. The local jurisdiction of the Courts is defined in r. 2 of the Arbitration Rules, *post.*

Procedure: Applications under this section should be made by notice of motion. See sec. 15(1) and notes.

Consolidation of Applications: See this note in sec. 15(1).

Evidence: A perusal of the notes to this section will show in what circumstances the Court may be moved. The facts relied upon should be established by evidence,whether in the form of affidavits or otherwise. See the notes to sec. 15(1).

Fees: See r. 5 of the Arbitration Rules, *post*, and notes.

Costs: See sec. 18 and notes.

Powers of the Court: The power to remit any matter to the arbitrators (under sub-sec. (1)), or to remit the award (under sub-sec. (2)) is distinct from the power given under sec. 13 to set the award aside (C. A. 21/38) (*supra*). The powers of the Court are discretionary (C.A. 247/38)(2) and are similar to those of the Court in England (C.A. 21/38) (*supra*). An appellate Court will not interfere with the discretion of the trial Court, unless the discretion was unreasonably exercised (C. L. A. 6/33)(3).

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(6)) 1, P. L. R. 810; 3, R. 1172; P. P. 14.12.32; 8.5.33.
Sec. 12(1).
(1) 5, P. L. R. 152; 1938, 1 S. C. J. 144; 3, Ct. L .R. 101.
(2) 6, P. L. R. 31; 1939, S. C. J. 13; 5, Ct. L. R. 39; P. P. 27.1.39. In exercising its discretion the Court will take account of the work and time which the arbitration involved: C. D. C., T. A. 9/41 (1941-2, T. A. 213 (*in Hebrew*)).
(3) 2, P. L. R. 72.

The Court cannot both set aside and remit an award (C. A. 5/37(4); C. A. 21/38 (*supra*)). If the award is set aside it cannot be remitted (*vide* C. D. C. Ja. 133/43, 147/43)(5). If the Court purports to do both, the judgment is ambiguous and the appellate Court may be called upon to determine whether the effect of the judgment is (as in C. A. 5/37) (*supra*) to set aside the award or (as in C. A. 21/38)(6) to remit it to the arbitrators. But the Court may partly remit and partly confirm or set aside (C. L. A. 16/31(7); C. D. C., T. A. 42/40(8) and *vide* C. A. 174/35(9)).

The power to remit an award may be exercised by an appellate Court (C. A. 235/43(10), following C. A. 21/38(11) and see C. A. 113/35(12)).

The Court should not remit before allowing the advocate of the party applying for the award to be set aside to conclude his argument (C.A. 25/37)(13), but where an award has a defect patent on the face of it, as when it sets out a number of alternative findings; so that whatever the arguments which could be adduced against, or in support of the remittal the Court would have no alternative but to remit; the Court may dispense with a hearing and remit, upon a perusal of the award, for the arbitrator to state which of the alternatives he adopts in his decision (C. A. 228/41)(14).

How the Court is seized: Normally, the Court may remit on application made by one of the parties to the arbitration (C .A. 228/41) (*supra*). The application should normally be made with notice (*ibid.* and see notes to sec. 15(1)). But the Court also has a discretion to remit an award (*in toto* or in part) of its own motion and independently of an application to remit (C. A. 174/35)(15), or when seized with an application to enforce or to set aside the award (C.A. 5/37)(16).

"The fact that neither party applied for the case to be remitted to Arbitrators does not fetter the discretion of the District Court to set aside or remit the case, having regard to the circumstances of the case, as laid down in Odlum *v.* Vancouver City [1915] 85 L. J. P. C., 95 (Russell on Arbitration, 12th Edition, p. 174)". (C. L. A. 2/34)(17). Most cases of remittal in the local law reports are in applications under secs. 13 or 14. See notes to these sections.

When the Court will remit: Awards are usually remitted to correct an irregularity. They may also be remitted on other grounds and the following cases are exhaustive as regards the grounds of remittal only in respect of

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(4) 1937, S. C. J. (N. S.) 74.
(5) 1944, S. C. D. C. 309.
(6) Note 1 *supra*.
(7) 1, R. 191.
(8) *Not reported*.
(9) 7, R. 57; P.P. 9.6.36.
(10) 1943, A. L. R. 814.
(11) Note 1 *supra*.
(12) 1937, S. C. J. (N. S.) 72.
(13) 1937, S. C. J. (N. S.) 95; 1, Ct. L. R. 88.
(14) 8, P. L. R. 624; 1941, S. C. J. 570; 11, Ct. L. R. 222. And see note 95 to sec. 2, *supra*.
(15) Note 9 *supra*.
(16) 1937, S. C. J. (N. S.) 74.
(17) 2, P. L. R. 170.

Palestinian reported cases. More instances may be found in English authorities (see note SOURCE, INTERPRETATION, *to sec.* 1).

"In Montgomery Jones & Co. *v.* Liebenthal & Co. [1898] I. Q. B. p. 487, Chitty J., laid down that one of the four grounds for remitting an award is that such award is bad on the face of it". (C.L.A. 2/34) (*supra*).

(*Award in the Alternative*): An award may be remitted if the arbitrator came to no decision, or offered alternative solutions (C. A. 228/41)([18]).

(*Award not final*): The award was remitted in C. D. C., T. A. 42/40([19]) for the arbitrators to ascertain and specify the costs payable, as the award purported to award costs on a percentage basis, without setting down a definite amount.

(*Failure to hear Evidence*): Where the award was given by a third arbitrator who had not heard the evidence the Court, instead of setting the award aside, decided to remit it for evidence to be heard, as the arbitrators had invested considerable time and labour in the arbitration (C. D. C., T .A. 9/41) ([20]).

(*Failure to keep Record of Proceedings*): In C. D. C., Ja. 392/31([21]), where the arbitrators omitted to keep a record of the proceedings and the arbitrators had not all signed an interim award, the award was remitted to the arbitrators for a rehearing and for the delivery of a fresh award. But see C. D. C., T. A. 319/43([22]).

(*Failure to sign*): See heading immediately preceding.

(*Failure to state a case*): In C. D. C., T. A. 12/40([23]) an award was remitted to the arbitrators with directions to state a case.

(*Misconduct*): See heading *infra, Technical Misconduct.*

(*Misdescription*): An award relating to the partition of land was remitted in C. A. 113/35([24]) in order to enable the arbitrators accurately to define the land.

(*Nullity*): The Court will not remit an award which is a nullity (as when it is delivered after a former award), as no useful purpose would be served by the remittal (C. A. 247/38([25]) and see notes to sec. 13).

(*Technical Misconduct*): According to English Law, where misconduct in the technical sense has been found against an arbitrator or umpire, the Court may either set aside the award or remit it (C. A. 5/37)([26]).

It would seem that the same powers may be exercised by the Court under secs. 12 and 13 (*ibid.*). When, however, the misconduct is of such a nature as to justify an application under sec. 11 for the removal of the arbitrator, or the award being set aside (*vide* C. D. C., Ja. 133/43, 147/43)([27])

([18]) Note 14 *supra.*
([19]) *Not reported.*
([20]) 1941-2, T. A. 213 (*in Hebrew*).
([21]) 1, R. 193.
([22]) 1944, S. C. D. C. 276.
([23]) 1940, T. A. 170 (*in Hebrew*).
([24]) 1937, S. C. J. (N. S.) 72.
([25]) 6, P. L. R. 31; 1939, S. C. J. 13; 5, Ct. L. R. 39; P. P. 27.1.39.
([26]) Note 16 *supra.*
([27]) 1944, S. C. D. C. 309.

a remittal is precluded (*vide* C. A. 17/35)([28]). An order of remittal consequently implies a finding that no such misconduct was proved as would disqualify the arbitrator from proceeding with the reference (*ibid.*).

Procedure after remittal: The remittal revives the authority of the arbitrator (C. A. D. C., T. A. 40/41)([29]). When the award is remitted in order to enable the arbitrator to state which of the alternative findings made in his award he finally adopts, he may make a final award without hearing the parties (C. A. 228/41)([30]).

The practice of communicating the final award to the Court by a letter addressed to the Registrar was condoned in the same case.

When the case comes again before the Court, after remittal, points on the former award may not be argued unless the party had no opportunity of arguing them on the previous occasion (C. A. D. C., T. A. 11/37)([31]), or unless they were raised but not dealt with in the former proceedings (C. A. 142/38)([32]). Where part of the award only has been remitted, and the remainder enforced, the judgment should be rewritten when the remitted part comes before the Court for enforcement. The procedure is detailed in an extract from C. L. A. 16/31([33]) which is quoted in the notes to sec. 15(3) under the last part of the heading *Leave to Appeal.*

Appeal from Order of remittal: Leave to appeal is required to take a decision on a remittal to a higher instance (see notes to sec. 15(3)). The procedure outlined in C.A. 142/38([34]) is, in this respect, obsolete and inapplicable.

Leave to appeal will not be granted if a fresh award has, in the meantime, been delivered (C. A. 12/39)([35]).

See, further notes to sec. 15(3) under heading *Grounds of Appeal, infra.*

Remittal in Land Court References: Where the reference was made in the Land Court under the provisions of sec. 6 of the Land Courts Ordinance (see notes to *Submission* in sec. 2, heading *Land Court References*), the following statutory provisions apply in the case of remittals, under sub-sec. (3) of that section:

> 6 (3) Before authenticating an award, a land court may remit it to the arbitrators for reconsideration on the following grounds -
>
> (a) if there is some defect patent on the face of the award;
>
> (b) if the land court is satisfied that the arbitrators have made a mistake;
>
> (c) if material evidence, which could not, with reasonable diligence, have been discovered before the award was made, has since been obtained.

([28]) 1937, S. C. J. (N. S.) 83.
([29]) 1941-2, T. A. 7.
([30]) Note 14 *supra.*
([31]) 1937, T. A. 6.
([32]) 1938, 1 S. C. J. 404; 4, Ct. L. R. 23.
([33]) 1, R. 191.
([34]) Note 32 *supra.*
([35]) 6, P. L. R. 119; 1939, S. C. J. 92; 5, Ct. L. R. 119; P. P. 11.5.39.

Remittal in Land Settlement References: The following provisions apply, under sec. 27(6) of the Land (Settlement of Title) Ordinance, in the case of references in Land Settlement. (See heading *Land Settlement* under *Statutory References,* following the definition of *Submission* in sec. 2):

27 (6) The settlement officer may remit an award to the arbitrators for reconsideration: -

(a) if there is some discrepancy patent on the face of the award;

(b) if the arbitrators admit that they have made some mistake and desire the award to be remitted;

(c) if material evidence which could not with reasonable diligence have been discovered before the award was made has since been obtained.

See also the provisions relating to a remittal applying in the case of other statutory references, as set out under the heading *Statutory References,* in the notes to sec. 2.

Power to set aside award.

13. Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set aside the award.

Source: Arbitration Act, 1889, Sec. 11(2). The English Act combines, in one section, the power to set aside awards and (sub-sec. (1)) the power to remove arbitrators for misconduct. See notes to sec.11.

Court: For the material jurisdiction of Courts see note *Court* in sec. 2. For the local jurisdiction, see Arbitration Rules, r. 2, *post.*

Applications to Court: Applications to Court to set aside arbitration awards are made by notice of motion (see notes to sec. 15(1)). There are no special rules as in the case of applications under sec. 14. Where application is made to set aside an award on the ground that it was made in favour of a stranger to the submission, such person need not be made a party to the application (C. A. 237/38)(1). Only the parties to the award may apply under this section (C.A.D.C., T.A. 56/38)(2).

Consolidation: As regards consolidation of applications, see this heading in the notes to sec. 15(1).

Powers of the Court: The powers of the Court under this section are independant of the powers conferred by sec. 11(3) to remove an arbitrator for misconduct during the pendency of the arbitration, and the power of the Court under sec. 12, to remit the award. The Court cannot, however, in the absence of a special application to that effect, on which proper fees have been paid, set aside an award on an application to enforce it, opposed by the other party (C.A. 6/38(4); C.A.D.C., T.A. 53/39(5); C.A. 365/43(6)). The proper order to

(1) 6, P.L.R. 24; 1939, S.C.J. 12; 5, Ct.L.R. 33; P.P. 24.1.39.
(2) 1938, T.A. 15.
(3) See notes to sec. 11, *supra, Powers of the Court.*
(4) 1938, 1 S.C.J. 98; 3, Ct.L.R. 114 and 5, P.L.R. 311; 1938, 1 S.C.J. 346; 3, Ct.L.R. 299.
(5) 1939, T.A. 13.
(6) 11, P.L.R. 318; 1944, A.L.R. 561.

make in such a case is either to enforce the award, or refuse to enforce it (C.A. 6/38) (*supra*).

In C.D.C., T.A. 285/38(7) the respondent in an application to enforce an award had been exempted from payment of court fees. His opposition to the enforcement contained a prayer that the award be set aside. The Court allowed the opposition in lieu of a separate application as the question of payment of fees on such application did not arise. See also C.A. 196/37(8).

See notes to sec. 14, heading *Opposition to enforcement of Award.*

A question of insufficient payment of fees cannot be raised on appeal in the circumstances of C.A. 174/35(9) outlined in note *Grounds of Appeal,* following sec. 15(3).

In accordance with English practice, the Court may, according to the circumstances (C. A. 21/38(10) following C. A. 5/37(11)) or where misconduct in the technical sense (see *infra*) has been found against an arbitrator or umpire (C. A. 5/37) (11), either set the award aside or remit it. It cannot do both (see notes to sec. 12, under the same heading). But see below. Where the misconduct is of such a nature as to disqualify the arbitrators from proceeding with the arbitration, the award should not be remitted (*cf.* C.A. 17/35) (12). An award was remitted in C.D.C., T.A. 9/41(13), where the third arbitrator had not heard the evidence.

The powers of the Court under this section are similar to the powers of the Court in England (C.A. 21/38) (14).

The Court may, on an application to set aside an award on the ground that it was delivered out of time, enlarge the time and remit the award (C. D. C., T. A. 122/38) (15).

The Court may also confirm part of the award and set aside the other, where no injustice is caused, (C.D.C., T.A. 137/39) (16) or remit it to the arbitrators (C.D.C., T.A. 42/40) (17).

See also C.L.A. 2/34 as quoted in note *When the Court will remit* following sec. 12.

In dealing with an award, the Court is not acting as a Court of appeal from the Arbitrators' decision, and will only set aside an award where an arbitrator has misconducted himself or the award has been improperly procured (C.A. 63/36) (18). See *infra,* GROUNDS FOR SETTING ASIDE AWARD.

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(7) 1940, T.A. 175 (*in Hebrew*).
(8) 1937, S.C.J. (N.S.) 335; 2, Ct.L.R. 187.
(9) 7, R. 57. P.P. 9.6.36.
(10) 5, P.L.R. 152; 1938, 1 S.C.J. 144; 3, Ct.L.R. 101.
(11) 1937, S.C.J. (N.S.) 74.
(12) 1937, S.C.J. (N.S.) 83.
(13) 1941-2, T.A. 213 (*in Hebrew*).
(14) Note 10 *supra.*
(15) 1938, T.A. 128. Leave to appeal refused in C.A. 12/39 (6, P.L.R. 119; 1939, S.C.J. 92; 5, Ct.L.R. 119; P.P. 11.5.39).
(16) 1940, T.A. 172 (*in Hebrew*).
(17) *Not reported.*
(18) 9, R. 724; 1, Ct.L.R. (N.S.) 158; 3, Ct.L.R. 4.

In C.A. 29/41([19]) the Court of Appeal upheld an interim injunction granted by the British Magistrate's Court to restrain the successful party from registering a Workmen's Compensation award when an application to set aside the award was pending

See note to sec. 14, under the same heading, for powers of the Court to correct mistakes in an award.

Costs: See sec. 18, *infra*, and notes.

Time to Apply to the Court: In C.D.C., Jm. 38/37([20]) the Court, in an *obiter dictum*, suggested that, there being no provision in the rules under the Ordinance, o.64. r.14 of the English R.S.C. should be applied, limiting the time within which an application to set aside could be filed, to six weeks from the delivery of the award. This *obiter* was queried in C.D.C., T.A. 122/38([21]) where an application to enlarge the time was before the Court. The point was neither taken in the defence nor referred to in the issue ([22]). In C.D.C., T.A. 312/38([23]) the Jerusalem case was disapproved and not followed.

In C.D.C., T.A. 147/41, 299/41([24]), an application to set aside an award was made six years after delivery of the award. The Court found that the application had been made within a reasonable time as the applicant had not been aware of the existence of the award, which had been delivered in his absence, until the opposite party had applied for its enforcement. See also C.D.C., T.A. 285/38([25]).

These decisions are consistent with C.A. 5/41([26]) in which it was held that in the absence of a statutory limitation, such as exists in England under o. 64, r. 14, there is no specified time within which an application to set aside an award should be brought. The Court further held (following Atwood *v.* Chichester, [1878], 47 L.J.Q.B. 300; 38 L. T. 48) that an application to set aside an award should not be dismissed on the ground that it was not brought within a reasonable time, unless the other side suffered damage by reason of the delay. When the successful party has not sought to enforce the award he cannot be considered to have suffered damage merely because the evidence as to what happened in the arbitration may no longer be available (C.A. 5/41) (*supra*).

There is an implied criticism in C.A. 12/39([27]) for a delay of eight months from delivery of the award in seeking to set it aside. But the case was decided before C.A. 5/41 (*supra*).

In C.D.C., T.A. 312/38([28]) a delay of four months was held not to be excessive as the applicant was abroad when the award was delivered.

Although overruled on another point (in C.A. 93/35)([29]), the decision

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([19]) 8, P.L.R. 113; 1941, S.C.J. 90; 9, Ct.L.R. 127.
([20]) *Not reported*. Referred to in the following case.
([21]) Note 15 *supra*.
([22]) As to the use of issues, see notes to sec. 15(1).
([23]) P.P. 18.8.39.
([24]) 1941-2, T.A. 189 (*in Hebrew*).
([25]) 1940, T.A. 175 (*in Hebrew*).
([26]) 8, P.L.R. 82; 1941, S.C.J. 71; 9, Ct.L.R. 71; P.P. 14.3.41.
([27]) 6, P.L.R. 119; 1939, S.C.J. 92; 5, Ct.L.R. 119; P.P. 11.5.39.
([28]) P.P. 18.8.39.
([29]) 7, R. 48. The decision of the lower Court on leave to appeal is at p. 53.

in C.D.C., Ja. 234/34, on the application for leave to appeal, might provide a useful guide regarding reasonable time generally:

> "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 Scheme Executive Board [1934] (151, L.T. 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 C.D.C., T.A. 12/40([30]) an application to set aside an award was heard although filed after issues had been framed in an action for the enforcement of the award. As to the use of such procedure, see title *Application to Court* in notes to sec. 15(1).

Fees: See r. 5, Arbitration Rules, *post*.

Evidence: The arbitrator may be heard in evidence in an application to set aside an award. This question is discussed in the notes to sec. 15(1).

When an award is sought to be set aside on account of misconduct, the arbitrator should not be placed in the position of having to explain how he arrived at his findings of fact. An arbitrator, when giving evidence, is fully entitled to refuse to answer such questions; and if he does answer, his answers cannot be a ground for setting aside the award if in fact the award, on the face of it, is not unreasonable or capricious (C.A. 229/41)([31]).

"Admissions made before arbitrators may be admissible in certain cases, but where the arbitrators give evidence, as in this case, regarding an admission against a document then certainly their evidence is inadmissible and was wrongly received." C.A. 128/35([31]a).

See also heading *Error patent on face of Award, infra*. And see notes to sec. 15(1) and 15(4).

GROUNDS FOR SETTING ASIDE AWARD.

The section mentions two grounds on which the Court may set aside an award: Misconduct of the arbitrators and improper procurement of the award. In addition to these grounds, a number of other grounds are accepted in England as available, under the inherent jurisdiction of the Court, to set aside awards. These grounds have been acted upon in Palestine and it has been held in C.A. 21/38([32]), a case decided on secs. 12 and 13, that the powers of the Court under the Ordinance are similar to the powers of the Court in England. The authorities set out hereunder are not exhaustive of the grounds on which awards may be set aside, but enumerate all the Palestinian reported cases on this subject. Further instances may be found in English case law for whose applic-

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([30]) 1940, T.A. 170 (*in Hebrew*).

([31]) 8, P.L.R. 603; 1941, S.C.J. 616; 11, Ct.L.R. 126.

([31]a) 7, R. 376; 1, Ct.L.R. (N.S.) 4. It is doubtful, however, whether this case represents the law at present on the admissibility of oral evidence against a document; recent decisions having considerably mitigated against the rule. See title *EVIDENCE*.

([32]) 5, P.L.R. 152; 1938, 1 S.C.J. 144; 3, Ct.L.R. 101.

ability see notes to sec. 1, under the heading: SOURCE, INTERPRETATION. In the following notes, cases on the enforcement of awards are also included to illustrate points applicable both under sec. 13 and sec. 14. As regards misconduct, cases under sec .11, are also included. It is important, however, to distinguish between cases of awards set aside on the grounds of misconduct and cases where awards were set aside on other grounds, as misconduct cannot be raised in opposition to the enforcement of an award under sec.14 whilst, in most other respects, secs.13 and 14 may be read together. See also notes to sec.14.

The notes indicate under what section any case quoted was decided, if it does not come under sec.13.

I. MISCONDUCT.

Meaning of Misconduct: Misconduct is not defined in the Ordinance and it appears, on a perusal of reported cases, that the word does not always carry the derogatory sense borne by the dictionary meaning. It need not imply corruption (C.D.C., T.A. 155/44)([33]). The term is somewhat fluid (C.A. 69/36) ([34]) and various adjectives are often used in conjunction with it to bring out its special connotation in the Ordinance. Thus in C.A. 154/42([35]) a distinction was made between *constructive misconduct,* being misconduct in matters of procedure, and *essential misconduct* where the misconduct is in matters other than procedure. The expressions *misconduct in the technical sense* (e. g., C.A. 5/37) ([36]) or *legal misconduct* (e. g., C.D.C., T.A. 137/39) ([37]) have also been used. And see C.A. 15/43([38]) and C.A. 32/43([39]): "technically... this is legal misconduct".

C.A. 17/35([40]) illustrates the difference between misconduct which precludes arbitrators from proceedings with the reference and misconduct which does not. Misconduct sufficient to remove an arbitrator under sec. 11 may well afford a sufficient ground to set aside an award (*vide ibid.*).

It is not sufficient to allege misconduct generally without giving particulars of the acts constituting misconduct (C.D.C., T.A. 137/39([41]); C.A. 53/22([42]), *Cf.* also C.A.D.C., Ha. 69/42([43])). Again, the Court should not set an award aside on the ground of misconduct without specifying the misconduct (C.A.D.C., T.A. 4/40) ([44]).

Misconduct does not depend on the consequences thereof, as they may affect one of the parties to the arbitration, but must be determined as at the time of commission (C.D.C., T.A. 155/44) ([45]), even if the misconduct am-

([33]) 1944, S.C.D.C. 321. Pending appeal. A case decided on an application under sec. 11.
([34]) 9, R. 726; 1, Ct.L.R. (N.S.) 48.
([35]) 9, P.L.R. 686; 1942, S.C.J. 951.
([36]) 1937, S.C.J. (N.S.) 74.
([37]) 1940, T.A. 172 (*in Hebrew but the expression is used in English*).
([38]) 10, P.L.R. 73; 1943, A.L.R. 58.
([39]) 10, P.L.R. 181; 1943, A.L.R. 208.
([40]) 1937, S.C.J. (N.S.) 83.
([41]) Note 37 *supra.*
([42]) 1, R. 175. Although decided on the former law, the case *semble* relied on English authorities, as regards procedure.
([43]) Ha. June-July, 1942, 37.
([44]) *Not reported.* (*In Hebrew*).
([45]) Note 33 *supra.*

ounts to a ruling, not carried out, given by the arbitrators in excess of authority, in circumstances amounting to misconduct (*ibid.*).

When once they enter on an arbitration, arbitrators must not be guilty of any act which possibly can be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on their part had in fact upon the result of their proceedings, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on their part, the award was unaffected by it, and was in reality just; arbitrators must not do anything which is not in itself fair and impartial. (*Per* Boyd, J., in *re* Brien and Brien [1910] 2 Ir. R. 84, quoted in C.A. 69/36)([46]).

See also the following headings under *Misconduct.*

Delegation of Powers: In C.D.C., T.A. 215/39([47]) an award was set aside on the ground that the submission referred the difference to His Eminence the President of the Chief Rabbinate, Tel-Aviv—Jaffa and that after a number of hearings before him, the arbitration had been concluded by two other members of the Rabbinate.

In the proceedings resulting in C.D.C., T.A. 155/44([48]), which was given on an application to remove arbitrators for misconduct, under sec.11, the arbitrators had entrusted an auditor with the power to examine the books, documents and vouchers of one of the parties, report on the profits made by such party over a period of years, to examine the parties, to ask for explanations, and to report on the activities of one of the parties abroad. The Court held that this constituted an improper delegation of powers by the arbitrators as the auditor would not confine himself to the scrutiny of any particular account, but might have to determine one of the question in issue: the claim by one party to participate in the profits of the other.

Where an umpire addressed a questionnaire to the arbitrators, one of whom replied, without sending copy of his reply to the other, and the other did not; this was held (C.A. 32/43)([49]) to constitute technical misconduct: Although this was done by consent, although the second arbitrator could have seen the questionnaire had he asked for it and although the umpire stated that it had not affected his award (see title *Improper communications with a Party,* and the second paragraph in title *Irregular conduct of the Proceedings, infra*).

The following act was held in C.A. 229/41([50]) not to constitute an unauthorised delegation of powers: The award was drawn up by an advocate, on the instructions of the arbitrators, in accordance with a rough draft prepared by the arbitrators. A comparison of the draft with the final award showed that the documents were in substance the same and that there had been no influence by the advocate.

In C.A. 243/37([51]), which was an action for the enforcement of an

([46]) Note 34 *supra.*
([47]) 1940, T.A. 170 (*in Hebrew*).
([48]) Note 33 *supra.*
([49]) Note 39 *supra.*
([50]) 8, P.L.R. 603; 1941, S.C.J. 616; 11, Ct.L.R. 126.
([51]) 5, P.L.R. 107; 1938, 1 S.C.J. 101.

award, the award was upheld although the arbitrator had, in a Land Court reference, consulted the President of the Land Court before delivering his award.

Quaere whether two arbitrators may give an award without consulting the third arbitrator (*vide* C.A. 235/43)([52]).

Failure to state a Case: Arbitrators have a discretion to state a case unless called upon by the Court to do so (see sec. 8 and notes) but in C.D.C., T.A. 12/40([53]) an award was remitted for a case to be stated.

Hearing the Evidence: ([54]) "A general statement has been made that arbitrators may proceed in receiving evidence without reference to principles of law or equity. Now we know that position to be contrary to law and the practice of the Courts." (*Per* Graham, B. in A.G. *v.* Davidson, [1825] 148 E.R. 366 Ex. Ch., quoted in C.D.C., T.A. 155/44)([55]). It is well established that arbitrators are bound by the ordinary rules of evidence and can only hear witnesses in cases where a Court could hear them (C.D.C., Ja. of 1929)([56]) and cannot refuse to hear witnesses where their evidence is admissible (C.A.D.C., T.A. 211/38([57]); C.D.C., T.A. 285/38([58]); C.D.C., T.A. 141/39([59])).

"I never understood that arbitrators were at liberty to deviate from those rules which govern the Superior Courts... I agree... that this is not legal evidence, and if it is not legal evidence, that it ought not to be received." (*Per* Hullock, B. in A.G. *v.* Davidson, quoted in C.D.C., T.A. 155/44)([60]). Arbitrators are therefore correct in refusing to hear witnesses to contradict the explicit terms of a written contract (C.D.C., Ja. of 1929)([61]) but their refusal to hear evidence on a question of usurious interest constitutes misconduct (C.D.C., T.A. 141/39, *supra,* and see title *EVIDENCE*). The provisions of the law of evidence relating to usurious loans may not be waived (*ibid.*). Whether other rules of evidence may be waived by consent was left open in this last case and *vide* C.A. 15/42([62]) where it was held that the arbitrator had, in fact, not disregarded them. But in C.D.C., T.A. 155/44([60]) where it was contended that the arbitrators had been guilty of misconduct on the ground that they had allowed inadmissible evidence, the Court held that a mistaken decision to allow inadmissible evidence did not amount to misconduct, "particularly in this case where the parties themselves relieved the arbitrators, by the submission, from the rules of procedure and evidence".

In the same case it was held that such provision in the submission did not entitle the arbitrators to call witnesses against the wishes of the parties.

([52]) 1943, A.L.R. 814.
([53]) 1940, T.A. 170 (*in Hebrew*).
([54]) This heading includes notes which properly belong to sec. 8(1)(a) and clauses (*f*) and (*g*) of this Schedule. The notes are collected under this heading for uniformity.
([55]) Note 33 *supra.*
([56]) 7, R. 38.
([57]) 1938, T.A. 78.
([58]) 1940, T.A. 175 (*in Hebrew*).
([59]) 1940, T.A. 174. (*in Hebrew*).
([60]) Note 33 *supra.*
([61]) Note 56 *supra.*
([62]) 9, P.L.R. 157; 1942, S.C.J. 216; 11, Ct.L.R. 107. But answered affirmatively in an *obiter dictum* given in C.D.C., T.A. 155/44.

Such act pertains to the powers of arbitrators and not to rules of evidence and the arbitrators, in thus exceeding their powers, are guilty of misconduct. On a parity of reasoning, the Court held that such a clause does not authorise the arbitrators to exclude a party from the hearing or from examining witnesses.

In W.C., Ja., 2/33([62]) it was held that a medical certificate, unless uncontested, could not be accepted by an arbitrator as evidence.

When an action in Court is referred to arbitration the parties may agree that the arbitrator should act on the evidence heard by the Court (C.A.206/37) ([63]).

An arbitrator who refuses to hear the evidence (C.D.C., T.A. 285/38) ([64]) or accept the documents submitted by the parties (C.D.C., T.A. 147/41, 299/41) ([65]), is guilty of misconduct: "Typical misconduct in the legal sense", in the words of C.D.C., T.A. 313/38 ([66]). So also if he issues an award without giving an opportunity to the defendant to plead or to adduce evidence (C.D.C., T.A. 265/40)([67]). But the point cannot be taken if the award is made in favour of the party whose witness the arbitrator refused to call and hear (C.A. 235/43) ([68]).

The arbitrator does not require any "conclusive" evidence to support his findings, there being no such test in law. The true test is, whether there is *any* evidence to support the finding (C.A. 48/40)([69]).

The arbitrators may not call witnesses *proprie motu* if the parties, or one of them, object (*In re* Enoch and Zaretsky, Bock, & Co. [1910] 79 L.J.K. B. 363; 101 L.T. 801, followed in C.D.C., T.A. 155/44 ([70])), particularly when this is done after the evidence adduced by only one of the parties has been heard. This rule applies whether the witnesses are parties to the proceedings or not; and whether or not the submission relieves the arbitrators from the rules of procedure and evidence (C.D.C., T.A. 155/44) (*supra*). An infringement of this rule constitutes misconduct as it is not of the functions or within the authority of an arbitrator to seek evidence for the plaintiff or for the defendant. He must adjudicate on the basis of the evidence brought before him (*ibid.*). But if no objection is taken before the witness is sworn, the award will be upheld (C.A. 228/41)([71]).

The arbitrator is generally authorised to enquire into matters not submitted to him if they assist him to decide upon the questions before him; and even if he receives evidence which does not directly affect the questions in issue, this does not amount to excess of authority which might justify the award being set aside (Eastern Counties Railway Co *v.* Robertson [1843] 1 D. & L. 498, 6 M. & G. 38, followed in C.D.C., T.A. 155/44([72])). But the parties may and

([62]) 5,R. 1881.
([63]) 1937, S.C.J. (N.S.) 106.
([64]) 1940, T.A. 175 (*in Hebrew*).
([65]) 1941-2, T.A. 189 (*in Hebrew*).
([66]) *Not reported.*
([67]) 1940, T.A. 103 (*in Hebrew*).
([68]) 1943, A.L.R. 814.
([69]) 7, P.L.R. 163. 1940, S.C.J. 385; 7, Ct.L.R. 170.
([70]) Note 33 *supra*. See also C.D.C. T.A. 141/39.
([71]) 8, P.L.R. 624; 1941, S.C.J. 570; 11, Ct.L.R. 222. See also note 95 to sec. 2, *supra*.
([72]) Note 33 *supra*.

should object to the arbitrator hearing evidence on matters not submitted with a view to adjudicate thereon. (C.D.C., Ja. 133/43, 147/43) (73). Failure to object on time will estop the parties from challenging the award (*ibid.*).

In C.A. 104/38(74) certain documents were locked by order of Court in an action in which the arbitrators had been appointed receivers. Upon a party complaining that he had not been given access to the documents which were material to his case, it was held that he should have applied to the Court for an order to release the documents.

In C.D.C., T.A. 9/41(75), where the third arbitrator had not heard the evidence, the award was remitted.

In addition to cases cited in this note where the Court refused to set aside awards, the following acts of arbitrators, connected with evidence, were also upheld by the Courts:

An examination by the arbitrators of the *locus in quo* in the absence of the parties (C.L.A. 2/33) (76); where the reference is made in Court, relying, by consent of the parties, on the evidence heard by the Court (C.A. 206/37) (77); allowing evidence of previous contracts between the plaintiff and third parties in order to prove relationship with the defendant (C.D.C., T.A. 155/44 (78), following Hagger *v.* Baker [1845]. 14 L.J. Ex. 227 and see next paragraph); refusing to hear evidence after a ruling, made on the completion of the examination of the agreed witnesses, that no further evidence should be heard (C.A. 229/41) (79); refusing to hear the evidence of the parties where the point was not pressed, and other evidence made it unnecessary (C.D.C., T.A. 147/39) (80); refusing to appoint additional experts in a case where, through the neglect of one party, the experts were not told to examine sanitary installations, (*ibid.*); failure to decide on onus of proof when a case of ownership is not made out after hearing all the evidence (C.A. 243/37) (81); hearing a defendant witness before the conclusion of the plaintiff's evidence when the witness had been brought from out of town and that procedure had been adopted at the request of the defendant himself (C.A.D.C., Ha. 69/42) (82); hearing the evidence of an unsworn witness and requiring a party whose evidence has been heard to submit an affidavit (C.D.C., T.A. 319/43) (83).

A point cognate to the hearing of the evidence arose in the above case where an affidavit was filed and withdrawn after the opposing party had ob-

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(73) 1944, S.C.D.C. 309.
(74) 1938, 1 S.C.J. 319; 3, Ct.L.R. 276.
(75) 1941-2, T.A. 213 (*in Hebrew*).
(76) 1, P.L.R. 856; 1, R. 194; P.P. 9.11.33. The judgment holds that arbitrators are not bound by the (now repealed) Evidence on Commission Rules, 1926. Why should these rules not bind the arbitrators when other rules do? See *infra*, note *Irregular conduct of the Proceedings.*
(77) 1937, S.C.J. (N.S.) 106.
(78) note 33 *supra.*
(79) 8, P.L.R. 603; 1941, S.C.J. 616; 11, Ct.L.R. 126.
(80) 1940. T.A. 14.
(81) 5, P.L.R. 107; 1938, 1 S.C.J. 101.
(82) Ha. June-July, 1942, 37.
(83) 1944, S.C.D.C. 276. See also notes to clauses (f) and (g) of the Schedule, *post.*

jected to it. The opposing party had, as an alternative to the objection, asked to cross-examine the deponent and this was refused after the affidavit had been withdrawn. The Court upheld the refusal (notwithstanding the ruling in *re* Quarty Hill & Co., *ex parte* Young [1882] 21 Ch. D. 642) ([84]). The case is pending appeal.

See also *Irregular conduct of the Proceedings, infra.*

Improper communications with a Party: Private meetings between the arbitrator and one of the parties, when questions pertaining to the controversy are discussed have repeatedly been held to constitute misconduct (C.A. 69/36) ([85]). In C.A. 154/42([86]) an award was set aside for misconduct as the arbitrator was proved to have frequently conversed with one of the parties in the absence of the other, stopping the conversation when the latter appeared. On the other hand if, as frequently happens, one party arrives to the proceedings before the other, there is nothing wrong in the arbitrator receiving the former in his room pending the arrival of the second party (C.A.D.C., Ha. 69/42) ([87]).

Generally, in deciding whether or not there has been misconduct on that ground, the point is not the effect which the misconduct had on the result of the arbitration proceedings, but the effect it might possibly have produced (C.A. 32/43) ([88]). The arbitrator's duty is not merely to see that justice is done, but also to behave in such a way that justice appears to be done (C.A. 69/36) ([89]).

See also other headings in this section.

A formal decision by the arbitrators to take payment of their fees from one of the parties, who was in strained financial circumstances, by means of promissory notes was held not to amount to misconduct (C.A. 229/41) ([90]). It had been argued that the arbitrators could no longer be impartial as they had an interest in one of the parties succeeding and thus being able to meet the notes.

See also heading *Partiality, infra.*

Irregular conduct of the Proceedings: In the absence of special directions in the submission, the arbitration should follow the ordinary rules of

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([84]) *I.e.*, that the deponent of an affidavit cannot avoid being cross-examined thereon if the affidavit is subsequently withdrawn.

([85]) 9, R. 726; 1, Ct.L.R. (N.S.) 48. On an application under sec. 11.

([86]) 9, P.L.R. 686; 1942, S.C.J. 951.

([87]) Ha. June-July, 1942, 37. In C.A. 53/22 (1, R.175), where no corruption was alleged, an interview granted to a party by one of the arbitrators was held not to afford a ground for setting aside the award. The decision was based, however, on the Turkish law and it was stated that English decisions were inapplicable in arbitration cases held under the provisions of the *Mejelle*.

([88]) 10.P.L.R. 181; 1943, A.L.R. 208.

([89]) 9,R. 726; 1, ct.L.R. 48. (Application under sec. 11). See the quotation from this case in note *Meaning of Misconduct, supra.*

([90]) 8, P.L.R. 603; 1941, S.C.J. 616; 11, Ct.L.R. 126.

procedure (C.D.C., T.A. 215/39)([91]) and keep a proper (C.D.C., T.A. 319/43) ([92]) record of the proceedings (C.D.C., Ja. 392/31)([93]).

An arbitrator should on no account hear the evidence of one party in the absence of the other (C.A. 2/35)([94]); C.D.C., T.A. 141/39 ([95])), especially after agreement by the parties that no further evidence should be heard (Walker *v.* Frobisher [1801] 6. Ves. 70, quoted in C.A. 2/35([94])) although the submission exempts the arbitrator from the rules of procedure and evidence (*vide* C.D.C., T.A. 155/44)([96]) even if the arbitrator swears that the evidence so admitted had no effect on his award, as the Court should not permit an arbitrator to decide so delicate a matter as to whether a witness, examined in the absence of one of the parties, had an influence on him or not (Walker *v.* Frobisher (*supra*) and see title *Improper communications with a Party* and third paragraph in title *Delegation of Powers, supra.*). Again, an arbitrator will be guilty of misconduct if he summons a witness without the request of either party (C.D.C., T.A. 21/37 ([97]); C.D.C., T.A. 141/39 ([98])) or hears such witness in the absence of the parties (C.D.C., T.A. 21/37) (*supra*).

In C.D.C., T.A. 157/40 ([99]) it was held that the conduct of the proceedings in the absence of one of the arbitrators had been irregular. An arbitrator should not refuse to hear witnesses requested by a party (C.D.C., T.A. 285/38)([100]); refuse to allow a party to cross-examine witnesses (Bache *v.* Billingham [1894], 1 Q.B. 107, 63, L.J.M.C.5., followed in C.D.C., Ja. 133/43, 147/43([101]); or generally refuse to hear evidence and accept the documents of a party (C.D.C., T.A. 147/41, 299/41)([102]). But see C.A. 235/43([103]). See also *Hearing the Evidence, supra.*

In C.A. 132/43 ([104]) the Court held that the parties could not challenge the regularity of the proceedings after they had agreed that the arbitrator should ask for the opinion of a third party by telephone regarding the price. See *Acquiescence, Estoppel, Waiver, infra.*

As to service of summons, see *Proceedings in Absence.* As to evidence, see *Hearing the Evidence.* See also *Insufficient Grounds for setting aside Awards.*

([91]) 1940, T.A. 170 (*in Hebrew*). See also note 76 *supra.*
([92]) 1944, S.C.D.C., 276.
([93]) I, R. 193. The manner of keeping the record is detailed in the notes to sec. 4. Failure to keep a proper record might perhaps afford a ground for setting aside an award for legal misconduct (C.D.C. T.A. 139/43 *supra*). See also note, (*Improper Record*) under *Insufficient Grounds for setting aside Awards, infra,* in this section.
([94]) 1937, S.C.J. (N.S.) 69.
([95]) 1940, T.A. 174 (*in Hebrew*).
([96]) Note 33 *supra.*
([97]) *Not reported.*
([98]) 1940, T.A. 174 (*in Hebrew*) and see C.A.D.C., T.A. 155/44 (note 33 *supra*).
([99]) *Not reported*
([100]) 1940, T.A. 175 (*in Hebrew*).
([101]) 1944, S.C.D.C. 309.
([102]) 1941-2, T.A. 189 (*in Hebrew*).
([103]) 1943, A.L.R. 814.
([104]) *Ibid.* 790.

Misapplication of the Law: This constitutes misconduct and affords a ground for setting aside the award (*vide* C.D.C., T.A. 155/44) ([105]). A finding of law may often be inferred from the award itself, as when award is given in the plaintiff's favour, thereby implying that a defence of prescription has been overruled (C.A. 228/41) ([106]).

In deciding on the admissibility of evidence, if whilst acting honestly the arbitrator comes to a false legal conclusion, he is not guilty of misconduct (Hagger *v.* Baker [1845] 14 L.J. Ex. 227, followed in C.D.C., T.A. 155/44) (*supra*). But if a mistake in law is apparent on the face of the award, the award may be set aside. See *Error patent on face of the Award, infra.*

An arbitrator is guilty of misconduct if he delivers an award in a matter proved to his satisfaction to have been finally determined otherwise (H.C. 98/34). ([107]).

Partiality: Partiality or bias constitute misconduct (*vide* C.A. 131/30) ([108]) and are good grounds for setting aside an award (C.D.C., Ja. 133/43, 147/43, quoting Russell, 13th ed., pp. 178 and 360) ([109]). In C.A. 53/22([110]) the award was sought to be set aside *inter alia* on the ground that the arbitrator named by the respondent had been paid by the latter for his services as arbitrator, and had acted as a partisan of the respondent. English decisions were quoted in support of the argument. The Court held:

> "... these decisions relate to arbitrations under the English Arbitration Acts, and the principles which govern them are not necessarily applicable in this country. It is unquestionably a common practice here for parties in disagreement who do not wish to go to the Courts, to submit their disputes to the decision of arbitrators, one of whom is chosen by each party and the third either by agreement between the parties or by the other two arbitrators; and such arbitration submissions are made with the full understanding and intention that the arbitrator appointed by each party is to some extent the representative of the party empowered by him to come to a reasonable settlement, and is not acting in a purely judicial capacity; and that the third arbitrator is an umpire only called in to decide points upon which the other two arbitrators cannot come to an agreement. This is the form of arbitration which appears to be contemplated by Article 1850 of the *Mejelle*.
>
> "This practice has obvious disadvantages but where it is the parties' intention to adopt it, an award is not to be set aside on the ground that the arbitrators have not acted purely judicially."

The enactment of the Arbitration Ordinance has rendered this decision inapplicable, and English authorities are now material in applications under sec. 13 and on the meaning of misconduct. (See note SOURCE, INTERPRETATION, in sec. 1). The practice described in the decision did not, however, lapse with the enactment of the Ordinance and it is customary, in a great number

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([105]) Note 33 *supra*.

([106]) 8, P.L.R. 624; 1941, S.C.J. 570; 11, Ct.L.R. 222. And see note 95 in sec. 2.

([107]) 2,P.L.R. 231; 9,R. 922; P.P. 3.1.35. Workmen's compensation case.

([108]) 5,R. 1810. Judgment of the District Court.

([109]) 1944, S.C.D.C. 309.

([110]) 1,R. 175.

of arbitrations, that the parties are represented by two advocates acting as arbitrators and that the third arbitrator or the umpire holds the balance between the interests represented by the two arbitrators. The proceedings are conducted with a show of judicial independence which is entirely unjustified by the position of the partisan arbitrators. C.D.C., T.A. 319/43([111]) where the Court pointed out, without comment, that the two arbitrators appointed by the parties had represented those parties respectively in Court proceedings which were withdrawn and submitted to arbitration; and C.D.C., T.A. 122/38([112]), where the conduct of one arbitrator ("the petitioner's arbitrator") was referred to the party who appointed him, indicate the tolerant attitude of the Courts to this practice.

This practice was never challenged in reported cases, but in C.A. 125/43([113]) it arose incidentally during the course of counsel's arguments and was criticized by the Court. The comments of the Court on this question do not appear in the judgment.

In C.D.C., T.A. 147/41, 299/41([114]), an award was set aside on the ground that one of the arbitrators had acted as the advocate of a party during the course of the proceedings.

In C.D.C., Ja. 133/43, 147/43([115]) the cumulative effect of the following instances of bias and animosity on the part of an arbitrator was held sufficient to set aside the award([116]), but doubts were expressed by the Court as to whether any one of these acts alone would have sufficed to justify the award being set aside on these grounds:

> "Upon the applicant declining to accept a proposed settlement to which the other parties had agreed the arbitrator said to him, 'Then I will take it from you by majority', meaning presumably that he would force upon him the terms which had been agreed to by the other parties. Another allegation is that, while the other parties before giving evidence took the oath in the ordinary form, the applicant was required by the arbitrator to take it in an unusual, long and very solemn form, the obvious implication being that before even he had testified, the arbitrator had already conceived greater doubts as to his veracity than that of the others" ([117]).

See also, on partiality, notes *Meaning of Misconduct, Improper communication with a Party, supra.*

([111]) 1944, S.C.D.C. 276.

([112]) 1938, T.A. 128. Leave to appeal refused in C.A. 12/39 (6, P.L.R. 119; 1939, S.C.J. 92; 5, Ct.L.R. 119; P.P. 11.5.39).

([113]) 10, P.L.R. 281; 1943, A.L.R. 301. In C.A. 131/30 (5, R. 1810), judgment of the District Court, the Court commented that, "some of these arbitrators would seem to be entirely ignorant of the meaning of the word 'impartial' ".

([114]) 1941-2, T.A. 189 (*in Hebrew*).

([115]) Note 109 *supra.*

([116]) But the Court also held that the award could be set aside on the sole ground of the refusal by the arbitrator to allow a party to cross-examine witnesses and made a finding that the arbitrator had been guilty of such act. See also *Irregular conduct of the Proceedings, supra.*

([117]) *Cf.* C.D.C., T.A. 319/43 (note 111 *supra*) discussed in the notes to clauses (*f*) and (*g*) of the Schedule, *post.*

Proceeding ex parte: The parties should be summoned to attend the proceedings. This should be done either by formal service of a notice of hearing, or personally by the arbitrator himself: C.A. 15/43([118]). In that case the arbitrator asked the son of one of the parties to notify his father. The latter failed to appear at the hearing and the arbitrator proceeded in his absence. This was held to constitute technical misconduct.

Although it is improper to hold meetings in the absence of a party who was not summoned (C.A. 15/43 (*supra*); C.A. 135/37([119])), and the parties should be notified that proceedings may be held in absence if they fail to appeal (C.A.D.C., Ha. 69/42)([120]), if a meeting is scheduled to take place on a certain date and one of the parties fails to attend after making an unsuccessful application to adjourn and without ascertaining whether the adjournment was granted, the arbitrator may proceed in the absence of that party (C.A. 135/37) (*supra*). Nor can a party who chooses to withdraw from the proceedings after making an unsuccessful application to adjourn, later take objection to the proceedings having been concluded in his absence (C.A.D.C., Ha. 69/42) (*supra*). Again, if a recusant party challenges the authority of the arbitrator and refuses to appear, the arbitrator should warn him that if he fails to appear, the proceedings will be held in his absence (Gladwin *v.* Chilcote [1841] 9 Dowl. 550; 5 Jur. 749; 61 R.R. 825, followed in C.A. 180/42)([121]). More than one warning need not be given (C.A. 180/42) (*supra*).

Res Judicata: See *Misapplication of the Law, supra,* last paragraph and see *Chose Jugée, Res Judicata* under INHERENT JURISDICTION, *infra.*

II. IMPROPER PROCUREMENT OF AWARD:

In the absence of any local decisions on this head, reference should be made to English authorities. An award is improperly procured, under English law, when the arbitrator has been bribed or treated or when fraud has been perpetrated on the arbitrator.

III. INHERENT JURISDICTION:

In the cases following, awards have been set aside on grounds other than misconduct or improper procurement of the award. They are set down under this heading in accordance with the opening remarks in note *Grounds for setting aside Award, supra.*

Absence of Submission: Reference to the notes on *Submission,* in sec. 2, and to note *Award in favour of Third Party, infra,* should be made for the proposition that an award cannot be made, on pain of nullity, against a person who is not a party to a valid submission. The note *Nullity, infra,* sets out authorities to the effect that application may, though need not always be made to set aside an award which is a nullity.

In C.D.C, T.A. 157/40([122]) the plaintiff had left the arbitration proceedings before their completion after stating that she was no longer interested

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([118]) 10, P.L.R. 73; 1943, A.L.R. 58.
([119]) 1937, S.C.J. (N.S.) 115; 2, Ct. L.R. 104.
([120]) Ha. June-July, 1942, 37.
([121]) 9, P.L.R. 745; 1942, S.C.J. 788.
([122]) *Not reported.* (*In Hebrew*).

in the claim. The Court held that the arbitrators should not have proceeded in the absence of a fresh submission.

But see note *Implied Submission* in sec. 2 and note *Acquiescence, Estoppel, Waiver, infra.*

See also note 13 to sec. 5.

Ambiguous Award: Where an award dealt with a period of six years — from 1936 to 1942 — without stating the dates on which the period commenced and terminated, such dates having relevance on the relations between the parties, the Court relied on the ambiguity as one of the grounds for setting the award aside (C.D.C., T.A. 280/43) ([123]).

Arbitrator functus officio: The following decision was given in C.D.C., T.A. 161/41 ([124]): During the course of the proceedings before the arbitrator, a question arose as to whether the assignment of part of the claim by the plaintiff to a third party had not avoided the authority of the arbitrator. The question was referred to an advocate who gave an opinion that the arbitrator was *functus officio*. The arbitrator nevertheless proceeded with the reference in case the amount awarded should exceed the amount assigned. He later found that the entire amount to which the plaintiff could be entitled had been assigned, and following the opinion received, non-suited the plaintiff. The award was set aside by the Court on the ground that the arbitrator had become *functus officio* on the date of the assignment and should not have proceeded with the reference. A subsequent re-assignment was also held not to affect the position.

After delivery of his award, the arbitrator is *functus* (C.A. 208/38([125]); and *vide* C.D.C., T.A. 292/39([126])) but his authority is revived by a remittal of the award (C.A.D.C., T.A. 40/41([127])). His authority subsists when he makes interim decisions (see notes to sec. 4) or exercises the powers conferred by sec. 8(3). After stating a case or reserving a point of law an arbitrator remains seized with the reference (C.A. 1/34) ([128]).

Nor can an arbitrator make an award after expiration of the period or extended period within which the award may, under clauses (*c*) and (*e*) of the Schedule, be made. See next note and cross-references.

Award delivered out of Time: Clauses (*c*) and (*e*) of the Schedule provide a statutory period within which an award may be delivered. An award delivered after the expiration of the period of the submission will be set aside (C.D.C., T.A. 313/38([129]); C.D.C., T.A. 229/42, 235/42([130])), though the period may be extended by the arbitrator before its expiration (see clauses (*c*) and (*e*) of the Schedule) or by consent of the parties, express or im-

([123]) *Not reported. (In Hebrew).*

([124]) 1941-2, T.A. 188 (*In Hebrew*).

([125]) 1938, 2. S.C.J. 106; 4, Ct.L.R.; 145; P.P. 11.11.38.

([126]) *Not reported. (In Hebrew).*

([127]) 1941-2, T.A. 7.

([128]) 2, P.L.R. 127; 5, R. 1882; 9, R. 917; P.P. 6.7.34. Workmen's Compensation case.

([129]) *Not reported (In Hebrew).*

([130]) 1941-2, T.A. 141 (*In Hebrew*).

plied (C.A. 93/35)[131]. But an award delivered after the expiration of those periods will not be set aside if the parties, by appearing before the arbitrator after the expiry of the period, impliedly consent to revive the arbitrators' authority (*ibid.*; C.D.C., T.A. 241/38[132]; and C.D.C., Ja. 133/43, 147/43[133]).

Consequently, when the arbitrators purport to enlarge the time after it has expired; an extension which, according to the strict legal position, is void and ineffective, a party who has acquiesced cannot challenge the validity of the extension (*ibid.*).

In C.D.C., T.A. 122/38[134], in an application to set aside the award on the ground that it had been delivered out of time, the Court enlarged the time and remitted the award for completion.

See also *Acquiescence, Estoppel, Waiver, infra,* and notes to clause (*c*) of the Schedule.

Award in favour of a Third Party: An award made in favour of a person who was not a party to the arbitration is a nullity and will be set aside (*vide* C.A. 237/38)[135], but see notes *Nullity* and *Severability, infra.* So also, an award given as between parties some of whom were not parties to the submission, will be set aside (C.D.C., T.A. 229/42, 235/42[136] and see notes to *Submission,* sec. 2). When a party to the submission assigns his claim during the course of the proceedings, the arbitrator becomes *functus officio* and cannot make an award (Cottage Club Estates Ltd. *v.* Woodside Estates Co. Ltd. [1927] 44 T.L.R. 20, 97 L.J.K.B. 72, followed in C.D.C., T.A. 161/41)[137]. A subsequent reassignment does not alter the position (*ibid.*).

Award not signed: Under the provisions of sec. 15(4) it is necessary to produce a signed copy of the award in applications to set aside or to enforce an award. When the reference is to more than one arbitrator, the award to be valid, must be unanimous unless otherwise provided in the submission (United Kingdom Mutual Steamship Assurance Association *v.* Houston & Co. [1896] 1 Q. B. 567, 65 L.J.Q.B. 484, followed in C.L.A. 7/33)[138]. See, however, C.D.C., T.A. 137/39[139] as quoted in the notes to sec. 4, heading *Implied Powers.*

Interim decisions should also be signed by all the arbitrators (C.D.C., Ja. 392/31[140], where the award was remitted on an application to enforce).

Award unreasonable and uncertain on the face of it: In C.D.C., T.A. 157/40[141] an award was set aside on this ground as it purported to order payment of maintenance for an unlimited period of time.

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(131) 7, R. 48.
(132) 1938, T.A. 133.
(133) 1944, S.C.D.C., 309.
(134) Note 112 *supra.*
(135) 6, P.L.R. 24; 1939, S.C.J. 12; 5, Ct.L.R. 33; P.P. 24.1.39.
(136) 1941-2, T.A. 141 (*In Hebrew*).
(137) 1941-2, T.A. 188 (*In Hebrew*).
(138) 2, P.L.R. 297; 1, R. 196; P.P. 9.5.34.
(139) 1940, T.A. 172 (*In Hebrew*).
(140) 1, R. 193.
(141) *Not reported.* (*In Hebrew, but the English expression is used in the judgment.*)

See also *Conditional Award*, and see *Error patent on face of the Award, infra*.

Chose Jugée, Res Judicata: A judgment in a criminal case is not *chose jugée* between the parties and is no bar to a claim. The arbitrator cannot, therefore, refuse, when a plea of *res judicata* is raised in such circumstances, to hear evidence (C.A.D.C., T.A. 211/38)(142). See also last paragraph of heading *Misapplication of the Law* under MISCONDUCT, *supra*.

Conditional Award: An award in the alternative is bad (C.A. 228/41 (143) where the award was remitted as being conditional). An award of partition providing that one party should pay a specified sum to the other party if a subsequent valuation would establish that the former's share was worth more than the latter's, was held in C.A. 113/35 (144) not to be conditional. In C.A. 13/31 (145) it was held that an award for the delivery of goods or money was not invalid as an award in the alternative.

In C.A.D.C., T.A. 114/40(146), a condition imposed in an award involving a third party, was not upheld (case of enforcement of award), the award being held to be bad on the face of it.

See also *Award unreasonable and uncertain on the face of it, supra*.

Error patent on face of the Award: If there is an error patent on the face of the award, such as when the award sets out a number of alternative remedies (C.A. 228/41)(147), or fails to dispose of all the matters submitted (C.A.D.C., T.A. 114/40)(148), or sets out a wrong legal conclusion (*vide* Hagger *v.* Baker [1845] 14 L.J. Ex. 227, quoted in C.D.C., T.A. 155/44)(149), the award will be set aside (*ibid*). Nor can it be enforced, though it may be remitted (C.A. 228/41) (*supra*). See *Failure to decide all Questions, infra*.

Where the arbitrators have gone wrong on a point of law, such as on a question of onus of proof, and the error appears on the face of the award, the award will be set aside (C.A. 144/33(150), following Landauer *v.* Asser [1905] 2 K.B. 184, 17 L.J.K.B. 659), though in C.D.C., T.A. 152/42(151), in an application to enforce the award, the error was corrected and the award enforced.

If the mistake of law is not patent on the face of the award, or on some document incorporated into the award by the arbitrators (C.D.C., T.A. 319/43 (152) and see *infra*) the point cannot be taken (*ibid.*, quoting Russell 13th ed., pp. 152 *seq.*, 192 *seq.* and *vide* C.A. 228/41(153)).

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(142) 1938, T.A. 78.

(143) Note 106 *supra*. Although awards in which conditions were imposed have been supported (*ibid.*, quoting Russell, 1931 ed., pp. 229-30).

(144) 1937, S.C.J. (N.S.) 72.

(145) 1,R. 190. (*Preliminary ruling*).

(146) 1940, T.A. 165 (*in Hebrew*).

(147) Note 106 *supra*.

(148) Note 146 *supra*. Case on an application to enforce.

(149) Note 33 *supra*. Case on an application under sec.11.

(150) 2,P.L.R. 331; 4,R. 1572; 7,R. 41; P.P. 29.5.35.

(151) 1941-2, T.A. 13.

(152) 1944, S.C.D.C. 276.

(153) Note 106 *supra*.

"The expression 'on the face of the award', is most succintly defined by Lord Dunedin in the Privy Council case of Champsey Bhara & Co. *v.* Jicraj Baloo Spinning and Weaving Co. Ltd. [1923] A.C. 480, where, after stating the rule, he says (at p. 487): 'An error of law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous." (C.D.C., T.A. 319/43) (*supra*). The submission is not a document so incorporated in the award (*ibid.*).

There is nothing to prevent the arbitrator making his award in such a way as to prevent the point from being raised, such as by giving no reasons for his findings (*ibid.*).

Quaere the effect of the arbitrator, in such a case, being a layman (*vide* C.A. 228/41, *supra*, and C.D.C., Ja. 234/34([154]), as quoted in notes to sec.2). See also notes to sec. 8, *supra*, p. 108.

An allegation that there was no evidence to support the arbitrator's findings is not a plea of mistake of law (C.A. 13/37([155]); *cf.* C.D.C., T.A. 147/39([156])).

A slight error in calculation, if patent on the face of the award, may be corrected by the Court and the award enforced (C.A. 104/38)([157]). If the mistake in calculation is not patent on the face of the award, the Court will not set aside the award (C.A. 2/35)([158]), but if there is an affidavit by the arbitrator admitting the error (such as subtracting two sums instead of adding them), the award will be set aside (*ibid.*, quoting *in re* Hall and Hinds [1841] 10 L.J.C.P. 210). If there is no affidavit by the arbitrator and it appears that he offered to correct the mistake and this was refused by the unsuccessful party, the award will not be set aside (Phillips *v.* Evans [1843] 13 L.J. Ex.80, cited in C.A. 2/35) (*supra*). See also *Misapplication of the Law, supra.*

Excess of Jurisdiction: The terms of the submission should be examined in order to determine whether the arbitrators have exceeded their authority by going into matters beyond the reference. If the submission is in general terms, the arbitrators may hear all the disputes arising thereout (*vide* C.A.D.C., T.A. 53/39)([159]). Thus, a submission referring disputes as to the ownership of a house will include all disputes connected with the ownership and will not be confined to contractual relations only (C.D.C., T.A. 147/39)([160]).

Unless specifically authorised by the submission or by consent of the parties, the arbitrator may not adjudicate on matters arising after the date on which they entered on the reference (C.D.C., T.A. 137/39)([161]), or adjudge interest on the award (C.D.C., T.A. 292/39)([162]) in both cases the offending

([154]) Set aside on another point in C.A. 93/35 (7, R.48).
([155]) 1937, S.C.J. (N.S.) 86; 1, Ct.L.R. 123.
([156]) 1940, T.A. 14.
([157]) 1938, 1 S.C.J. 390; 3, Ct.L.R. 276.
([158]) 1937, S.C.J. (N.S.) 69.
([159]) 1939, T.A. 13.
([160]) 1940, T.A. 14.
([161]) 1940, T.A. 172 (*in Hebrew*).
([162]) *Not reported.* (*In Hebrew*).

part of the award was struck out and remainder upheld - see heading *Severability, infra*). See also C.A. 98/42([163]) under *Land Court References, infra.* But objection should be made and recorded when the arbitrator steps out of the limits imposed upon him by the submission, for if no protest has been made, the award will not be set aside (Macaura *v.* Northern Assurance Co. Ltd. [1925] A.C. 619, 94 L.J.P.C. 154, quoted in C.D.C., Ja. 133/43, 144/43) ([164]). An arbitrator cannot exercise powers under the submission before entering on the reference (C.D.C., T.A. 363/43) ([165]).

When two awards are given this constitutes an excess of jurisdiction and the second award will be set aside (C.A.D.C., T.A. 169/39) ([166]) as a nullity (C.A. 247/38) ([167]), it being implied in all cases, unless otherwise provided in the submission, that arbitrators may give only one award (C.A. 117/39) ([168]). (See also notes to sec.4).

The plea of excess of jurisdiction does not include contentions that the award is not executable on the face of it, or that there has been a wrongful extension of time by the arbitrators. These points were held, in an action under sec.14, to be separate points of opposition to an award (C.D.C., T.A. 241/38) ([169]).

Arbitrators may give an award dissolving a partnership, if this is authorised by the submission (C.A.D.C., T.A. 25/40([170]); C.D.C., T.A. 9/41) ([171]) and provide terms for the settlement of disputes between the partners (C.D.C, T.A. 241/38) ([172]). If the arbitrator is authorised to appoint a receiver, he may do so only after entering on the reference (C.D.C., T.A. 363/43) ([173]).

See also *Hearing the Evidence, Delegation of Powers,* under *Misconduct, supra, Nullity infra.* See also note 13 to sec.5.

Failure to decide all Questions: If the submission *entitles* the arbitrator to deal with a certain question (such as the dissolution of a partnership) the award is valid even if he has not dealt with that question (C.D.C., T.A. 241/38) ([174]). In C.D.C., T.A. 319/43([175]) the Court considered that the existence or non existence of a partnership between the parties had not been made an issue in the submission and that it was therefore not necessary for the arbitrators to make a finding on that question. The submission referred to a claim for an account of the profits and losses of the business transacted by one of the parties "and to which (the other party) claims to be partner".

Where such licence cannot be read in the submission, the arbitrator must adjudicate on all matters referred and he cannot leave differences between the

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([163]) 1942, S.C.J. 655; 12, Ct.L.R. 118.
([164]) 1944, S.C.D.C. 309.
([165]) 1944, S.C.D.C. 192.
([166]) 1940, T.A. 22 and see C.A. 117/39 *infra.*
([167]) 6, P.L.R. 31; 1939, S.C.J. 13; 5, Ct.L.R. 39; P.P. 27.1.39.
([168]) 7, P.L.R. 47; 1940, S.C.J. 50; 8, Ct.L.R. 129.
([169]) 1938, T.A. 133.
([170]) 1940, T.A. 168 (*in Hebrew*).
([171]) 1941-2, T.A. 213 (*in Hebrew*).
([172]) Note 169 *supra.*
([173]) Note 165 *supra.*
([174]) 1938, T.A. 133.
([175]) 1944, S.C.D.C. 276.

parties unadjudicated (C.A.D.C., T.A. 114/40[176]; C.D.C., T.A. 147/41, 299/41[177]), on pain of having the award set aside (C.D.C., T.A. 147/41, 299/41) (*supra*). Thus, an omission to deal with a counterclaim may be fatal to the validity of the award (C.D.C., T.A. 229/42, 235/42)[178]. In C.D.C., T.A. 42/40[179] an award was remitted for the arbitrators to ascertain and specify the costs which, in the award, had been given on an unascertained percentage basis.

Illegality of Transaction out of which the submission arose is a ground for setting aside the award (*vide* C.A. 99/35)[180]. See also notes to sec.2, *supra* at p. 80.

Nullity: When the award amounts to a nullity, as when the arbitrator purports to deliver it after having delivered a previous award (C.A. 247/38[181]; C.A.D.C., T.A. 169/39[182] and *vide* C.A. 117/39[183]) or where one of the parties has died during the proceedings (C.A.D.C.,Ja. 233/32)[184], or where the award is made in favour of a stranger (C.A. 237/38)[185], there is no need to apply for setting it aside (C.A. 247/38)[186]. The fact that the award is null and void should, however, be apparent on the face of the award and if it is not so apparent, application should be made, under the inherent jurisdiction of the Court, to set the award aside, (C.A. 5/41)[187]. *Cf.* C.A. 237/38[188] where an application to set aside was made. See note *Severability, infra,* as regards the enforcement of part of an award and setting aside that part which is a nullity.

An interim decision is not an award which can be set aside or enforced (C.D.C., T.A. 363/43)[189].

Insufficient Ground for setting aside Awards:

In addition to the headings following, reference should be made to cases of awards not set aside, mentioned in the previous headings dealing with grounds for setting aside awards, particularly in the closing paragraphs of the note *Hearing the Evidence.*

Reference should also be made to the notes following sec. 14, where awards were upheld notwithstanding certain alleged irregularities.

(*Award by Consent*): Though the procedure is "rather unusual" there is no reason why arbitrators should not issue an award by consent of the

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(176) 1940, T.A. 165 (*in Hebrew*).
(177) 1941-2, T.A. 189 (*in Hebrew*).
(178) *Ibid.* 141 (*in Hebrew*).
(179) *Not reported.*
(180) 1937, S.C.J. (N.S.)78.
(181) Note 167 *supra.* And compare C.D.C., Ja. 187/37 (*not reported*) where it was held that an award made on two different dates was a nullity.
(182) 1940, T.A. 22.
(183) 7, P.L.R. 47; 1940, S.C.J. 50; 8, Ct.L.R. 129.
(184) 1, R. 193. See footnote 7 *ante,* p. 83.
(185) Note 135 *supra.* See also notes *Absence of Submission Award in favour of a Third Party, supra.*
(186) Note 167 *supra.*
(187) 8, P.L.R. 82; 1941, S.C.J. 71; 9, Ct.L.R. 71; P.P. 14.3.41.
(188) Note 135 *supra.*
(189) 1944, S.C.D.C. 192.

parties who sign the award (C.D.C., T.A. 368/38)(190). The document will, in any event, be valid as an agreement (*ibid.*). See notes to sec. 14, *Action on the Award*, as to the manner of enforcing such award where there is a doubt as to its effect.

(*Award insufficiently stamped*): This is not a ground for setting aside an award as it is not mentioned in sec. 13 (C.D.C., T.A. 9/41)(191), but an unstamped award cannot be enforced. See notes to secs. 14 and 15(4). *Cf.* note INHERENT JURISDICTION, *supra*.

(*Failure to give Reasons*): Detailed reasons in support of the findings need not be given in the award and the award is all the better for being precise (C.D.C., Ja. 234/34)(192). Even when the object in omitting to give reasons is to avoid the award being set aside for error on the face of it (*vide* C.D.C., T.A. 319/43)(193). Where reasons for the findings can be inferred from the award, it is immaterial that they are not specifically set out (*vide* e. g., C.D.C., Ja. of 1929)(194).

(*Improper Record*): Failure to keep the record of the proceedings in the same manner as a Court should do was condoned in C.D.C., T.A. 319/43(195) on the grounds that the record had been kept by a layman and that no miscarriage of justice had resulted but the Court was not prepared to hold that a deficient record can never be a good ground for setting aside an award (see also C.D.C., Ja. 392/31(196)).

(*No miscarriage of Justice*): There is a presumption in favour of the validity of awards and a reluctance by the Courts from interfering with a decision with which the parties have agreed to abide (see *Presumption in favour of Award* in the notes to sec. 14). If no miscarriage of justice was occasioned, the Court will not interfere with an award notwithstanding an irregularity. (C.D.C., T.A. 137/39(197); C.D.C., T.A. 319/43 (*supra*)) particularly if the offending part of the award may be severed (*vide* C.D.C., T.A. 137/39 (*supra*)). See *Severability, infra*.

Acquiescence, Estoppel, Waiver: It is very questionable whether a party by performing an award so acquiesces in it that he will be precluded from moving subsequently to have it set aside for irregularity (Goodman *v.* Sayers [1820] 2. J. & W. 249, quoted in C.A. 13/31)(198), but where the award is for payment of money or, in the alternative, delivery of goods, disposal of the goods by the defendant does not amount to a performance (C.A. 13/31) (*supra*).

Nor is a party precluded from applying to set aside an award on the ground of misconduct, error of law and illegality by reason of having signed

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(190) 1940, T.A. 20.
(191) 1941-2, T.A. 213 (*in Hebrew*).
(192) As set out in C.A. 93/35 (7, R. 48) setting it aside on appeal on another point.
(193) 1944, S.C.D.C. 276.
(194) 7, R. 38.
(195) *Supra*. See that case as discussed in the notes to sec. 4, as regards the requirements for keeping the record.
(196) 1, R. 193.
(197) 1940, T.A. 172 (*in Hebrew*).
(198) 1, R. 190. (*Interlocutory Order*).

an irrevocable power of attorney to execute the award (C.A. 99/35)([199]). Essential misconduct cannot be waived by conduct, though constructive misconduct may be (C.A. 154/42)([200]).

Misconduct prior to an order of remittal cannot be raised in an appeal from a subsequent judgment refusing to remove the arbitrators (C.A. 17/35)([201]).

When no written submission was made and signed, a party who participated in the proceedings was held to be estopped from challenging the award (C.A. 63/36 ([202]); C.A.D.C., T.A. 65/39([203])). But see note *Implied Submissions,* in sec. 2.

Again, where the arbitrators purported to extend the time, after the expiration thereof, with retroactive effect, although according to the strict legal position the extension was invalid and ineffective; a party who had acquiesced in the extension was held to be estopped from arguing against its validity as in the words of Russell (13th ed., p. 388), "The Courts will not permit a party to lie by or act in an indecisive manner, so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not." (C.D.C., Ja. 133/43, 147/43([204]), see note *Award delivered out of Time, supra,* and notes to clause (c) of the Schedule). And in C.D.C., T.A. 319/43([205]), a party who had raised no objection to the failure to stamp written extensions of the submission made by consent, but had continued to appear in the proceedings following the extensions, was held to be estopped from objecting to the absence of stamping([206]). The Court held that the same principle applied to the faulty manner in which the record had been kept, to the knowledge of the party seeking later to set aside the award on that count. Waiver had not been raised in this connection, however, and the record was upheld on other grounds.

In C.D.C., Ja. 133/43, 147/43 (*supra*), following Macaura *v.* Northern Assurance Co. Ltd. ([1925] A.C. 619) and adopting the principle enunciated by Russell in the passage quoted above, the Court refused to consider a number of allegations directed against the validity of the award, and in particular a plea that the award should be set aside on the ground that it extended to matters beyond those referred in the submission: the parties having allowed the arbitrator to hear evidence on such matters without objection.

In C.D.C., T.A. 193/38([207]) it was held that appearance in the proceedings constituted waiver of improper appointment of arbitrators, unless (following Jungheim Hopkins & Co. *v.* Fonkelman [1909] 2 K.B. 948, 18 L.J.K.B.

([199]) 1937, S.C.J. (N.S.) 78.

([200]) 9, P.L.R. 686; 1942, S.C.J. 951. As to the meaning of these expressions, see *supra,* MISCONDUCT.

([201]) 1937, S.C.J. (N.S.) 83.

([202]) 9, R. 724; 1, Ct. L. R. (N. S.) 158; 3, Ct. L. R. 4.

([203]) 1939, T. A. 15; p. p. 28.11.39.

([204]) 1944, S.C.D.C. 309.

([205]) *Ibid.* 276.

([206]) But the Court also held that the extension had properly been stamped after execution.

([207]) 1939, T.A. 133. Workmen's compensation case.

1132) the party was not aware, at the time, that the arbitrators were not qualified to be appointed.

In C.A. 132/43([208]), where the parties had agreed that the arbitrator should ask the price from a third party by telephone, it was held that the proceedings could not be challenged in Court on that ground. See also C.D.C., T.A. 161/41([209]) which is summarised in note *Arbitrator functus officio, supra.*

In C.A. 98/42([210]) it was held that an objection to the local jurisdiction of the Land Court in a Land Court reference should have been raised at the earliest opportunity and could not, for the first time, be taken on appeal. This ruling does not apply where objection to jurisdiction is *ratione materiae* — see note *Lack of Jurisdiction* in notes to sec. 14.

In C.D.C., T.A. 122/38([211]), the petitioner's arbitrator had agreed to an enlargement of time and the Court held that it was doubtful whether the petitioner was not estopped from raising this objection to the award and whether he could apply to set it aside on that ground.

In C.A.D.C., T.A. 1/40([212]), which referred to an action on an award, the defendant, having relied on the award in other proceedings, the Court held that he was estopped from contesting its validity.

In a number of cases the Courts appear to have allowed applications to set aside awards in circumstances similar to those in the cases set out above, where the Courts refused to interfere. It does not appear, from any of the former cases, either that the point of waiver, acquiescence or estoppel was taken, or that there were no special circumstances which brought these cases outside the scope of the cases outlined above.

It is important to point out in this connection, that waiver must be pleaded and will not be taken by the Court *proprio motu* (*vide* C.D.C., T.A. 319/43)([213]).

The above case is also illuminating as regards the time when objection should be made during the course of the proceedings to prevent subsequent allegations of acquiescence. See also, on this subject, cases on objection to witnesses in the note *Hearing the Evidence,* under MISCONDUCT, *supra.*

As regards appeals see C.A. 174/35([214]) mentioned in note *Grounds of Appeal* to sec. 15(3).

See also note *Consent, Estoppel* to clause (*c*) of the Schedule, *post.*

Severability: If an award is partly valid and partly bad, the Court may enforce part of the award, if severable from the remaining part, which may then be set aside or not (C.A. 237/38([215]); C.D.C., T.A. 137/39 and C.D.C., T.A. 292/39([216]); C.D.C., T.A. 265/40([217]); C.A. 98/42 ([218]); C.D.C., T.A.

([208]) 1943, A.L.R. 790.
([209]) 1941-2, T.A. 188 (*in Hebrew*).
([210]) 1942, S.C.J. 655; 12, Ct.L.R. 118.
([211]) Note 112 *supra.*
([212]) *Not reported.* (*In Hebrew*).
([213]) 1944, S.C.D.C. 276.
([214]) 7, R. 57; P.P. 9.6.36.
([215]) 6, P.L.R. 24; 1939, S.C.J. 12; 5, Ct.L.R. 33; P.P. 24.1.39.
([216]) 1940, T.A. 172. *And not reported.* (*Both in Hebrew*).
([217]) 1940, T.A. 163 (*in Hebrew*).
([218]) 1942, S.C.J. 655; 12, Ct.L.R. 118.

152/42[219]) or remitted (C.D.C., T.A. 42/40)[220]. The above cases include decisions on applications to enforce awards under sec. 14.

Effect of setting aside Award: When an award is set aside the authority of the arbitrators is not revived (see note *Arbitrator functus officio*), under INHERENT JURISDICTION, *supra*. The submission also remains unaffected, but compare note *Termination of Submission*, following the definition of "Submission" in sec. 2.

Contracting Out: A provision in a submission purporting to restrain the parties from challenging the award is void as being contrary to public policy (C.D.C., T.A. 88/42, 193/42[221], following Czarnikow & Co. Ltd. *v.* Roth, Schmidt & Co. [1922] 127 L.T. 824, not following Tullis *v.* Jackson [1892] 67 L.T. 340). The offending part of the submission is severable, however, and the Court will hear the application to enforce, the opposition thereto and an application to set aside (*vide ibid.*).

The provisions in art. 61 of the Code of Civil Procedure appear to be abrogated so far as they conflict with the above decision. See also *Acquiescence, Estoppel, Waiver, supra*.

Appeals: See sec. 15(3) and notes.

Land Court References: Where the reference was made by the Land Court, as described in the notes to sec. 2, the following statutory provisions apply under sec. 6(4) of the Land Courts Ordinance, in applications to set the award aside:

> (4) The award may be set aside on the following grounds-
>
> (*a*) if the decision has been procured by fraud or the production of forged documents or by the concealment of material documents;
>
> (*b*) if there has been misconduct on the part of the arbitrators.

It will be noticed that the effect of the above sub-section does not differ very materially from other cases of applications to set aside awards.

In an arbitration relating to land the arbitrator cannot make an award that one party should pay half the produce of the land for the current year (C.A. 98/42)[222].

The import and defences to an application to set aside should appear in the record of the Land Court (C.A. 196/37)[223].

Land Settlement References: The same provisions are enacted in sec. 27(7) of the Land (Settlement of Title) Ordinance as in sec. 6(4) of the Land Courts Ordinance, *supra*, save for the word "award" being substituted for "decision" and for the omission of the words "or the production of forged documents" which do not appear, however, to enlarge the meaning of the words "procured by fraud".

Workmen's Compensation References: A petition to set aside an award in Workmen's Compensation can be made under sec. 13 (C.A. 138/32)[224].

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(219) 1941-2, T.A. 13.
(220) *Not reported.*
(221) *Not reported.*
(222) 1942, S.C.J. 655; 12, Ct.L.R. 118.
(223) 1937, S.C.J. (N.S.). 335; 2, Ct.L.R. 187.
(224) 5, R. 1877; P.P. 13.8.33.

It cannot be made after registration of the award, by the Registrar of the Supreme Court (C.D.C., Ja. 267/33; C.D.C., T.A. 237/40)([225]) as the proper remedy lies by way of application for the rectification of the register (see note (*Workmen's Compensation*) under *References under specified Ordinances* in the notes to sec. 2 and see C.D.C., T.A. 80/42([226])).

If the petition is filed within the fifteen days allowed before registration of the award, it will be entertained (C.D.C., T.A. 265/41)([227]) and, although the Court has jurisdiction to grant an injunction restraining the Chief Registrar from recording the award (C.A. 29/41)([228]), this need not be done if the petition is presented on time (C.D.C., T.A. 265/41) (*supra*).

The proper Court to entertain such petitions is the District Court, irrespectively of the amount involved. See notes to definition of *Court*, in sec. 2, heading *Meaning of Court in Statutory References*.

As regards awards given on voluntary submissions see *ante* p.73 note 112.

See also the terms of the other various statutory references outlined in the notes to sec. 2.

Enforcement of award.

14. An award may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.

Source: This section is taken from sec. 12 of the Arbitration Act, 1889. The following is the text of the section in the English Act, with italics supplied to show divergences from the Ordinance:

> 12. An award *on a submission* may, by leave of the Court *or a judge*, be enforced in the same manner as a judgment or order to the same effect.

Effect of divergence in the Texts: The omission of the words "or a judge" which formed part of the draft and which appear in the corresponding section of the Act is obvious in its results: Only the Court is, under the Ordinance, vested with the powers which, in England, may be exercised by the Court or a judge thereof. (See also notes to sec. 15(2)). As regards the deletion, in the Ordinance, of the words "on a submission" which appear in the Act, a reference to English authorities show that the presence of these words prevent the English Courts from enforcing awards given on verbal submissions as such submissions are not valid submissions within the meaning of the Act. As the definition of *submission* is similar under the two enactments, it might be argued that the omission in sec. 14 of the words quoted above enables the Courts in Palestine to enforce awards delivered otherwise than in pursuance of a written submission. Such awards are enforced in England by means of an action on the award. (See this heading, *infra*.).

([225]) *Not reported*, both quoted in C.D.C., T.A. 265/41 (*infra*).

([226]) *Not reported*.

([227]) 1941-2, T.A. 41.

([228]) 8, P.L.R. 113; 1941, S.C.J. 90; 1, Ct.L.R. 127.

In C.D.C., T.A. 88/42, 139/42(1), however, the Court, relying on English authorities, held that "unless there was a submission to arbitration in this case we have no jurisdiction" (to enforce the award) — Wrighton *v.* Hopper [1867] 15 L.T., *per* Blackburn J., at p. 567. It does not appear that the divergence in the texts was brought to the attention of the Court.

Awards in statutory references are included, by reason of the wording, provided that the remedies under the Ordinance are specifically made to apply or are not excluded. See *Statutory References, sec.* 2.

Court: For the jurisdiction of the Court see definition of this term in sec. 2, and the notes thereto. For local jurisdiction, see Arbitration Rules, *post,* r. 2. See also *infra, Action on the Award.* And see notes to sec. 3 of the Foreign Awards Ordinance *post,* for *Court* in connection with foreign awards.

Applications to Court under this section are made by notice of motion. See sec. 15(1), and notes, Arbitration Rules, *post,* for practice and procedure.

Evidence: See notes to sec. 15(1) under this heading. See also sec. 15(4) and notes.

Costs: See sec. 18 and notes.

Who may apply: Only a party to the award may apply for its enforcement. The arbitrator himself may not do so, even as regards that part of the award dealing with his fees (C.A.D.C., T.A. 56/38)(2). See also *Application to enforce the Award; Opposition to Enforcement of Award; Powers of Court, infra.*

Consolidation of Applications: See this heading in the notes to sec. 15(1).

Action on the Award: In addition to an application under this section for leave to enforce the award, the English Law remedy of bringing an action upon the award is also available in Palestine, there being no provision in the Ordinance to the contrary (C.A. 171/37(3). See also C.A.D.C., Ha. 39/38(4)). But the two remedies cannot be combined, so that an action asking for the enforcement of the award, with an alternative claim for damages in respect of breach of a contract which was the subject matter of the award, will not be entertained (C.D.C., T.A. 182/41)(5). The remedy of suing on the award may be chosen if there is a doubt whether the award is valid as such or only as an agreement between the parties (*vide* C.D.C., T.A. 368/38)(6). In the latter case, however, the agreement should be final and en-

(1) *Not reported.*

(2) 1938, T.A. 15.

(3) 1937, S.C.J. (N.S.) 119; 2, Ct.L.R. 137. See also C.A.D.C., T.A. 1/40 (*not reported*). Yet in C.A.D.C., T.A. 114/40 (1940, T.A. 165, *both in Hebrew*) doubts were expressed by the Court whether this form of action was possible in the absence of any statutory provision *and authority from the Supreme Court.* The further remedy available in England under R.S.C. O.12, of enforcing an award by execution, has not been applied in Palestine.

(4) N.L.R. 49.

(5) 1941-2, T.A. 12. Appeal discussed in C.A. 54/42 (9, P.L.R. 806; 1942, S.C.J. 324; 12, Ct.L.R. 43.

(6) 1940, T.A. 20. See also heading *Effect of divergence in the Texts, supra.*

forceable (C.A.D.C., T.A. 114/40)(7). If it contemplates the performance in the future of acts by third persons and does not finally dispose of the disputes between the parties, the award is unenforceable as an agreement and, as an award, it is bad on the face of it (*ibid.*).

An action on the award is distinguishable from an action based on a claim arising out of an award (*vide* C.A.D.C., T.A. 44/39)(8).

The position of the defendant in an action on the award is similar to that in petitions to enforce the award and all the defences available in the latter cases are open in actions on the award (C.A.D.C., T.A. 114/40)(9); e. g., that the award is bad on the face of it (*ibid.*) or that it is null and void owing to a previous award having been given by the arbitrator (C.A.D.C., T.A. 169/39)(10). The points may be taken in the defence to the action and need not be set out in a counterclaim (C.A.D.C., T.A. 88/40)(11). The defence of misconduct cannot be raised (see note *Defences, infra*) and a separate application should therefore be made under sec. 13 to set the award aside for misconduct.

See also notes *Effect of Award, Award not stamped, infra.*

Jurisdiction of Court in Actions on Awards: An action on the award is not one of the remedies available under the Ordinance(12), so that the procedure relating thereto should be sought in the ordinary rules of civil procedure. (See note SOURCE, INTERPRETATION, *supra p.* 55). The material and local jurisdiction of the Courts should therefore also depend on the rules relating to civil actions and not be taken from the Ordinance (sec. 2) or the rules thereunder (r 2). The following, somewhat obscure ruling given in C.A.D.C., T.A. 88/40(13), which was an appeal from a judgment in an action on an award, if it decides otherwise, is, it is respectfully submitted, bad law: "It is true that the magistrate may decide on the legality of the entire document submitted to him, even on an amount exceeding the amount of his jurisdiction — as long as the action falls within his jurisdiction. This rule cannot, however, be applied when this document is an arbitration award as the law itself (*sic*) lays down the jurisdiction of the various courts to deal with and determine its validity. In this case the magistrate will never be competent to deal with the matter."

Foreign Awards: See Foreign Awards Ord. (*post*) and notes.

Effect of Award: Even though not enforced by the Court, an award, if valid and as long as it is not set aside (C.A.D.C., T.A. 31/40)(14), and

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(7) 1940, T.A. 165 (*in Hebrew*).

(8) 1939, T.A. 125. In such actions the award may not, of course, be altered by the Court (*ibid.*) as may be the case when the award is sought to be enforced or set aside: See heading *Powers of the Court* in this section (*infra*) and in sec. 13.

(9) 1940, T.A. 105 (*in Hebrew*).

(10) 1940, T.A. 22.

(11) *Not reported.* (*In Hebrew*).

(12) As regards foreign awards, see sec, 3(1) of the Arbitration (Foreign Awards) Ordinance, *post.*

(13) *Not reported.* The passage is translated from the original Hebrew.

(14) 1940, T.A. 167 (*in Hebrew*). It may also be prescribed. See C.A. 183/38 (5, P.L.R. 576; 1938, 2 S.C.J. 197; 5, Ct.L.R. 17).

does not amount to a nullity (C.D.C., Ja. 5/33)([15]) is conclusive evidence between the parties thereto of the facts found by it (C.A. 212/43)([16]) or referred in the submission (Misc. Applic. D.C., T.A. 222/43)([17]). It constitutes *res judicata* and precludes a fresh claim on the matter adjudicated (*ibid.*; C.A. 121/37([18]); C.A.D.C., T.A. 31/40 (*supra*) and see C.A. 52/37([19])) even when they do not appear on the award (C.A.D.C., T. A. 25/40)([20]).

Admissions made before the arbitrators may, in certain cases, be admissible in Court (C.A. 128/35)([20]a). No evidence may, therefore, be given to contradict it (C.A. 212/43) (*supra*). If the award is invalid then it is, of course, no evidence in the action (*ibid.*). If valid, it binds the parties like a judgment (Misc. Applic. D.C., T.A. 222/43) (*supra*). It does not enure against, or in favour of persons who were not parties to the submission (C.A. 133/40)([21]) not even in favour of the arbitrator (C.A.D., T. A. 56/38)([22]). It may also be enforced by means of an action on the award (see note under that heading, *supra*).

Where a party cannot contract out of a statute, an award will not have greater effect than an agreement. Thus, an award ordering the eviction of a party cannot be enforced if there is nothing in the proceedings or on the face of the submission or of the award to establish a ground which would invest the Court with jurisdiction to order eviction under sec. 8 of the Rent Restriction (Dwelling Houses) Ord. (C.A.D.C., T.A. 194/43, following Brown *v.* Draper, [1944] 1 All. E.R. 246([23]); L.A. 58/25([24])).

Compare the position regarding Workmen's Compensation cases: *ante*, p. 73.

An award does not appear to preclude a fresh submission, made by consent, in respect of the matters covered by the award (C.A. 198/22)([25]). The decision is based on the former law and was held to be sanctioned by art. 1849 of the *Mejelle*. *Quaere* whether it still applies.

As to an award operating as a condition precedent to the filing of an action, see note *Powers of Court* in notes to sec. 5.

([15]) P.P. 11.9.33. See also C.D.C., Ja, 227/33 mentioned *infra* under *Defences*.

([16]) 1943, A.L.R. 601. See also C.A. 124/30 (3, R. 1167) and note *What may be submitted* to sec. 2.

([17]) *Not reported*.

([18]) 1937, S.C.J. (N.S.) 75. See next note.

([19]) 1937, S.C.J. (N.S.) 128; 1 Ct.L.R. 72; P.P. 7.7.37. But *cf.* annotation No. 1 in C.A. 235/43 at 1943, A.L.R. 815. See also C.A. 36/31 (1, R. 243).

([20]) 1940, T.A. 168 (*in Hebrew*). The question should be covered by the submission: See C.A. 53/22 (1, R. 175) which, however, is based on the former law and Misc Applic. D.C., T.A. 222/43 (*supra*).

([20]a) 7, R. 376; 1, Ct.L.R. (N.S.) 4. And see notes to sec. 15(1), *Evidence on Application*.

([21]) 7, P.L.R. 417; 1940, S.C.J. 497. See also the judgment of the Privy Council on appeal: P.C. 34/41 (10, P.L.R. 517; 1943, A.L.R. 800). *Cf.* also C.A.124/30 (3, R. 1167).

([22]) 1938, T.A. 15.

([23]) 1944, S.C.D.C. 104.

([24]) 5, R. 1777, incorrectly reported *sub no.* 88/25.

([25]) 1, R. 178.

See also next note.

Presumption in favour of award: The Courts incline in favour of the validity of awards. In C.A. 15/42([26]), the following passages from Russell on Arbitration and Awards (13th ed., pp. 203-4) was quoted with approval:

> "The Courts are always inclined to support the validity of an award, and will make every reasonable intendement and presumption in favour of its being a final, certain, and sufficient termination of the matters in dispute".
>
> "The award will be sustained although the arbitrator has omitted in his award to notice some claim put forward by a party if, according to the fair interpretation of the award, it is to be presumed that the arbitrator has taken the claim into his consideration in making his award".

In C.A. 243/37([27]) the Court delivered the following *dictum*:

> "We wish to say that there are too many cases of this description coming before this Court, where the parties definitely agree to submit their dispute to arbitration and then the unsuccessful party exercises every known ingenuity in order to pick holes in the award."

The Court is not a Court of appeal from the arbitrator and will not set the award aside unless there has been misconduct or the award has been improperly procured (C.A. 63/36)([27]a). As long as the award is not set aside it is deemed valid (C.A.D., T.A. 4/40([28]); C.A.D.C., T.A. 31/40([29])).

See also *Powers of the Court*, in the notes to sec. 13, and C.A. 10/27 and other cases quoted in note *Grounds of Appeal* in sec. 15(3).

But see notes to secs 8, 13 and 15 (*passim*) for instances of the Court interfering with awards.

Applications to enforce the Award: The proper remedy to ask the Court is for "leave to enforce the award." Though it is not correct to speak of a "confirmation of the award" (C.A.D.C., T.A. 40/41)([30]), or to ask to "enter judgment confirming for execution the award of the arbitrators" (C.D.C., T.A. 52/41)([31]), the Court will, in such cases, adopt the maxim *de minimis non curat lex* and ignore the divergence in wording (*ibid.*). Rule 3 of the Arbitration Rules (*post*) provides for applications for the *enforcement* of an award and for an award being made a rule of Court. Rule 4 mentions a *confirmation* of the award if no opposition has been filed within the prescribed time.

Whilst, therefore, the applicant does not apply for confirmation, but for enforcement, (C.A.D.C., T.A. 40/41) (*supra*) the Court, on an application to enforce, confirms the award under Rule 4. Hence the frequent use of the expression "confirmation of the award" in law reports. See e. g., C.A. 56/

([26]) 9, P.L.R. 157, 1942, S.C.J. 216; 11, Ct.L.R. 107.
([27]) 5, P.L.R. 107; 1938, 1 S.C.J. 101
([27]a) 9, R. 724; 1, Ct.L.R. 158; 3, Ct.L.R. 4. And also, under the inherent jurisdiction: See notes to sec. 13.
([28]) *Not reported.* (*In Hebrew*).
([29]) 1940, T.A. 167. (*In Hebrew*).
([30]) 1941-2, T.A. 7.
([31]) *ibid.* 10.

38([32]); C.A. 352/43([33]). In Land Court and Land Settlement references, the award is *authenticated* by the Court; in Workmen's Compensation references, it is *recorded;* in Cooperative Societies references it is *approved* and in *Village Administration* references it is *confirmed*. See these and the other headings in statutory references in notes to sec. 2, for special provisions therein made relating to awards.

See also *Form of Application, infra.*

Fees: See r. 5 of the Arbitration Rules, *post.*

Opposition to enforcement of Award: The defence to an application for the enforcement of an award is by way of opposition, under r. 3 of the Arbitration Rules. Such oppositions are really defences and have little in common, in that respect, either with direct or with third party oppositions under the Ottoman Code of Civil Procedure([34]), or with applications to set aside an *ex parte* judgment under the present rules.

Under the former Arbitration Rules, it was held that the only obligation on the opposer if he desired to oppose enforcement was that imposed by r. 3 of the former Rules, namely payment of the fees prescribed within seven days of service upon him of the notice (C.A. 111/32([35]); C.A. 51/33([36]); C.A. 96/36([37])).

This, it was held, could be done by any party without production of a power of attorney from the party on whose behalf the fees were paid. There was no obligation upon him to file any notice of opposition, or to state any ground for opposing before his opposition was heard (C.A. 112/32) (*supra*, followed, though doubted, in C.A. 96/36 (*supra*)). Rules 3 and 4 of the new Rules, with their different wording, make it doubtful whether these decisions are good law and it appears to be fairly clear that an opposition should now be filed. Thus in C.D.C., T.A. 241/38([38]), it was held that it was too late to take a point of defence in the closing speech.

The requirement relating to payment of fees remains under the present rules. See C.A. 174/35([39]), mentioned in the note *Grounds of Appeal,* in sec. 15(3), where it was held that the question of non payment of fees could not be raised by the Respondent on an appeal from a refusal to set aside.

When the opposer does not appear on the day of the adjourned hearing, the opposition cannot be dismissed and the award enforced without hearing the case (C.A.D.C., T.A. 31/39)([40]).

([32]) 1938, 1 S.C.J. 297; 3, Ct.L.R.225a.

([33]) 11, P.L.R. 275; 1944, A.L.R. 424 and the unreported appeal C.A. 374/43 where the expression "confirmation and enforcement" is used.

([34]) A distinction which the Court, in C.D.C., Ja. 187/37, failed to take into account. The case is discussed in the notes to rr. 3 and 4 of the Arbitration Rules, *post.*

([35]) *Not reported.* Quoted in the following two cases.

([36]) 2, P.L.R. 50.

([37]) 8, R. 640; 1, Ct.L.R. 47; P.P. 14.10.37.

([38]) 1938, T.A. 133.

([39]) 7, R. 57; P.P. 9.6.36.

([40]) 1939, T.A. 11.

The opposer should be given an opportunity to state his objections to the award (C.A. 196/37)(41).

See also note *Powers of Court* in sec. 13.

See Arbitration Rules, *post*, rr. 3 and 4.

Defences: The word "award" contained in section 14 means an adjudication of the dispute before the arbitrators (C.D.C., T.A. 363/43)(42). An application cannot, therefore be made for the enforcement of an interim or preliminary order by the arbitrator (*ibid.*).

Misconduct and mistake of the arbitrator may not be pleaded as a defence to an application for the enforcement of an award (C.A. 365/43)(43). As regards misconduct, see also C.D.C., T.A. 285/38(44); C.A.D.C., T.A. 114/40(45); C.D.C., T.A. 265/40 (46). A special application should, in such cases, be made under sec. 13 of the Ordinance to set the award aside (C.A. 6/38(47); C.A. 365/43 (*supra*)). (In an earlier case, C.A. 206/37(48), where the defendant opposed confirmation of the award, the Court allowed him to call evidence in order to establish misconduct. It does not appear that the point was argued).

When the Award will not be enforced: Reference should be made to the notes following sec. 13 for cases where awards were set aside. In such circumstances the award cannot be enforced (applications to set aside are usually heard before applications to enforce — see notes to sec. 15(1)). Bearing in mind that misconduct (and mistake) cannot be raised in an opposition to an application for the enforcement of the award (see note *Defences, supra*) the cases set out in the notes to sec. 13 are applicable under this head as well. The following cases, decided in applications under sec. 14, are also material.

In the unreported case C.D.C., Ja. 227/33, in an action under an insurance policy, it was contended that an award given by an arbitrator regarding the amount of the loss under a policy of insurance could not be used, as the arbitrator could only act after a difference between the parties had arisen. As the policy made an award or agreement as regards the amount of the loss a condition precedent to the filing of a claim under the policy and as the Court held that no difference had in fact arisen, the claim was dismissed.

The death of one of the parties to the submission avoids the arbitration

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(41) 1937, S.C.J. (N.S.) 335; 2, Ct.L.R. 187.
(42) 1944, S.C.D.C. 192.
(43) 11, P.L.R. 318; 1944, A.I.R. 561.
(44) 1940, T.A. 175 (*in Hebrew*).
(45) *Ibid.* 165 (*in Hebrew*).
(46) *Ibid.* 163 (*in Hebrew*).
(47) 1938, 1 S.C.J. 98; 3, Ct.L.R. 114 — *leave to appeal;* 5, P.L.R. 311; 1938, 1 S.C.J. 346; 3, Ct.L.R. 299 — *appeal.* See also C.A. 63/36 (9, R. 724; 1. Ct.L.R. 158; 3, Ct.L.R. 4).
(48) 1937, S.C.J. (N.S.) 106.

and all proceedings after the death (C.A.D.C., Ja. 233/32)([49]), unless otherwise provided in the submission (C.A.D.C., T.A. 45/41)([50]).

In C.D.C., Ja. 392/31([51]), where the arbitrators had failed to keep a record of the proceedings and had not all joined in the signature of an interim decision, the Court refused to enforce the award, and remitted it to the arbitrators for rehearing and delivery of a fresh award.

In C.D.C., T.A. 201/38([52]) the Court refused to confirm an award based, not on law, but on "a vague moral principle which cannot be enforced by the Civil Courts", and which could not be executed by the Execution Office as it called upon the deceased defendant to give bills with "safe" or good security.

Unless a contrary intention appears from the submission, only one award may be given([53]).

In C.A. 36/31([54]) it was contended that an award could not be enforced as bills given to secure the amount due thereunder had been negotiated thereby making it possible to recover the debt twice. It was held, however, on the facts, that there had been no such negotiation.

It is also open to a defendant in an application for the enforcement of an award to plead that there was no submission. This is a good point to take *in limine* (C.D.C., T.A. 88/42, 139/42([55]) following Wrighton *v.* Hopper([56])). See note *Effect of divergence in Texts, supra*. The defendant may also plead that the submission was not stamped (C.B.M., Ja. 1601/37)([57]); that the award is bad on the face of it([58]), that it provides for future undertaking which cannot be enforced, that the arbitrators exceeded their jurisdiction (C.A.D.C., T.A. 114/40)([59]) and that the award is a nullity (C.A.D.C., T.A. 169/39)([60]).

See, however, note *Acquiescence, Estoppel, Waiver,* in the notes to sec. 13.

Award incapable of execution: An award providing for the settlement of disputes between partners in accordance with certain directions may be executed like a judgment of dissolution of a partnership (C.D.C., T.A. 241/38)([61]), but a condition in the award involving a third party is invalid (C.A.D.C., T.A. 114/40)([62]).

([49]) 1, R. 193. The judgment relies on the provisions of English Law, but the Act has been altered in this respect by the 1934 Amending Act. The amendment does not affect the applicability of this case in Palestine (see notes to sec. 1, relating to interpretation and see p. 81). The report of the case is faulty, see note 7 to sec. 3.

([50]) 1941-2, T.A. 212 (*in Hebrew*).

([51]) 1, R. 193.

([52]) *Not reported.*

([53]) *Ante*, p. 86.

([54]) 1, R. 243.

([55]) *Not reported.*

([56]) *In re* Hopper [1867] L.R. 2 Q.B. 367; 36 L.J.Q.B. 97; 15 L.T. 566.

([57]) P.P. 5.1.38.

([58]) But *cf.* C.A. 63/36 (9, R. 724; 1, Ct.L.R. 158; 3, Ct.L.R. 4).

([59]) 1940, T.A. 165 (*in Hebrew*). For particulars of these defences, see notes to sec. 13.

([60]) *Ibid.* 22.

([61]) 1938, T.A. 133.

([62]) 1940, T.A. 165 (*in Hebrew*).

The Court is not concerned whether the successful party will be in a position to execute the award after its enforcement. An award relating to immovable property outside the jurisdiction may therefore be enforced (C.D.C., T.A. 157/37) ([63]).

Verbal Awards: See this note in sec. 15(4).

Award not stamped: Reference should be made to the notes to sec. 15(4) for provisions relating to the stamping of awards. If the award is insufficiently stamped it cannot be enforced (C.B.M., Ja. 1601/37) ([64]); as the Court must take judicial notice of the insufficiency of stamping (C.A.D.C., T.A. 68/38) ([65]). But the Court should, after exacting payment of the penalty and unpaid duty, in accordance with sec. 16(1) of the Stamp Duty Ordinance, accept the document as valid (*ibid.*: C.B.M., Ja. 1601/37, *supra, per contra, vide, infra*). No reference need, though it may, be made to the Commissioners of Stamp Duty for adjudication, as the Court may alone decide the amount of the duty and penalty (C.A.D.C., T.A. 223/38) ([66]).

In C.D.C., T.A. 84/43([67]) it was unsuccessfully argued that an award could not be accepted by the Court even on the conditions outlined above. The submission made to the Court was to the effect that sec. 16(4) of the Stamp Duty Ordinance enacted a general prohibition against the use of unstamped documents "for any purpose whatever" and the exception in sec. 16(1) of that Ordinance applied only to documents sought to be admitted "as evidence". When application is made to enforce an award, it was further argued, the award is not given in evidence but is used within the meaning of the words "for any purpose whatever". The *dictum* in C.D.C., T.A. 137/39([68]), as set out in the notes to sec. 15(4), *infra* (third paragraph), which appears to support this contention, was not relied upon. The submission was overruled as the Court held that the award had been properly stamped. Although this case was set aside on appeal (C.A. 352/43) ([69]), the question of stamping was not argued there([70]). See also C.A.D.C., T.A. 223/38 (*supra*).

Whether or not an award may be accepted by the Court after payment of the duty and penalty, it is submitted that the decision in C.B.M., Ja. 1601/37 (*supra*), so far as it holds that awards belong to that class of documents which may not be stamped after execution, is bad law, as sec. 17(1) of the Stamp Duty Ordinance was misread. See title *STAMP DUTY*.

An action filed on the award([71]) in the Magistrates' Court was dismissed (M.C., T.A. 998/39) ([72]) on the ground that the award could not be used in evidence as being insufficiently stamped. On appeal (C.A.D.C., T.A. 88/40) ([73])

([63]) 1937, T.A. 174.
([64]) P.P. 5.1.38.
([65]) 1938, T.A. 48.
([66]) *Ibid.* 114.
([67]) *Not reported.*
([68]) 1940, T.A. 16 (*Order of the Registrar*).
([69]) 11, P.L.R. 275; 1944, A.L.R. 424.
([70]) As indeed it could not, as no appeal lies from an order overruling a stamp objection. See title *STAMP DUTY*.
([71]) See note *Action on the Award, supra.*
([72]) *Not reported.*
([73]) *Not reported.*

the Court upheld the ruling of the Magistrate and held that he had been entitled to dismiss the action as the document on which the action was based was insufficiently stamped. Both Courts relied on C.A. 59/39([74]). There was no allegation that the Magistrate could not have allowed the document under sec. 16(1) of the Stamp Duty Ordinance had he decided so to use his discretion.

A stamp objection to the award must be taken at the first opportunity (C.D.C., Ja. 234/34)([75]). Under the present Arbitration Rules this, presumably, means in the opposition to the enforcement.

See notes to sec. 15(4) for further particulars relating to the stamping of awards.

Contracting Out: See this note in sec. 13.

Unsuccessful Grounds of Opposition: The following cases set out grounds which were raised in opposition to the enforcement of awards and which were held by the Courts insufficient to oppose the enforcement:

Arbitrator resigning after the conclusion of the proceedings and delivery of the decision by majority, the award being subsequently signed by the remaining arbitrators, (C.A. 68/37)([76]); unsigned and unstamped submission, where the parties took part in the proceedings (C.A. 63/36)([77]).

It is immaterial to the validity of an award if an authorised arbitration tribunal styles itself a Court (C.A. 19/27)([78]).

Misconduct and mistake may not be pleaded in opposition to the enforcement of an award (see *Defences, supra*).

The preceding headings in this section and in the notes to sec. 13 give other instances of unsuccessful oppositions to awards.

Powers of the Court: The Court may, on an application to enforce the award, enforce it in part (see *Severability, infra,* and notes *Powers of the Court* under sec. 12) and remit or refuse to enforce another part. In the absence of a special application to that effect, the Court cannot set aside the award as a whole or in part (see *Defences, supra* and notes to sec. 13). In C.A. 104/38([79]), where a miscalculation appeared on the face of the award, the Court corrected the error and enforced the award. See also C.D.C., T.A. 152/42([80]). The Court may also reduce the costs awarded by the arbitrators (*ibid.*).

Lack of Jurisdiction: When the Court is not vested with jurisdiction *ratione materiae,* it should dismiss the petition *proprie motu,* without any application (C.A.D.C., T.A. 322/37)([81]). This may be done at any stage of the

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([74]) 1939, S.C.J. 325; 6, Ct.L.R. 3.
([75]) 7, R. 51. Overruled on another point, in C.A. 93/35 (*ibid.* 48).
([76]) 1937, S.C.J. (N.S.) 57; 1, Ct.L.R. (N.S.) 61. (The award could, *semble,* be delivered by a majority under the terms of the submission).
([77]) 9, R. 724, 1 Ct.L.R. (N.S.) 158; 3 Ct.L.R. 4.
([78]) Reported in Hebrew in *Hamishpat* Vol. 1 p. 182.
([79]) 1938, 1 S.C.J. 319; 3, Ct.L.R. 276 — *leave application.*
([80]) 1941-2, T.A. 13.
([81]) 1937, T.A. 89. Although based on the provisions of art. 48 of the Ottoman Code of Civil Procedure, this decision is still applicable: See title *CIVIL PROCEDURE.*

proceedings (*ibid.*). As regards lack of jurisdiction *ratione loci* the position seems to differ: see Arbitration Rules, *post r.* 2 and notes.

Appeals: See notes to sec. 15(3).

Land Court References: Where the reference was made by the Land Court, as described in the notes to sec. 2, reference should be made to the following statutory provision of sec. 6(2) of the Land Courts Ord., in applications to enforce (authenticate) the award:—

> (2) Subject to the powers set out in sub-sections (3) and (4) as to remitting or setting aside the award, a land court shall, on the application of a party with notice to all other parties, authenticate the award, and the award, when so authenticated, shall have the effect of a judgment of a court and shall be executory.

The sub-section is set out as amended in 1939 and its provisions do not now materially differ from the provisions of sec. 14 of the Arbitration Ordinance, as applying in the case of other awards. But see *infra*. Before 1939 it was held that the Court could not authenticate the award at the expiration of six months from the date of its issue, whatever it felt about its merits and irrespectively of the time when application was made to authenticate (L.Jm. 78/28)([82]). In C.A. 50/37([83]), however, this case was not followed and the Court held, following English authorities, that the award could be authenticated if application had been diligently made.

The import of an application and the defences thereto should appear in the record of the Land Court (C.A. 196/37)([84]).

Once the award is authenticated by the Land Court it has, in the wording of sec. 6(2), "the effect of a judgment of a Court" and is not merely "enforceable by leave of the Court in the same manner as a judgment or order of the Court" as in sec. 14 of the Arbitration Ordinance provided. When a Land Court authenticates an award in a reference under sec. 6 of the Land Courts Ordinance, the award, therefore, becomes a judgment of the Land Court and that judgment is appealable under the Land Courts Ordinance, without leave either of the Land Court or of the Court of Appeal (C.A. 243/37)([85]). L.A. 33/34([86]) is an authority to the same effect and this view is also supported by C.A. 56/38 and C.A. 57/38([87]). But in L.A. 80/29([88]) and in C.A. 121/38([89]) it was held that an opposition under the provisions of art. 162 of the Ottoman Code of Civil Procedure could not be made against the authentication of an award by the Land Court as (C.A. 121/38) (*supra*) such oppositions could only be directed against judgments, not against awards. The Court did not, therefore, take the same view regarding the order authentica-

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([82]) 2, R. 500. Confirmed on appeal in L.A. 58/28 (*not reported*).

([83]) 1937, S.C.J. (N.S.) 155; 1, Ct.L.R. (N.S.) 116; 3, Ct.L.R. 18; P.P. 29.7.37.

([84]) 1937, S.C.J. (N.S.) 335; 2, Ct.L.R. 187.

([85]) 5, P.L.R. 43; 1938, 2 S.C.J. 237. *Interlocutory Order*. See also C.A. 295/42 (10, P.L.R. 71; 1943, A.L.R. 83).

([86]) 1937, S.C.J. (N.S.) 76.

([87]) 1938, 1 S.C.J. 297; 3, Ct.L.R. 255a and *ibid.* 299 and 241.

([88]) 1, P.L.R. 524.

([89]) 1938, 1 S.C.J. 379; 4, Ct.L.R. 93; P.P. 12.7.38. See also on third party opposition L.A. 92/26 (3, R. 1014).

ting the award as was taken by the authorities quoted above. In a dissenting judgment delivered in C.A. 121/38, (*supra*), Abdul Hadi J. held that the opposition was made against the judgment and not against the award.

The provisions of arts. 161 and 162 are no longer applicable since the enactment of the Civil Procedure Rules and the Magistrates Courts Procedure Rules, so that the above decisions are, in this respect, obsolete.

The District Court has no jurisdiction to enforce or authenticate an award in a reference under sec. 6 of the Land Courts Ordinance (C.D.C., Jm. 455/32) ([90]).

Earlier proceedings recounted in the above judgment, dealing with default of appearance are obsolete since the enactment of the Civil Procedure Rules.

Land Settlement References: Sec. 27(5) of the Land (Settlement of Title) Ordinance, which contemplates references in land settlement proceedings (see notes to sec 2, *supra* p. 71), also provides for the authentication of awards delivered in such references:

> (5) The settlement officer may, with the consent of the parties, refer to arbitration any dispute arising out of a claim and, subject to the powers set out in the following subsections([91]), shall authenticate the award within fifteen days of its issue: the award when so authenticated shall have the effect of a decision of the settlement officer and, for the purpose of the Stamp Duty Ordinance, shall be deemed to be an award of arbitrators appointed by a court.

The authorities mentioned in the preceding heading would appear to apply to this sub-section as regards the limitation of time, the differences between the sub-section and the corresponding provision in sec. 6 of the Land Courts Ordinance, before the 1939 amendment, being only as regards the length of the period provided.

The question of stamping is discussed in the notes to sec. 2, under the heading *Reference by Order of Court.*

Workmen's Compensation Awards: These are discussed *ante*, pp. 73 *sqq.*

Foreign Awards: See sec. 20 and notes.

Procedure.

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

(2) 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.

(3) 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.

([90]) P.P. 25.6.33.

([91]) *I. e.*, power to remit or set aside: See same heading in notes to secs. 12 and 13.

(4) On the hearing of a petition to enforce or set aside an award the applicant shall produce before the Court a signed copy of the award.

Sub-sec. (1).

Source: See (*Old Law*), *infra.*

Court: See definition of Court in sec. 2, and notes, for the material jurisdiction of Courts and r. 2 of the Arbitration Rules, *post*, for the local jurisdiction.

Rules applicable: The sub-section provides for applications to be made in the form of petitions, whilst rule 7 of the Arbitration Rules provides that the rules in force relating to Civil Procedure should apply in all proceedings under the Ordinance. The rules applicable are therefore the Arbitration Rules, read together with the Civil Procedure Rules or the Magistrates Courts Procedure Rules (*vide* C.D.C., T.A. 192/40)(1).

Special procedure rules (rr. 3 and 4) have been enacted only in connection with applications under sec. 14.

Form of Applications:

(*Old Law*): The procedure in England is governed by the Rules of the Supreme Court. The form is normally by originating summons(2) and the draft of this sub-section referred to "summons returnable before the Court." Before the enactment of the Civil Procedure Rules, 1938, when the Ottoman Code of Civil Procedure applied, no special procedure by way of petition was provided and a perusal of old cases shows that a freer use was made of English forms than is now possible in view of the interpretation placed by the Courts on the sub-section, as read together with the Arbitration Rules and the Civil Procedure Rules (see below). Thus, it can be seen, from C.A. 53/22(3), which was decided prior to the enactment of the *Ordinance*, that the procedure applying in England was followed.

The English practice of originating summons as followed locally, in the form of petitions, before the enactment of the Civil Procedure Rules, was similar to that for actions instituted by statement of claim, but the pleadings initiating the proceedings were headed "petition" (C.D.C., T.A. 147/39)(4) and entituled in the matter of the Arbitration Ordinance and in the matter of the particular arbitration(5). This practice was continued after the enactment of the rules (*vide* C.D.C., T.A. 12/40)(6). In C.D.C., T.A. 301/38, 302/38(7) it was held that the nearest approximation to a petition was a statement of claim

(1) 1940, T.A. 100. (*Order of the Registrar*).

(2) Certain steps can also be taken in England by notice of motion — the more customary procedure in the Chancery Division. This sub-section has therefore no counterpart in English Law.

(3) 1, R. 175.

(4) P.P. 20.11.39. (*Interlocutory ruling*).

(5) This procedure is still followed in applications under the Succession Ordinance, when the Civil Procedure Rules do not apply.

(6) 1940, T.A. 170 (*in Hebrew*).

(7) P.P. 10.1.39.

under r. 7 of the Civil Procedure Rules and the old practice was thus affirmed. Proceedings by way of motion under rr. 305 *seq.* C.P.R.([8]) were held in that case to be inapplicable in the absence of a *lis pendens,* but although the petition had, in that case, been made by notice of motion, the Court decided to treat the notice as a statement of claim and to continue the proceedings.

In C.D.C., T.A. 147/39([9]) the same Court (Edwards, P.D.C. and Korngrun, J.) held that the proper procedure under sec. 15(1) was that laid down by rr. 3 and 4 of the Arbitration Rules. The inconsistency between this case and C.D.C., T.A. 301/38, 302/38 (*supra*) was due to the fact that the Arbitration Rules were not brought to the notice of the Court in the latter case (C.D.C., T.A. 52/41)([10]).

(*New Law*): The absence of specific provisions in the Civil Procedure Rules dealing with petitions caused the question of procedure to come frequently before the Courts. The apparent conflict between sec. 15(1), which refers to petitions and rules 3 and 5 of the Arbitration Rules, which refer to applications, did not help to clarify the position. But see below *Divergence between the Sub-section and the Rules.* In C.A. 65/42([11]) it was held that proceedings by way of originating summons were inapplicable in petitions under the Ordinance and that the proper method of proceeding was by notice of motion under rr. 305 *sqq.*, C.P.R. A ruling to the same effect was also given in C.A. 352/43([12]). On the other hand, C.D.C., T.A. 301/38, 302/38([13]) as far as it held that proceedings by notice of motion could not be instituted in the absence of *lis pendens* was overruled by C.D.C., T.A. 52/41([14]) wherein it was also held that the correct procedure was by way of motion. But in C.A. 32/43([15]) it was held that petitions to set aside awards could also be made by way of action initiated by statement of claim. The same decision had been given in C.D.C., T.A. 12/40([16]) regarding petitions to enforce awards.

The effect of these decisions is that petitions under the Ordinance, at any rate as regards the enforcement and setting aside of awards, may be made either by notice of motion or by way of action instituted by statement of claim([17]). The latter procedure is much lengthier and costly. The usual steps in an action, such as entering an appearance (C.D.C., T.A. 301/38, 302/38) ([18])

([8]) The corresponding rules under the Magistrates Courts Procedure Rules are rr. 232 *seq.* See the remarks relating to originating summons in C.D.C., T.A. 52/41 (*infra*). R. 7, C.P.R. is too wide. (*ibid.*).

([9]) Note 4 *supra.*

([10]) 1941-2, T.A. 10.

([11]) 9, P.L.R. 392; 1942, S.C.J. 429.

([12]) 11, P.L.R. 275; 1944, A.L.R. 424.

([13]) Note 7 *supra.*

([14]) Note 10 *supra.*

([15]) 10, P.L.R. 181; 1943, A.L.R. 208. See also C.A. 154/42 (9, P.L.R. 686; 1942, S.C.J. 951).

([16]) 1940, T.A. 170 (*in Hebrew*).

([17]) Proceedings by motion are also "an action" within the meaning of the C.P.R. (C.A. 352/43 *supra* note 12).

([18]) Note 7 *supra.*

and framing issues (*vide* e. g., C.D.C., T.A. 12/40)([19]), must be followed. The more usual and expeditious course is, therefore, to proceed by notice of motion (C.A. 32/43)([20]). But where a defendant is anxious to delay execution, he may apply for the award to be set aside by way of action and take advantage of the lengthy proceedings involved. Although the plaintiff will, in such cases, make use of the speedier proceedings under C.P.R., r. 305, in seeking to enforce the award, his petition will normally be heard after the petition to set aside (see *Consolidation of Applications, infra*).

The procedure now applied was criticized by Edwards, J. in C.A. 65/42([21]) as being unsatisfactory. See also title *CIVIL PROCEDURE* for further particulars of applications by notice of motion.

The following cases, so far as they set out the practice under the former law, are now obsolete: C.A. 4/28([22]); C.A. 13/28([23]); C.A. 91/35([24]); C.A. 56/38([25]); C.A. 57/38([26]); C.A.D.C., T.A. 53/39([27]). As regards C.D.C., T.A. 285/38([28]) overruled by C.D.C., T.A. 52/41([29]), see notes to Arbitration Rules, *post*.

See *Applications to Court,* in previous sections and *Evidence on Applications, infra.* See also Arbitration Rules, *post,* r. 3 and notes thereto.

Divergence between the Sub-section and the Rules: As pointed in the heading (*New Law*), *supra,* there is a conflict between the wording of the sub-section and that of rules 3 and 5 of the Arbitration Rules: The former refers to "petitions" whilst the latter mention "applications". Having regard to the decisions set out in the preceding heading, to the effect that petitions under the Ordinance should be instituted by notice of motion, which is also the case for applications, the divergence in wording is immaterial. This was the view taken by the Court in C.D.C., T.A. 52/41 (*supra,* note 29).

Evidence on Applications: Applications by notice of motion are supported by affidavit (see title *CIVIL PROCEDURE*), but evidence may also be led on the hearing of the motion (C.A. 65/42)([30]). The arbitrators are frequently heard as witnesses on applications to enforce or to set aside an award (*vide* e. g., C.A. 229/41)([31]). On the limitations to this right, see

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([19]) Note 16 *supra.* But issues are framed by certain judges even in proceedings by action. This is the practice of the learned judge (*Hubbard, R/P.D.C.*) who decided C.D.C., T.A. 88/42, 139/42 (*not reported*).

([20]) Note 15 *supra.*

([21]) Note 11 *supra.*

([22]) 1, P.L.R. 268; 1, R. 150. This case held, *inter alia,* that applications under this section could not be made *ex parte.* This is still good law but now depends on the reading of the relevant rules.

([23]) 1, P.L.R. 300; 4, R. 1557.

([24]) 8, R. 702.

([25]) 1938, 1 S.C.J. 297; 3, Ct.L.R. 225 a.

([26]) *Ibid.* 299 and 241.

([27]) 1939, T.A. 13.

([28]) 1940, T.A. 175 (*in Hebrew*).

([29]) 1941-2, T.A. 10.

([30]) Note 11 *supra.* Relying on C.P.R. 312 & 189(2).

([31]) 8, P.L.R. 603; 1941, S.C.J. 616; 11, Ct.L.R. 126.

notes to sec. 13, under heading *Evidence,* where this case is quoted. *Quaere* how far the decision in C.A. 65/42 (*supra*) has affected the ruling in C.A. 247/38([32]) wherein it was held that it was entirely within the discretion of the trial Court whether to call the arbitrator as a witness. When the arbitrator is called as a witness, the record of the proceedings is usually taken as an exhibit in the case (*vide* e. g., C.A.D.C., T.A. 211/38([33]); C.D.C., T.A. 141/39([34])). The record may be challenged by extraneous evidence (*vide* C.D.C., T.A. 141/39) (*supra*) but is otherwise taken as true and binding (*vide* C.D.C., Ja. 133/43, 147/43) ([35]).

Admissions made before arbitrators may sometimes be used in the Court (C.A. 128/35) ([36]).

An application for enforcement of the award must be accompanied by a signed copy of the award (sec. 15(4)).

As regards the evidence required for any particular application, reference should be made to the notes following the relevant sections.

See note *Consolidation of Applications, infra* for evidence by affidavit in the case of consolidated applications.

See also notes to sub-sec. (2) hereof.

Advocates: A power of attorney authorising an advocate to appear in arbitration proceedings may also be used in Court in proceedings arising out of the award (C.B.M., Jm. 4971/38([37])).

As regards powers of attorney authorising the advocate to submit, see note *Who may submit,* following the definition of *Submission* in sec. 2. As regards powers of attorney to appear before arbitrators, see notes to sec. 4, heading *Cases.* See also note *Opposition to enforcement of Award* in the notes to sec. 14.

Fees: For the fees payable in proceedings under the Ordinance, see Arbitration Rules, *post,* r. 5 and notes.

Costs: See sec. 18, and notes.

Remedies available: In addition to the remedies specifically set out under the terms of the Ordinance (secs. 3, 5, 6, 7, 8(2), 9, 10, 11, 12, 13, 14 and 20) reference should be made to the notes to sec. 5 for ancillary remedies which a Court may grant together with an order for stay; to the notes to sec. 13 for the power of the Court to set aside awards under its inherent jurisdiction and to grant injunctions restraining a party from registering a Workmen's Compensation award pending an application to set the award aside; to the notes to sec. 14 for the power of the Court, when enforcing an award, to correct a mistake in calculation appearing therein; and to the notes to sec.

([32]) 6, P.L.R. 31; 1939, S.C.J. 13; 5, Ct.L.R. 39; P.P. 27.1.39.

([33]) 1938, T.A. 78.

([34]) 1940, T.A. 174 (*in Hebrew*) where a certified copy of the record was accepted.

([35]) 1944, S.C.D.C. 309.

([36]) 1, Ct.L.R. (N.S.) 4; 7, R. 376. See note to this case in sec. 13, *ante,* p. 122.

([37]) P.P. 11.9.38. Set aside on appeal on different grounds.

15(3) for the power of the Court to grant ancillary remedies when it is seized with an appeal.

The question of inherent jurisdiction also arose in C.A. 125/43([38]) where it was unsuccessfully argued that a Court could not appoint a receiver under r. 297 of the C.P.R. in the absence of a *lis pendens*, and that an arbitration did not constitute such a *lis pendens*. The position, it was contended, was the same as applied in England before the 1934 Arbitration Act provided a statutory exception to this general rule([39]).

The Supreme Court upheld the power of a Court to appoint a receiver in connection with pending arbitration proceedings, relying on the difference in wording between the relevant rules under the Civil Procedure Rules and the corresponding English Rules of the Supreme Court. The decision is based principally on the ground of convenience, as may appear from the following extract:

> "In 1938 our Civil Procedure Rules came into force and it seems to us to be relevant to bear in mind that at that time the English legislature had apparently found that the balance of convenience was in favour of allowing in a proper case — where a dispute had been referred to arbitration — a receiver to be appointed. That being so, we may assume that in Palestine also the balance of convenience from the point of view of the public is that a Court should have power to appoint a receiver even although there has been a reference to arbitration. We think, therefore, that the method of approach to this problem is to see whether the wording of rule 297 and the following rules excludes us from holding that a Court can, if it wishes, in a case where it considers it to be just and convenient, appoint a receiver".

This case and the case following are difficult to reconcile with the English *dictum* quoted in C.A.D.C., T.A. 40/41([40]), as mentioned in the notes to sec. 1, *ante*, p. 56 heading CONSTRUCTION.

C.A. 125/43 (*supra*) was followed in Misc. A.D.C., T.A. 222/43([41]) where it was held that an order of attachment may be granted by the Registrar of the District Court in connection with pending arbitration proceedings.

Unauthorised Tribunals, Conflict of Jurisdiction: The District Court has jurisdiction to restrain unauthorised tribunals from acting (C.D.C., T.A. 2/42)([42]) or to stop by injunction an inferior tribunal, such as an arbitrator under the Cooperative Societies Ordinance from continuing arbitration proceedings pending the hearing of an action in the District Court (C.A. 154/41([43]); C.A. 247/41([44])).

Where the provisions of the Arbitration Ordinance are excluded, as in the case of Trade Disputes arbitrations under the Defence Regulations, the

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([38]) 10, P.L.R. 281; 1943, A.L.R. 301.

([39]) See, in notes to sec. 1, heading: SOURCE, INTERPRETATION.

([40]) 1941-2, T.A. 7.

([41]) *Not reported.*

([42]) 1941-2, T.A. 16.

([43]) 8, P.L.R. 375; 1941, S.C.J. 397; 10, Ct.L.R. 138.

([44]) Same case; *Ibid.* 618, 633 and 202. The High Court will not interfere: H.C. 99/41 (*ibid.* 567, 513 and 165) — other proceeding in the same case.

High Court may be approached, as was done in H.C. 147/42([45]), or other remedies be sought in the Courts (*vide ibidem*). See also H.C. 25/44([46]).

Powers of the Court: By virtue of this sub-section, read together with r. 7 of the Arbitration Rules, the Court appears to be invested with the very wide powers conferred upon it by the Civil Procedure Rules and the Magistrates Courts Rules. Thus, in C.D.C., T.A. 301/38, 302/38([47]), the Court after holding that a petition should have been instituted by statement of claim and not by notice of motion, decided to regard the motion as a statement of claim (C.P.R., r. 123). Again, in C.A. 65/42([48]), the application of C.P.R. 312 and 189(2) was considered. See also the same heading under sub-sec. (3) hereof.

But in C.D.C., T.A. 192/40([49]) it was held that r. 361 of the Civil Procedure could not be invoked to extend the time provided by r. 3 of the Arbitration Rules.

As regards the powers of the Court on appeal, see notes to sec. 15(3).

Consolidation of Applications: Where an award is before the Court, it is nearly always on two applications, the one to enforce it (and opposition thereto — see sec. 14 and notes, and Arbitration Rules, *post*) and the other to set it aside. The opposition and application to set aside may be set out in the same document but separate fees are payable thereon. (See notes to secs. 13, 14 and see C.A. 174/35([50]) mentioned in note *Grounds of Appeal*, to sec. 15(3)). A perusal of the notes to secs. 13 and 14, will make it clear why an opposition to an application to enforce is usually not sufficient to contest the award. It was formerly customary (e. g., C.D.C., T.A. 52/41)([51]) to hear the two applications together. In C.A. 352/43([52]) it was held that the petitions could be consolidated, but only after an order under r. 304 C.P.R. had been made, as motions are actions within the meaning of C.P.R., r. 2([53]).

An application to set aside an award may, by consent, be taken before an application to enforce (C.A. 32/43)([54]) and this seems to be the better (C.A.D.C., Ha. 69/42)([55]) and more prevalent (e. g., C.A. 235/43)([56]) practice.

([45]) 10, P.L.R. 7; 1943, A.L.R. 35.

([46]) 11, P.L.R. 187, 1944, A.L.R. 266.

([47]) P.P. 10.1.39. But this case is now obsolete on the other points. See *supra*. P. 156.

([48]) 9, P.L.R. 392; 1942, S.C.J. 429. (Judgment of Edwards, J.)

([49]) 1940, T.A. 100 (*Order of the Registrar*).

([50]) 7, R. 57; P.P. 9.6.36.

([51]) 1941-2, T.A. 10.

([52]) 11. P.L.R. 275; 1944, A.L.R. 424.

([53]) In C.D.C., T.A. 147/41, 299/41 (1941-2, T.A. 189, *in Hebrew*) two applications were so consolidated under r. 304.

([54]) 10, P.L.R. 181; 1943, A.L.R. 208.

([55]) June-July, Ha. 1943, 37.

([56]) 1943, A.L.R. 814.

As on 12.1.1945.

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