LAW REPORTS
OF THE
DISTRICT COURT
IN
TEL-AVIV
1937

George B. Mu'amm
Advocate

LAW REPORTS
OF THE
DISTRICT COURT
IN
TEL-AVIV

FEBRUARY 1937 – FEBRUARY 1938

TEL-AVIV
1938

Printed in Palestine (Eretz-Israel)

Co-operative Printing Press "Hapoel Hazair", Tel-Aviv.

PREFACE.

*The present compilation contains selected judgments delivered by the District Court in Tel-Aviv, from the beginning of February, 1937, to the end of February, 1938, being with one exception *), either final or confirmed on appeal. Wherever the confirming judgment on appeal is available in print a note to that effect has been appended to the report.*

The period over which these judgments extend represents the first year during which the District Court functioned separately in Tel-Aviv.

Considerable efforts had been made for the establishment of an independent District Court in Tel-Aviv. A first step in that direction was taken in February, 1937, and thanks to the interest taken by the present Chief Justice, Sir Harry H. Trusted, the Court has reached its present status and that measure of independence which it now enjoys.

The Court as originally constituted consisted of Their Honours Shaw, Relieving President, and Dr. Many. With the appointment of Their Honours Edwards and Dr. Korngrun as District Court President and Judge respectively, and of Mr. Z. Harakabi as Registrar, the Court received its final form and status.

It is hoped that this volume, containing as it does reports on points of novelty and practical importance, may prove of assistance to practitioners in Tel-Aviv and elsewhere.

The credit for the publication of this work is equally shared between Advocate Y. Heirouti, for his initiative, Mr. (now advocate) E. Shereshevsky, who wrote the headnotes and Mr. (now advocate) A. M. Apelbom, who selected the judgments, prepared the index and saw the book through the press.

Mr. S. Bursi is responsible for the technical work and for financing the enterprise.

---

*) Gaber *v.* Migdal Insurance Co. Civil Case No. 127/37 (p. 62).

جورج عام
George [illegible]
Advocate

CIVIL APPEAL No. 45/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :

John Chandris. APPELLANT.

v.

Isaac Hos & Co. RESPONDENT.

Action before British Magistrate — Non appearance of witnesses for Plaintiff — Power of Court to strike out for non-appearance limited to that of plaintiff but not to that of witnesses.

N. B. : This case came up again on appeal in C. A. D. C. 249/37, *post, p.* 55.

Appeal from the Judgment of the Magistrate's Court in file No. 129/36, dated 22.12.36, whereby Appellant's (Plaintiff's) action was struck out.

JUDGMENT:

This is an appeal from the Judgment of the British Magistrate, whereby the Appellant's action was struck out because the witnesses whom the Appellant desired to call in support of this claim were not present.

In our view, the only case in which an action may be struck out is when the Plaintiff fails to make an appearance, or applies for the case to be struck out.

Further the provisions of article 16 of the Magistrate Law were not complied with in that the Plaintiff was not given the opportunity of naming the witnesses and summoning them.

The appeal is allowed and the case remitted for rehearing.

Delivered in open Court this 6th day of February, 1937.

R/President.

Judge.

CIVIL APPEAL No. 11/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Menahem Mendel Chudakow. APPELLANT.

v.

Dr. Abraham Aharonov. RESPONDENT.

Application for the appointment of an arbitrator — New preliminary points, not raised at first hearing, may be raised subsequently if no opportunity was given to raise them at first hearing — Unilateral undertaking to refer to arbitration may be sufficient if accepted by conduct of the second party.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 9557/36 dated 10.9.36, whereby Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

This is an appeal against a judgment whereby the Magistrate's Court dismissed an application for the appointment of an arbitrator on the ground that there was between the parties no legal submission to go to arbitration.

In previous proceedings the same application was dismissed on the ground that the notice for the appointment of an arbitrator was invalid because it was not signed by the Appellant himself. This Court set aside the Magistrate's decision and remitted the case to him for completion.

Now the following points are at issue :—

1. Can a party raise an issue available in a former proceeding ?
2. Does an unilateral undertaking to refer a dispute to arbitration, if accepted by the other party constitute a binding submission or not ?

On the first point we are not satisfied that the Respondent was given the opportunity of arguing his preliminary points at the same time in the previous proceeding as should have been done in the lower Court. In these circumstances we find that the Respondent is not estopped from arguing new preliminary points.

We should observe that this method of trying cases piecemeal is not desirable. It causes waste of time on the part of the Courts and additional expenses on the part of litigants.

As to the second point at issue, we hold that a unilateral written undertaking to submit to arbitration, if accepted by the other party, constitutes a binding submission. In this present case we are satisfied that the other party by his conduct, accepted and confirmed the written submission of the first party.

This appeal is therefore allowed and the case remitted for completion. Costs in this Court and in the Court below to follow the event.

Dated this 13th day of February, 1937.

President.

Delivered in open Court on 19.2.37, in the presence of Mr. P. Goldberg for Appellant.

President.

CIVIL APPEAL No. 29/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Haim Mitelman. APPELLANT.

v.

Joseph Dagan. RESPONDENT.

Application for Stay of Proceedings on grounds of arbitration — Power to stay proceedings is discretionary — Duty of Magistrate to hear parties, if required to do so.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 10024/36, dated 25.12.36, whereby defendant (Appellant) was ordered to pay LP. 100 with interest, costs and advocate's fees.

JUDGMENT.

This appeal is based on two grounds :—

a) That the Magistrate had to stay proceedings in view of the fact that the parties in the case had submitted their dispute to arbitration ; and

b) That the Magistrate did not hear the parties applied for by the Appellant.

As to the first point, the power of the Court to stay proceedings in case of arbitration is discretionary and in this case we do not see any reason for interfering with the exercise of the Magistrate's discretion.

With regard to the second ground of appeal the Magistrate was bound to hear the parties in confirmity with his own decision in this case.

The appeal is therefore allowed and the case remitted for completion.

Delivered this 2nd day of March, 1937.

President.

CIVIL APPEAL No. 50/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Haim Ashriky. APPELLANT.

v.

Erwin Moses. RESPONDENT.

Claim for rent after order for eviction — Plaintiff entitled to assessed rent but not to agreed rent — Original contract of lease discharged.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 14054/36, dated 11.12.36, whereby Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

The Appellant's claim before the Magistrate was for rent under a contract of lease duly signed by the parties.

The Magistrate dismissed the action on the ground that since the Appellant got an order for eviction he can no more rely on the contract of lease or on the promissory notes given in connection with the said contract.

In our view, though the Appellant is not entitled to the rent agreed

upon in the contract, he is nevertheless entitled to a rent from the date of the order of eviction till the actual eviction. The rent is to be assessed in the ordinary way. The cause of action, namely rent, not having changed, the Appellant is not bound to bring a new action.

The appeal is allowed and the case remitted for completion.

Delivered this 8th day of March, 1937, in the presence of Mr. Kaufman for Respondent.

R/President.

Judge.

CIVIL APPEAL No. 59/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :
Alice Tietz. APPELLANT.

v.

1. Yehuda Veizel,
2. Zarna Veizel,
3. David Veizel. RESPONDENTS.

Claim on promissory notes given in respect of interest for loan secured by Mortgage — Right to sue on notes not debarred by the order of foreclosure obtained previously. Mejelle article 730.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 17075/36, dated 31.1.37, whereby Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

In our view, the fact that the Appellant obtained an order of foreclosure of the Mortgage, does not deprive him of the rights to sue on the promissory notes given in payment of the interest of the loan secured by the said Mortgage. Article 730 of the Mejelle is clear on this subject.

The appeal is allowed and the case remitted for hearing on its merits.

Delivered in open Court this 22nd day of March, 1937, in the presence of Mr. Dr. Grunwald for Appellant.

R/President.

Judge.

CIVIL APPEAL No. 60/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF:

Shoshana Phlumin Rosin. APPELLANT.

v.

"Hakibutz Hameuchad, Kevutzat Poalim Leityashvut Shetufit Limited". RESPONDENT.

Appeal against a judgment of the Magistrate's Court given in favour of Respondent — The Respondent a cooperative society registered under a corporate name — Appeal describing Respondent otherwise than the registered name must fail.

Appeal from the Judgment of the Magistrate's Court in file No. 5388, dated 10.1.37, whereby Appellant (Defendant) was ordered to pay LP. 2.017 mils with interest and costs.

JUDGMENT:

Upon considering the judgment appealed against we find that it was given in favour of "Hakibutz Hamehuhad, Kebutzat Poalim Lityashvut Shetufit Limited".

Upon Section 21 of the Cooperative Societies Ordinance, the registration of a society shall render it a body corporate by the name under which it is registered.

The appeal having been filed against a certain "Hakibutz Hamehuhad" must therefore be dismissed, no judgment having been in favour of such a person.

Delivered in open Court this 6th day of April, 1937.

R/President.

CIVIL APPEAL No. 67/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Franziska Elias. APPELLANT.

v.

Israel Resnitzky. RESPONDENT.

Claim on promissory note signed by one partner on behalf of partnership — Partnership dissolved by death of partner and in liquidation — Personal liability of drawer — Preferment of note before liquidation proceedings no bar to claim in Court.

Appeal from the Judgment of the Magistrate's Court Tel-Aviv in file No. 18489/36, dated 24.2.37, whereby Appellant's (Plaintiff's) action was dismissed with costs and advocate's fees.

JUDGMENT:

This is an appeal from the Judgment of the Chief Magistrate, Tel-Aviv, in case No. 18489/36.

In that case the Appellant sued the Respondent on a promissory note, dated 5.12.35, for LP. 200.—

The statement of claim set out that the Respondent had signed on behalf of the partnership Chevrat Shutfut Lebinayn Batim Meshutafim Be Erez Israel, and that the Respondent had not paid the promissory note on the date of maturity (15.3.36). It also set out that Respondent was a partner in the firm when he signed the promissory note.

The learned Chief Magistrate dismissed the Appellant's claim. He found that in liquidation proceedings the Appellant's husband had claimed the promissory note as being his property, and he did not accept the Appellant's statement that the promissory note was her property. He found consequently that the Appellant could not bring an action on the promissory note. The learned Magistrate remarks :—

> "I think that a partner cannot be sued personally on a partnership debt without the firm being joined if in existence, Section 18 does not go so far as Plaintiff argued. While claim is still before liquidator appointed by Court, I doubt if an action also lies in a Court".

The Respondent submits that the Appellant has failed to serve Respondent or to file in this Court within the prescribed time a certified copy of the Judgment appealed against in accordance with article 186 of the Civil Procedure Code.

Having considered the arguments of both parties we find that article 186 of the Civil Procedure Code does not apply in this case, special provision having been made in the Magistrate's Law with regard to appeals from Magistrate's Courts. We have considered the points raised in appeal and the replies thereto, and we are unable to find that the Appellant cannot sue on the promissory note. Even if it be assumed that the Appellant received the promissory note after maturity she could sue upon it, although if she were not a holder in due course the Respondent could avail himself of any defence that would have been available to him against the person from whom Appellant took the promissory note.

It was not denied that the Respondent was a partner in the Margoa firm, nor was it denied that the promissory note had been signed by persons authorised to sign on behalf of the firm.

We find that the partnership had dissolved by the death of one partner although its affairs had not been finally liquidated. We further find that the Respondent was jointly and severally liable for the debts of the firm and that he could be personally sued thereon-section 18 of the Partnership Ordinance (Chapter 103). It would of course have been open to him to prove, if he could, that the debt was not due from the firm.

We are unable to find that the preferment of a claim on the promissory note in the liquidation proceedings precluded the Appellant from suing the Respondent personally. There was no fraud upon the other creditors.

The appeal is allowed and Judgment entered for the Appellant for LP. 200 with costs in this Court and in the Court below, and LP. 5 advocate's fees.

Delivered in open Court this 31st day of May, 1937, in the presence of :— Mr. Moyal for Respondent.

R/President.

Judge.

CIVIL APPEAL No. 113/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :
Ephraim Mielboyer. APPELLANT.

v.

Jacob Pass. RESPONDENT.

Claim for brokerage — Article 80 of the Civil Procedure Code applicable only to contracts which by custom are made in writing — Broker and client relations not fixed in writing — Oral evidence admissible.

N. B.: The District Court of Haifa has held that brokerage contracts *are* customarily reduced to writing: C. A. D. C. Ha. 267/37 — *Northern Law Reports*, Jan. *p.* 3.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 11721/36, dated 15.3.37, whereby Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

The claim before the Magistrate was one for brokerage.

The Magistrate refused to hear oral evidence on the ground that the claim exceeded LP. 10.—.

In our opinion the article 80 of the Civil Procedure as to the admissibility of oral evidence applies only to contracts and transactions which by custom are made in writing. It has never been the custom for the relations between a broker and his client to be fixed in writing.

The appeal is allowed and the case remitted for hearing evidence.

Delivered in open Court this 31st day of May, 1937, in the presence of Mr. Frenkel for Appellant.

R/President.

Judge.

CIVIL APPEAL No. 134/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Levant Trade Company. APPELLANT.

v.

Moshe Yehezkel Matalon. RESPONDENT.

Claim for recovery of rent paid in excess of rent assessed by Rent Commissioner — Rent recoverable if paid under protest or reservation.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 2321/36, dated 29.7.36, whereby Appellant (Defendant) was ordered to pay LP. 21 with interest and costs.

JUDGMENT:

It has been held by this Court in previous cases that monies paid in excess of the rent as assessed by the Rent Commissioner can be recovered if they were paid under protest or reservation.

In this case the Magistrate dismissed Appellant's claim without giving him the opportunity of proving that the monies which he paid in excess to the assessed rent were paid under protest or reservation.

The appeal is allowed and the case remitted for completion.

R/President.

Judge.

Delivered in open Court this 31st day of May, 1937.

R/President.

CIVIL CASE No. 95/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :

David Illgovsky,
Gedalia Illgovsky. APPLICANTS.

v.

Itzhak Meir (Max) Halperin. RESPONDENT.

Application for the appointment of a receiver under Article 1313 of the Mejelle — Plaintiff present in this country — Mejelle inapplicable.

JUDGMENT:

The Plaintiffs and the Defendant are joint owners of an orange grove. It is alleged by Plaintiffs that the Defendant is not contributing to the expenses of cultivating the orange grove in question. On this ground and relying on Article 1313 of the Mejelle the Plaintiff asks for for an order to be allowed to make the necessary expenses and to be appointed as a receiver of the Defendant's share in the grove.

The Plaintiff in his evidence admits that the Defendant is now in Palestine and he produced a letter (Exh. 1)whereby the Defendant allows the Plaintiff to make the necessary expenses being himself unable to participate.

We hold that under these circumstances the Mejelle does not apply and we see no ground to appoint a receiver.

The action is therefore dismissed with costs.

Dated this 15th day of June, 1937.

R/President.

CIVIL APPEAL No. 138/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :
Lazar Elinson. APPELLANT.

v.

Salomon Gorlin. RESPONDENT.

Action of Foreign bill — Plea that holder is not a holder in due course according to Foreign law —Evidence of Foreign law unnecessary — Defendant's absence does not deprive him of right of defence — Evidence by examination on oath by Commission Interrogatoire.

Appeal from judgment of the Magistrate's Court Tel-Aviv in file No. 6293/36 dated 17/3/37 whereby Appellant (Defendant) was ordered to pay LP. 149,750 with costs and Advocate's fees.

JUDGMENT:

This is an appeal from a judgment of the Magistrate's Court Tel-Aviv whereby the Magistrate adjudged to Respondent the sum of 450 American gold dollars.

The appeal is based on two grounds :

a) That the Magistrate refused to hear expert evidence on Polish law, in order to prove that the Respondent is not a holder in due course of the bill on which the claim is based.

b) That the Magistrate refused to have the Respondent who is in Poland examined on oath by a Commission Rogatoire to the effect that the Appellant did not receive any consideration.

While we agree with the learned Magistrate that there was no necessity of hearing evidence as to the law in Poland, we hold that the Magistrate could not refuse to have the have the Respondent examined on oath by a commission rogatoire.

The fact that a plaintiff is resident in a foreign country does not deprive a defendant from his right of defence.

The appeal is allowed and the case remitted for completion.

Delivered in open Court this 30th day of June 1937.

R/President.

Judge.

CIVIL APPEAL No. 144/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Kolman Briker. APPELLANT.

v.

Eliezer Chodorow. RESPONDENT.

Action for the return Notes — Alleged loss of notes — Duty of defendant to give claimant full Bank guarantee to guard against possibility of future claim on same notes.

N. B.: See also C. A. D. C. 172/37, *post p.* 18.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 14753/36, dated 18.4.37, whereby Appellant (Defendant) was ordered to pay LP. 110.600 with interest and costs.

JUDGMENT.

This is an appeal from a judgment of the Magistrate whereby the Appellant was ordered to return to Respondent a certain number of promissory notes for a total amount of LP. 110.600 or in default to pay that amount.

From the minutes of the case it appears clearly that the said bills could not be found. In that case, we hold that the Appellant is bound to give Respondent a full Bank guarantee in the total sum of the said promissory notes to secure Respondent against the possibility of any claim being brought against Respondent by a person into whose hands the said promissory notes may fall.

The judgment of the Magistrate is accordingly amended.

Delivered in open Court this 22nd day of July, 1937.

R/President.

Judge.

CIVIL APPEAL No. 152/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Kupat Milve Vechisachon, Rehovoth. APPELLANT.

v.

Reuven Zarkow. RESPONDENT.

Action on a Note against guarantor "Aval" — Meaning of "Banking Business' — Mere making loans of money not a Banking business — Duty to register under the Banking Ordinance.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 8610/36, dated 9.5.37, whereby Appellant's (Plaintiff's) action was dismissed with costs.

JUDGMENT.

The Appellant which is a Co-operative Society Ltd., sued the Respondent on a promissory note for an amount of LP. 100.—.

The Respondent signed the promissory note as a guarantor "Pour Aval", the maker of the note being a certain Samuel Hirsh, who received a loan from the Appellant.

The Respondent in his defence before the Magistrate submitted that inasmuch as the loan given by Appellant to the maker of the note is "banking business', within the meaning of the Bank Ordinance 1927 and since the Appellant was not at the date of the bill registered under the Banking Ordinance, he cannot sue on the bill, the transaction being illegal. The Magistrate accepted this plea and dismissed Appellant's action.

According to the Banking Ordinance 1921 "Banking business" means the business of receiving from the public on current account money which is to be repayable on demand by cheque and of making advances to customers. It follows from this definition that the mere fact of making a loan does not constitute a banking business.

Further, it is clear from Section 62(2) of the Co-operative Societies Ordinance that only a society which undertakes the business of *receiving deposits on current account from other than its own members,*

shall comply with the provisions of the Banking Ordinance and shall be subject to registration. It follows that a Co-operative Society which only makes advances of money is not subject to registration under the banking Ordinance.

The appeal is therefore allowed and the case remitted for hearing on its merits.

Delivered in open Court this 26th day of July, 1937.

President.

CIVIL CASE No. 154/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Ignacy Isak Banner. PLAINTIFF.

v.

Ruth Brind. DEFENDANT.

Dissolution of partnership — Arbitration proceedings pending — Power of Court to stay proceedings — Power of Court to limit time for the issue of the award — Power of Court to appoint receiver

JUDGMENT:

This is an application for the dissolution of a partnership existing between Plaintiff and Defendant for the exploiting of a pharmacy called "Hatzaphon Pharmacy".

A preliminary point was raised by the Defendant to the effect that arbitration proceedings on the same subject matter are pending before arbitrators appointed by the parties in pursuance of section 11 of the partnership agreement and consequently the present proceedings must be stayed.

After hearing a very able address from Mr. Needer who appeared for the Plaintiff and taking into consideration the fact that the Applicant took the initiative in starting the arbitration proceedings, and as we see no reason why the arbitration proceedings should not continue, we order the present proceedings to be stayed on condition that the Arbitrators do give their award within 4 months of this date.

As to the application for the appointment of a provisional receiver we think that the best person to be so appointed is the Defendant herself. Having regard to the smallness of the business we think that it would be to the prejudice of both sides if a paid receiver were to be appointed.

We therefore appoint the Defendant to be Receiver without remuneration. She must give her personal bond in the sum of LP. 200.— for the due performance of her office.

As to the application for an injunction — without going into the question whether we have jurisdiction to grant such an injunction — we see no sufficient grounds for granting it.

We make no order as to costs. Liberty to apply.

Dated this 26th day of July, 1937.

Read of the presence of Mr. Neder and Mr. Gorodisky.

R/President.

CIVIL APPEAL No. 172/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

Menahem Finkelman. APPELLANT.

v.

Sara Schupak. RESPONDENT.

Action on lost Promissory Note — Loss of note must be alleged and proved — Administration of oath to defendant insufficient.

N. B.: See also case on *p.* 15, *ante.*

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 5916/37, dated 27.5.37, whereby Appellant (Defendant) was ordered to pay LP. 35 with interest and costs.

JUDGMENT:

The Respondent's action before the Magistrate was based on a promissory note, alleegd to have been guaranteed by the Appellant.

The note in question was not produced by the Respondent who asked

for the Appellant to be put on oath that he never signed a bill as a guarantor for the amount of LP. 35.— in favour of Isaac Feygin.

The Appellant refusing to take such an oath the Magistrate entered judgment against him for the amount of the claim.

In our opinion, since the claim is one on a promissory note, the note must be produced, and if it be alleged that the bill is lost the loss must be proved and the disposition of the Bills of Exchange Ordinance as to lost bills must be applied.

The appeal is allowed and the case remitted for completion.

R/President.

Judge.

Delivered in open Court this 26th day of July, 1937.

R/President.

CIVIL APPEAL No. 129/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Miriam Panicz. APPELLANT.

v.

Jacob Rosenberg. RESPONDENT.

Appeal from judgment of the Rent Tribunal — Power of Rent Tribunal to fix rent below the maximum fixed by the Ordinance — Power of the Rent Tribunal to vary the conditions of the original contract of lease.

Appeal from the Jadgment of the Rent's Tribunal Tel-Aviv in file No. 497/36 dated 19.4.37 whereby rent was reduced to LP. 15 per month.

JUDGMENT:

This is an appeal from the decision of the Rent Tribunal of Tel-Aviv.

It appears that on 4.3.34 the parties entered into an agreement of tenancy in respect of a shop in the building belonging to the Appellant situate at No. 69 Allenby Road, Tel-Aviv. The construction of this building has been completed in May 1934.

Under the terms of the contract the shop was let for a term of one year beginning on 1.5.34 and ending on 1.5.35, and the Respondent (Lessee) undertook :—

a) To pay a yearly rent of LP. 200 ;

b) To pay the rent in advance for the whole year ;

c) To pay the Municipal Property Rate.

The agreement was prolonged by virtue of the Landlords and Tenants Ordinance 1935 and 1936 for a second and third year.

On 24.11.36 the Respondent applied to the Rent Commissioner, and subsequently he applied to the Rent Tribunal.

Under the final order given by the Rent Tribunal :—

a) The rent was fixed at a monthly rent for LP. 15.

b) The Respondent was released from his contract undertaking to pay the rent in advance for the whole year, and was allowed to pay by 12 monthly instalments of LP. 15 each.

c) The Respondent was released from his contract obligation to pay the Municipal Property Rate.

The only point that we need deal with is whether the provisions of section 13 of the Landlords and Tenants (Ejection and Rent Restriction) (Extension) Ordinance, 1935, empowers the Rent Tribunal to reduce the rent below the maximum fixed by section 12(1), and to vary the agreement as to the payment of Municipal Property Rate by the lessee and as to the mode of payment.

Having considered the submissions of the parties we find that section 13 does empower the Rent Tribunal to reduce the rent below the maximum fixed by section 12(1). With regard to the variations we find that these too were within the powers of the Rent Tribunal and we are not prepared to hold that they did not exercise their powers reasonably.

The appeal is dismissed wih costs and LP. 2.— advocate's fees.

Delivered in open Court this 27th day of July 1937, in the presence of : Michaelowsky for Appellant and Dr. Rabinovitz for Respondent.

R/President.

Judge.

CIVIL APPEAL No.195/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour The R/President (Shaw, J.),
His Honour Judge I. Many.

BETWEEN :

B. Franko. APPELLANT.

v.

S. Alman & Co. RESPONDENT.

Action for accounts — Jurisdiction of Magistrate's Courts strictly limited to matter specified in the Magistrate Court's Jurisdiction Ordinance, 1935 *— Action for accounts is a special action not within the matters so specified.*

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 3857/36, dated 4.6.37, whereby Appellant (Defendant) was ordered to pay LP. 50.810 mils with interest and costs.

JUDGMENT:

In our opinion the Magistrates Courts jurisdiction is limited to the subject laid down in the Magistrates Courts Ordinance, 1935.

An action for accounts is a special action which does not fall within the matters laid down in the above mentioned Ordinance.

The appeal is allowed with costs and LP. 2.— Advocate's fees.

R/President.

Judge.

Delivered in open Court this 27th day of July, 1937.

R/President.

CIVIL APPEAL No. 192/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

L. Halperin. APPELLANT.

v.

F. Schlesinger. RESPONDENT.

Claim for the refund of money paid to customs department — Relations of customs agent and owner of goods — Duties of agent express and implied — Right to indemnity

Appeal from Judgment of the Magistrates' Court, Tel-Aviv of 5/5/37 in file No. 6387/37.

JUDGMENT:

The Magistrate dismissed the claim of the Appellant although proved by documents for the reason only that the Respondent did not authorise the Appellant to pay for him to the Custom Dept. the sum claimed as undercharge of import duty.

The relations between the Appellant as a customs agent and the Respondent as an owner of goods who entrusted his goods to the Appellant are regulated by Art. 1449 of the Mejelle and Section 166(i) of the Customs Ordinance 1929. The Appellant as a Customs Clearer was an agent of the Respondent in order to pay the Customs Department all duties in connection with the goods of the Respondent — and was obliged to pay the whole amount of these duties including the amounts short levied or erroneously refunded (Sec. 149(1) of the Customs Ordinance). As an agent of the Respondent, Appellant is entitled to be indemnified by the Respondent. (Art. 1506 of the Mejelle) whether Respondent as owner of the goods agrees expressly to indemnify him or not.

We therefore allow the appeal, set aside the judgment and order that the Respondent shall pay to the Appellant the sum of LP. 5.337 together with legal interest from 25/4/37, costs of this action in the Magistrate's Court and the District Court, and LP. 2 advocate's fees.

R/President.

Judge.

Delivered in open Court, this 30th day of September, 1937.

President.

CIVIL APPEAL No. 219/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

BETWEEN :

Pinchas Klaks. APPELLANT.

v.

Shmuel First. RESPONDENT.

Signature on undertaking — Signatory only clerk of firm — No personal liability — Not party to action.

Appeal from judgment of the Magistrates' Court Tel-Aviv in file No. 7927/35, dated 30/6/37, whereby Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

The Respondent proved to the satisfaction of the Magistrate that he was only a clerk of the firm "The Taxi Service" and neither the owner nor the manager of this firm.

The Magistrate therefore was right in holding that the Respondent is not the party of the Plaintiff in this case.

We dismiss the appeal and confirm the judgment appealed against with costs and LP. 2.— Advocate's fees for the Respondent.

R/President.

Judge.

Delivered in open Court this 30th day of September, 1937.

President.

CIVIL APPEAL No. 233/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Shalom Lederberg. APPELLANT.

v.

British Thomson Houston Ltd. RESPONDENT.

Claim for recovery of specific object — Article 1635 of Mejelle — Party in possession of object – only party to action — Joinder of person from whom object obtained unnecessary.

Appeal from judgment of the Magistrate's Court Tel-Aviv in file No. 13330/36 dated 28/7/37 whereby Appellant (Defendant) was ordered to pay LP. 23 or to return a certain radio.

JUDGMENT:

The claim in this case is a claim for a special piece of property, within the meaning of article 1635 of the Mejelle.

According to this article and the judgment of the District Court as a Court of Appeal in the same case — only the man who is in possession of the property claimed *i. e.* the Respondent is a party to the claimant and it is not necessary to hear the case in the presence of the vendor, from whom his right is alleged to derive. (Art. 1636 of the Mejelle).

As the claimant (Respondent) proved his claim (art. 1818 of the Mejelle), we dismiss the appeal and confirm the judgment with costs and LP. 2.— Advocate's fees for the Respondent.

President.

Judge.

Delivered in open Court this 30th day of September 1937.

President.

CIVIL CASE No. 111/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Abraham Leghziel. PLAINTIFF.

v.

Haim Ben-Tiqva. DEFENDANT.

Agreement of dissolution of partnership — Subsequent agreement of sale between some of the parties only — Reference to former agreement — Breach of second agreement — Failure to obtain consent of third party stipulated for.

JUDGMENT:

The facts in this case are undisputed and are as follows :

1. The Plaintiff Abraham Leghziel together with the Defendant Haim Ben-Tiqva and a third person not a party to this case Eliezer Rabi were partners of a partnership "Plimaks". On the 8/6/36, all three partners dissolved this partnership by mutual consent. Plaintiff left the partnership, transferred all his rights in it to the Defendant and Eliezer Rabi and both these undertook by a contract dated 8/6/36 to pay to the Plaintiff a sum of LP. 300.

2. On the same day a second contract was made between the Plaintiff and the Defendant only (without Eliezer Rabi) in which the parties named themselves "Vendor" and "Purchaser" respectively.

By this contract Defendant undertook to transfer to the Plaintiff not later than 1/8/36 all his rights in the property known as No. 40 Shchunat Borohof (registered at the Land Registry Jaffa as Block 6167, Name "A" parcel 8 under Deed No. 449 of 2/10/30) for the sum LP. 420. As these rights to the sold property a leasehold for about 50 years could not be transferred to the claimant without the consent of the Keren Kayemeth Leisrael Ltd., then registered owner of the land Defendant undertook to obtain such consent. In consideration of this land transfer Plaintiff waived his right to claim from the Defendant and Eliezer Rabi LP. 300 due to him under the first agreement and to pay the rest in the Land Registry at the moment of the transfer. According to clause 8 of the second contract the Defendant undertook to pay LP. 100 as liquidated damages in the event of rescission from the fulfillment of this contract.

3. The Defendant did not fulfil his obligations under the contract mentioned in 2. in spite of a notarial notice served on him by the Plaintiff.

Counsel for Defendant admitted the above facts but raised two points of defence :

1) Defendant not having fulfilled his obligations under the the second contract — this contract became null and the parties have to go back to the first contract between the three partners *i. e.* Plaintiff can sue both the Defendant and Eliezer Rabi for LP. 300 or the Defendant for LP. 150 only.

2) The obligation to pay liquidated damages is confined to the point that Defendant will "repent" or "recede" from the fulfilment of the second contract *i. e.* when the non compliance will come from his own will and not from a reason beyond his control that the Keren Kayemeth Leisrael Ltd. refused to give its consent. Neither defence has any foundation on the facts of this case or in law. Nothing in the second contract indicates an intention to revive the first contract in the relations between the Plaintiff and the Defendant. As far as the Plaintiff and the Defendant are concerned the second contract was substituted for the first, which became cancelled (See Halsbury Laws of England volume 7 page 505 "novation") and the parties in this case are bound only by the latter.

Defendant did not produce any evidence other than the contracts in order to prove the special intention of the parties to limit the liability of the Defendant for damages to the case where a breach of the contract would be a consequence of his own bad will and not for any other reason.

From the contract itself this intention is not clear. Defendant when agreeing to procure the consent of the Keren Kayemeth Leisrael Ltd. to the transaction between the parties, should have known whether he would be able to fulfill this obligation. He undertook so to do and consequently must abide by his obligation under the contract or pay damages.

For the above reasons and in accordance with art. 106 and 111 of the Civil Procedure we give judgment for the Plaintiff for the sum of LP. 400 with legal interests as from 7/5/37, costs and LP. 2.— advocate's fees. The provisional attachment is thereby confirmed with costs for the Plaintiff.

The judgment was delivered in open Court this 7th day of October 1937 in the presence of the parties.

President.

Judge.

CIVIL APPEAL No. 194/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Pinhas Hochgloben. APPELLANT.

v.

Samuel Rosenblat. RESPONDENT.

Claim on Promissory notes — Plaintiff resident abroad — Plea of no consideration — Evidence of plaintiff by an affidavit sworn abroad in answer to questions submitted by defendant — Estopped from raising plea of non-compliance with Convention formalities.

JUDGMENT:

Appellant raised two grounds of appeal, both of formal nature :

(1) Power of attorney of advocate for Plaintiff is not in order. The claim was brought on behalf of a firm : "Le Peigue — Samuel Rosenblatt". Power of attorney is signed before the British Vice-Consul in Lodz also by "Le Peigue- Samuel Rosenblatt", but as counsel for Defendant pleaded, there is no evidence that Samuel Rosenblatt is still entitled to sign for this firm. The Magistrate, was right in disregarding this plea. The claim is based on two promissory notes signed by the Defendant to the order of "Le Peigue- Samuel Rosenblatt". The same Samuel Rosenblatt as a holder in due course (Section 28 of the Bills of Exchange Ord. 1929) claims now on the ground of these promissory notes. According to section 28 of the Bills of Exchange Ord. 1929 there is no need for him to prove his right to claim.

(2) Appellant (Defendant) pleaded lack of consideration, and wished to prove his defence by the evidence of the Claimant as a witness. As the Claimant lives in Lodz (Poland) it was for the Defendant to pay the costs in connection with the hearing of the Plaintiff through the intermediance of a competent Polish Court. In accordance with the Convention regarding Legal Proceedings in Civil and Commercial Matters between the United Kingdom and Poland — extended to Palestine 17/10/32. (See P. G. No. 329 from 1/12/32). But counsel for Defendant did not deposit any sum for these costs and agreed that the Claimants should answer by an affidavit to two questions,

regarding the consideration for the promissory notes claimed. Counsel for the Defendant even himself wrote the two questions and handed in the paper to counsel for the Plaintiff. He cannot now come forward with complaints that the Magistrate accepted this affidavit of the Plaintiff signed before a British Vice Consul as an additional proof and that the conditions and formalities prescribed by the above mentioned Convention were not complied with.

We therefore dismiss the appeal and confirm the judgment appealed against with costs and LP. 2.— advocate's fees for the Respondent.

Delivered in open court this 20th day of October 1937.

President.
Judge.

CIVIL CASE No. 180/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Rina Rechtman. PLAINTIFF.

v.

Moshe Rechtman. DEFENDANT.

Claim for maintenance — Concurrent Jurisdiction of Civil and Religious Courts — Effect of submission — Right to choose Court exhausted after choice made — Consecutive judgments in same file not separate judgments.

JUDGMENT:

In this case, Plaintiff Rina Rechtman sues her husband Moshe Rechtman for maintenance for herself and her child. Defendant pleaded want of jurisdiction of this Court according to section 53(ii) of the Palestine Order in Council, which gives to the Rabbinical Courts of the Jewish Community jurisdiction in any other matter of personal, *i. e.* any matter other than those specified in Art. 53(i), status of Jewish Palestinian Citizens, where all the parties to an action consent to their Jurisdiction. Defendant alleged that in this

case the parties consented to the jurisdiction of the Rabbinical Court. Plaintiff denied it. — Upon Plaintiff's demand the Secretary of the Rabbinical Court was heard as a witness and on the ground of his evidence and the file of the Rabbinical Court the following facts were found.

(1) The litigation between the same parties represented by the same advocates started before the Rabbinical Court in May, 1936.

(2) The original claim brought by the same Plaintiff before the Rabbinical Court was for maintenance for herself and her child and custody of the child. — Because of unfortunate disputes between her and her husband, the Defendant.

(3) The Rabbinical Court heard the case in the presence of both parties and ordered that the parties should live for some time separated and that the Defendant should pay to the Plaintiff his wife maintenance for some months. This original judgment was then prolongated by other judgments ordering the Defendant to pay maintenance for an other number of months. The last of these judgments was issued on 11 Nissan (Month April) 1937. This judgment ordered the original judgment to be extended for another 3 months, *i. e.* that Defendant had to pay LP. 4.— per month maintenance to his wife (Plaintiff) and child from 4 Nissan, 1937.—

(4) The practice of the Rabbinical Court is that the original claim must be made in writing and that after the lapse of time fixed in such a judgment ordering a party to pay maintenance until some date — any of the parties can verbally ask that the case be renewed and the other party summoned. Upon the request of the Defendant the Plaintiff was summoned before the Rabbinical Court for 11 Tamuz, 1937 (August), she did appear before that Court, did not object the jurisdiction and answered the claim. The copy of the minutes of this sitting proves, that — as in former hearings — the economic position of the husband was discussed in connection with an eventual divorce and the maintenance of the wife and the child. The parties were granted a short adjournment to see whether there was a possibility of a compromise. The parties were yet once more summoned to appear before the Rabbinical Court on 25th October, 1937, at it is mentioned in the summons for the continuation of the hearing of 11 Tamuz, 1937.—

(5) On the 25/6/37 the claimant lodged her claim for maintenance in the District Court Tel-Aviv.—

Counsel for the Plaintiff alleged that every one of these temporary judgments issued by the Rabbinical Court was the end of a separate

action, in which his client agreed to the jurisdiction of the Rabbinical Court, but that this jurisdiction was terminated, when three months had clapsed from the day of the issue of the last provisional judgment (April 1937) and that she is now entitled to claim further maintenance by a new action brought in the District Court, a Court of Concurrent jurisdiction (53(ii) of the Palestine Order in Council).

In the light of the evidence given by Rabbi Hochman, the Secretary of the Rabbinical Court and of the judgments of the Supreme Court sitting as a Court of Appeal No. 112/36 and 163/33 we can not accept the contention of the Plaintiff. Concurrent jurisdiction has a meaning only in the sense that the parties are entitled to bring their claims before one Court or the other, but this right is exhausted. When they took the choice and instituted the action in one of the Competent Courts. The parties can not go from one Court to the other, when they are not satisfied with an order of the first Court. This ruling is stated expressly in the judgment of the Supreme Court C. A. No. 112/36 : "As another Court having concurrent jurisdiction was chosen by the parties we feel bound to hold that if any variation of the order was desired the only Court, which had jurisdiction was the Court, which originally dealt with the matter", and further, "we decide the matter as we do so that there may be finality in litigation and to prevent the clashing of Courts having concurrent jurisdiction in the same matter". The consecutive judgments of the Rabbinical Court can not be regarded as separate judgments deciding separate actions. They are all given in the same file and based on the same findings as to the economic capacity of the Defendant, they are rather partial decisions of the same cause of action, besides they expressly state that they are only extensions of the original judgment. The litigation between the parties originally instituted in the Rabbinical Court, to which jurisdiction both parties consented are now going on in this Court, so that only the Rabbinical Court and not the District Court is competent to deal wih the case.—

For these reasons we dismiss the claim for want of jurisdiction with costs and LP. 2.— Advocate's fees for the Defendant.

Delivered this 26th October, 1937, in the presence of :—

Advocate Pevsner for plaintiff.

Advocate Heruti for defendant.

President.

Judge.

CIVIL CASE No. 52/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Joseph Rosenman. PLAINTIFF.

v.

Shimon Katzperovsky. DEFENDANT.

Claim for recovery of money on account stated — Relations of principal and agent — Right of agent to retain money belonging to principal — Set-off — Effect of silence of party contracting — Silence of agent.

JUDGMENT:

The facts proved in this case are as follows :—

1) Defendant, Shimon Katzperovsky acted for the Plaintiff Joseph living out of Palestine as his manager in Plaintiff's orange grove.

2) For some reason — irrelevant to this case — Plaintiff discharged the Defendant from his post and appointed in his place another agent, Abraham Safian, asking from the Defendant an account of all monies received and expended by him in connection with Plaintiff's orange grove.

3) The new manager of the Plaintiff, Abraham Safian, received from the Defendant a statement of account. This account is headed at the top "Account of investments in the orange grove of Mr. Joseph Rosenman in the period from October 1936 till January 1937", and contains the following figures and remarks : — "Income LP.950.840 mils, Expenditure : LP. 543.633 mils (Detailed figures are not denied so they are not mentioned here) — remained with me LP. 407.207 mils. Against this are due to me from Mr. Rosenman in the matters of Hashotel according to my detailed account which I have sent to him — LP. 332.600 mils. Remained with me balance in favour of Mr. Rosenman LP. 74.607 mils". This account bears at the bottom a remark "The sum of LP. 74.607 mils I have received for Mr. Joseph Rosenman by a cheque on the Mizrahi Bank 31.1.37", and is signed by Abraham Safian the new manager of the Plaintiff.

4) The Plaintiff denies that Defendant, his agent, was entitled to deduct the sum of LP. 332.600 mils eventually, due to him from the

partnership "Hashotel" — from a sum due by the Defendant to the Claimant personally without a special authorisation from the Claimant his principal. Plaintiff sues therefore for repayment. Defendant pleaded (1) that this debt of "Hashotel" is in fact personally due from the Claimant one of the partners of this firm although the work was done by the Defendant for the "Hashotel".

(2) That as appears from the account itself — Plaintiff's new manager did not raise any protest against the retention of LP. 332.600 mils by the Defendant, that he received the balance of LP. 74.607 mils and that by the behaviour and silence of Plaintiff's new agent Plaintiff is now estopped from claiming any item of the account having accepted the account *in toto*.

Counsel for Plaintiff then asked leave to give to Defendant the oath to the effect that the sum in dispute is a personal debt for the Plaintiff, but when the oath had to be administered, counsel for Defendant objected to the form of the oath and declared that this sum of LP. 332.600 mils is due to the Defendant "from the Claimant together with other persons", that in this case there are only questions of law, and finally that the relations between the parties have to be judged only on the basis of the document produced, *i. e.*, the aforementioned statement of account. — Consequently the Defendant did not take the oath.

In this case there are two issues, *viz.* (a) Was the Defendant entitled to retain a sum of LP. 332.600 mils by way of a set off a debt due to him from a partnership "Hashotel" against a debt due from him personally to the Claimant a partner of the "Hashotel" firm.

(b) Can the Claimant for reasons of the behaviour and the silence of this agent Safian — be regarded as having accepted the account of the Defendant and is therefore estopped from claiming the sum retained by the Defendant ?

In other opinion both questions are to be answered in the negative — whether we follow the Palestinian or the English Law. In the judgment of the Supreme Court sitting as a Court of Appeal C. A. 99/34 the following is stated : "There is no provision in the Ottoman Law which enables a person to set off a debt due to him from another person upon the account against a debt due from him to the same person upon a separate account". The more so if the debt intended to be set off is due to the debtor not from the same person but from a third person, a company, partnership and so forth. The above mentioned judgment states further that the English Rules as to set off cannot be applied in Palestine under Art. 46 of the Palestine

Order in Council 1922, as they are purely the creation of Statutes or Rules of Court.

In this case there was not a set off at all. A set off is a defence in Court, not some step taken outside the Court. What the Defendant has done, was simply to retain money belonging to his principal without any legal reasons. Art. 1463 of the Mejelle states : "Property in the possession of an agent... is considered to be property deposited with him for safe keeping". The principle laid down in the Book dealing with Trust and Trusteeship of the Mejelle, is that the man entrusted is obliged to return the property to the principal upon every demand (Art. 774 and 794 of the Mejelle) except in cases, in which the Law expressly gives to the agent a lien or a right of retention.

With regard to the second issue — silence of a contracting party can become a reason for creating obligations only when such a party is silent although he is by the law or a contract obliged to speak (Art. 67 of the Mejelle). No such necessity to protest is stated in the Mejelle with regard to relations between a principal and an agent. The principal is not estopped from claiming the balance of a debt due to him from his agent even if he received a small part of it. Especially when his account with his agent was settled by another agent — who may not have all information — and not by him personally. As far as the English Law is concerned the principal is not bound by a payment to or settlement with his agent, unless such payment or settlement was made in the ordinary course of business and in a manner actually or apparently authorised by him. (Bowstead on Agency, 8th Edition, p. 334). The settlement endeavoured to be made by the Defendant, *i. e.*, his arbitrary retention of a large sum due to the Plaintiff is far from being made in the ordinary course of business and no proof was adduced to show that it was authorised by the Plaintiff (Art. 779 of the Mejelle).

For these reasons we give judgment for the Plaintiff for LP. 332.600 mils together with legal interest as from 22-2-37 cost and LP. 3.— advocate's fees. The provisional attachment is hereby confirmed with costs.

Delivered this 27th day of October, 1937.

President.

Judge.

Judgment delivered in the presence of Mr. Fellman for Plaintiff and Mr. Dunkelblum for Defendant.

President.

CIVIL APPEAL No. 213/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :
The Palestine Credit Utility Bank Ltd. APPELLANT.

v.

Abraham Etkind. RESPONDENT.

Claim and Counterclaim — Defendant entered upon his defence — Plaintiff's objection to counterclaim on ground of Arbitration clause — Effect of (a) *Temporary striking out of case and* (b) *Stay of Proceedings — No right to order Stay of Proceedings after step in the proceedings.*

JUDGMENT:

In this case there is a claim by the Respondent Mr. Etkind against the Appellant, the Palestine Credit Utilitw Bank Ltd. for salary amounting to LP. 34,508.— After the beginning of the trial and after the Appellant had entered upon his defence on the merits of the case and witnesses were heard the Appellant brought a counterclaim for LP. 212,030 being a sum due to the Appellant from the Respondent in connection with the same agreement as that upon which the Respondent had based his claim for salary. In answer to the counterclaim Respondent pleaded that according to clause 12 of the mentioned agreement any dispute between the parties shall be referred to the award of arbitrators. The Magistrate decided :

(a) To order both parties to remit their claims, (The original and the conterclaim) to arbitrators.

(b) To strike out the claim and conterclaim temporarily from the list of cases.

The Magistrate was wrong in both decisions for the following reasons:

(1) Under section 5 of the Arbitration Ordinance a Magistrate cannot order the parties to go to arbitrators. No Court can do it. It is the right of the parties themselves to refer their disputes to arbitrators or not and their decision depends entirely upon their own

will subject to such remedies, as are given by the Arbitration Ordinance to one party willing to go to arbitration against another refusing to comply with a submission. What a Magistrate can do is to "make an order staying the proceedings" in a case before him when he is of the opinion that the parties ought to refer their claims to arbitration.

(2) This "Order staying the proceedings" is not identical with the "Striking out" of an action (לבטל) as defined in 2 (1) of the Judgment by Default (Magistrates Court) Rules 1928. The order staying the proceedings is a definite judgment — and the Plaintiff cannot institute a fresh action upon payment of the prescribed fees — as it is in the case of a "striking out" — The Magistrate was therefore wrong in deciding to strike out the case "temporarily".

(3) In as much as the original claim is concerned the Magistrate could not stay the proceedings, because the Defendant (Appellant) did not plead arbitration at ali and the Magistrate may decide to stay proceedings only, when a party applies for such a stay and this also "at any time after appearance and before taking any other steps in the proceedings". But not in any cases where witnesses had been examined and cross examined.

(4) With regard to the counterclaim, it has to be regarded as a separate claim (According to art. 1632 of the Mejelle and the Judgment of the Supreme Court as a Court of Appeal C. A. No. 95/23). When the Respondent (Defendant in the counterclaim) pleaded arbitration the Magistrate should have decided whether he was to order a stay of proceedings in the counterclaim or whether he wished to hear it — and not to connect both claims and remit both together to arbitrators.—

We therefore allow the appeal, set aside the judgment appealed against and remit the case to the Magistrate, for him to hear the original claim and give a judgment on its merits — and with regard to the counterclaim to give an order for staying the proceedings or to hear the conterclaim also, on its merits as he will find in accordance with section 5 of the Arbitration Ordinance.—

Costs to abide the event.

Delivered in open Court this 27th day of October 1937.

President.

Judge.

CIVIL APPEAL No. 220/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Israel Yehezkiel. APPELLANT.

v.

Arieh Kahana. RESPONDENT.

Article 1775 of Mejelle — Right of debtor to decide on which debt payment was made — Administration of oath to plaintiff.

JUDGMENT:

From the record of the case and the Judgment it is not clear why the sum of LP. 13,200 should not be deducted from the sum claimed and adjudged. The Plaintiff admitted the receipt of this sum after the bringing in of his claim but stated, that this sum was paid on account of another debt. According to art. 1775 of Mejelle it is the debtor who decided on which debt he wants to pay any sum. This point should be cleared up and the sum of LP. 13,200 deducted.

The Magistrate found that the Defendant did not prove his defence as to the agreed price of 450 mils per day and was right in his decision to tender the oath to the Claimant. This oath should now be administered if the Defendant so wishes and judgment given according to art. 1632 of the Mejelle.

We therefore allow the appeal, set aside the judgment and remit the case to the Magistrate for completion.

Cost to abide the event.

Delivered in open Court this 27th day of October 1937.

President.

Judge.

CIVIL APPEAL No. 211/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Ibrahim Abu Houssa. — APPELLANT.

v.

Menachem Arousi. — RESPONDENT.

Hire — Effect of article 478 of Mejelle — Benefit of hire must cease for reasons inherent in thing hired itself — Outside interference of no effect.

JUDGMENT:

The judgment of the Magistrate is apparently based on art. 478 of the Mejelle which reads : — "If the benefit to be obtained from the thing hired is entirely impossible (ceased to exist), then the rent becomes no longer payable". Until recently this article used to be interpreted in a meaning favourable to the Claimant *i. e.* that when for reasons of riots the lessee is not able to use the premises hired without endangering his life he is not obliged to pay the rent. — This interpretation was changed by the recent judgment of the Supreme Court sitting as a Court of Appeal No. 138/37. By this judgment the principle was introduced that the ceasing of the benefit from a thing hired must be due to reasons, which arose in the thing itself and not from other circumstances.

In accordance with this opinion of the Supreme Court we set aside the judgment and dismiss the claim with costs and LP. 2.— advocate's fees for the Appellant (Defendant).

Delivered in open Court this 28th day of October, 1937.

President.

Judge.

CIVIL APPEAL No. 232/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

I. Hose Co. — APPELLANT.

v.

Yehiel Halperin. — RESPONDENT.

Privity of Contract — Liability of agent contracting on behalf of company not registered in Palestine — Demands by party not provided for in contract — Contract cancelled — no right to retain benefit thereunder.

JUDGMENT:

The appeal was brought in time. By rule 5 of the Judgment by Default (Magistrate Court) Rules of Court — the addendum to art. 42 of the Magistrates Law became of no effect, so that for all appeals against Judgments of the Magistrate Court the period is 8 days as from the day next after the notification of the judgment to the Appellant.

In this matter, the Magistrate was right in his decision as to the privity as the Appellant negotiated with the Respondent and signed on behalf of a firm "Intourist" a foreign corporation limited by shares not registered in Palestine but working in Russia. It would be legally impossible for the Respondent to sue the firm "Intourist" in Russia : — So long as this situation prevails, we have to regard the firm "Intourist" as not being in existence. Appellant therefore is responsible personally.—

The contract between the parties states expressly in clause (1) that the tickets are valid one year from the date of the signature of the contract (30/11/1934). On the 10/6/35 the Appellant asked from the Respondent a new payment not foreseen in the contract within one month and gave him a new period for the cancellation of the contract. As the Respondent did not pay the new sum — the tickets never were delivered to him, and Appellant is not entitled

to receive payment for a thing that never was sold or to retain the money received by the Respondent without any legal reasons.—

We therefore dismiss the appeal and confirm the judgment appealed against, with costs and LP. 3.— advocate's fees for the Respondent.

Delivered this 28th day of October, 1937.

President.
Judge.

CIVIL APPEAL No. 245/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :
Shoushana Sheinkar. APPELLANT.

v.

Alexander and Bunia Sherman. RESPONDENTS.

Appeal addressed to "District Court" instead of "Land Court" — No right to amend by Court of its own motion.

JUDGMENT:

The appeal is addressed to the District Court instead to the Land Court. We regret that we are not entitled of our own motion to allow the Appellant to amend the word "District" to "Land". This procedure being contradictory to section 5(3) of the Magistrate Courts Jurisdiction Ordinance. The appeal is hereby dismissed with costs, and LP. 2.— advocate's fees for the Respondent.

Delivered in open Court this 27th day of October 1937.

President.
Judge.

CIVIL CASE No. 297/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Nathan Adlerstein. PLAINTIFF.

v.

Heinrich Weinrib. DEFENDANT.

Action of preliminary contract — Privity of parties — Verbal delegation of authority — Signature by agent — Non-disclosure of principal.

JUDGMENT:

This is a claim for damages on the ground of a "preliminary contract" (in German Vorvertrag) purporting to be made between the claimant Nathan Adlerstein and the Defendant Heinrik Weinrib.

Advocate for Defendant pleaded want of privity between the parties. After perusal of all documents produced and after hearing of the parties as witnesses I find the following facts proved :—

1) The preliminary contract was made in two identical copies, dated 24/1/35. In the agreement there is an express provision, that it has to be written in two copies. On the top of both copies the words "between Mr. N. Adlerstein Tel-Aviv (Claimant) on the one part and 1) Mr. Heinrik Weinrib (Defendant) 2) Stanislav Stiller on the other" appear. Both copies are signed by the Claimant. The copy handed in to the Defendant is not signed by any man whose name is N. Adlerstein "N" being identical with "Nathan" Adlerstein, the Claimant. Only the copy which remained in the hands of the Plaintiff *i. e.* which was handed in to him by his son the said Doktor Adlerstein bears an additional signature of the Plaintiff. The Plaintiff himself admitted — when heard as a witness — that on the 24/1/35 both copies were signed only by the Defendant and Dr. Adlerstein and that he, the Plaintiff, put his signature on one copy two days after the 24/1/37.

2) It has been found further that the man who signed the contract with the Defendant *i. e.* Doctor Adlerstein did it in his own name without any mention on the document, that he signs it on behalf or as an agent of his father, the Claimant.

3) Doctor Adlerstein never had a written power of attorney to bind his father the Claimant by a contract for sale of a manufacture. The Claimant himself stated that he has only orally authorised his son to make negotiations with the Defendant in his name and that his son negotiated as his agent. This deposition was contradicted by the evidence of the Defendant (a witness called by the Plaintiff) who deposed that during the whole time of negotiations he did not deal with the Plaintiff, but only with Doctor Adlerstein, who never mentioned, that he sells the manufacture of his father Nathan Adlerstein or that he is only an agent of the Claimant, and that he, the Defendant, learned the fact, that N. Adlerstein and Doctor Adlerstein are two separate persons, only when he received the notarial notices from the Claimant.

From all these facts it is clear that there never was concluded an agreement between the Defendant and the Claimant. The Claimant never signed the two copies of the agreement. The person mentioned agent for the Claimant did not refer the contract to his father, the as a party in the agreement did not sign it. Doctor Adlerstein, the principal. Art. 1461 of the Mejelle expressly provides, that when agent makes a contract without reference to the principal, only the agent has all rights and obligations from this contract. The Plaintiff is therefore not a party to the "preliminary contract" and there is no privity between the Claimant and the Defendant.

I would therefore dismiss the claim with costs and LP. 2 Advocate's fees for the Defendant.

This judgment was delivered in open Court in the presence of the parties this 30th day of October, 1937.

Judge.

The judgment of the Court is that the case be dismissed and the Plaintiff must pay the Defendant his costs of this action and LP. 2 Advocte's fees.

President.

Judgment read in presence of Mr. J. Kahana for Plaintiff and Mr. B. Goldman for Defendant.

President.

CIVIL CASE No. 176/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Raphael Palatnik. PLAINTIFF.

v.

1. Itzhak Huri,
2. Joseph Asar,
3. Baruch Azar Shamai,
4. Abraham Azar Shamai. DEFENDANTS.

Contract for the sale of land — Undertaking to transfer (a) land (b) right to land in virtue of contract with third party — Effect of Art. 690 of Mejelle (Hawale) — Right of rescision lost after dealing with property — Undertaking to assign rights in a contract concerning land not a disposition of immovable property.

JUDGMENT:

This a claim for repayment of a sum of LP. 786.896 being a part of the purchase price of land not transferred in the name of the Plaintiff and LP. 750 liquidated damages based on an alleged breach of a contract between the parties. After having heard the representatives of the parties and the witnesses produced by the Defendant and after perusal of the document, the following facts have been found as partly admitted by both parties and partly proved.

1. On the 22/2/35 a contract was made between the parties concerning a plot of land described as plot No. 32 measuring 409.1 sq. ms. (out of the land belonging to the group No. 22) and some smaller pieces of adjacent plots of 263.5 sq. ms. named in the contract "Completions" of the main plot.—

2. Clause 1 of the contract runs : The vendors (Defendants) undertake herewith to sell to the purchaser (Plaintiff) and the later agrees to purchase from them the above mentioned plot from a part of 409.1 sq. ms. which is already registered in the names of the vendors according to Kushan Tabu Jaffa No. 7215/34 and the rest belongs to them on the basis of a right assigned to them in the Committee of the group 22 — *i. e.* the plot which the Municipality of Tel-Aviv

holds for the vendors, and the vendors will give order to the Municipality of Tel-Aviv to transfer these completing parts mentioned above to the name of the purchaser or to his order in accordance with the contract existing between the Municipality of Tel-Aviv and the group 22.

3. From the evidence given by Mr. Aryeh Schneidermann, Chief Clerk of the Town Planning Department of the Municipality of Tel-Aviv on the ground of the file and the documents, whose evidence was not contradicted by any of the parties in this case, it was found that the plot in question belonged to the Defendants as members in a quarter, in which the Municipality being identical with the Town Planning Committee of Tel-Aviv arranged the parcellation scheme in accordance with the approved Town Plan. As there were many plots — and among them also the plot of the Defendants — which had to be completed by some small pieces of land adjacent to them — the Municipality undertook to help the owners of these plots to purchase these small strips from their respective owners or in case of refusal on the part of these owners, to expropriate these strips under the power vested in the Municipality of Tel-Aviv as the Local Town Planning authority and to connect these small pieces with the respective plots. These obligations of the Municipality were fixed in a contract between the Municipality and all owners of plots, members of the "Group 22". Defendants were parties to this contract. Under this contract, Defendants were entitled to sell their plots to the Plaintiff or another person and to assign their rights derived from the aforementioned contract with the Municipality to the purchaser.

4. In fulfilment of the contract made on 22.2.35, the Defendants transferred their main plot into the name of the Plaintiff in the Tabu of Jaffa and assigned their rights to the Municipality under their contract with the Municipality to the Plaintiff, who became in their place a party to the latter contract in connection with the so-called "completions". The Municipality accepted the Plaintiff as a party to its contract with the "group 22", allowed the Plaintiff to build a house on this plot and make the pavement on one of these strips of land.

5. Counsel for Plaintiff admitted — when asked by the Court — that the Plaintiff, after having been registered as the owner of the main plot and after having constructed a house on it — sold the plot and the house together with the "completions" to another person.

Now, as counsel for the Plaitiff alleges, the Defendants have committed a breach of the contract made between the parties on 22.2.35, by the fact that they had not transferred the ownership of these

strips of land destined for completion of the main plots in the name of the Plaintiff, in the Land Registry.

In our opinion Plaintiff's claim is not based either on facts or on law, for the following reasons :—

1. Clause 3 of the contract has to be read together with clause 1. Defendants never undertook to register themselves the "completions" in the name of the Plaintiff in the Tabu. From the wording of the contract it is clear that the Defendants undertook (a) to register the Plaintiff as an owner of the main plot in the Land Registry ; (b) to assign their rights from the contract with the Municipality to the Plaintiff, *i. e.* to procure that the Municipality should accept the Plaintiff as a party to the contract beween the Municipality and the owners of the group 22. The Defendants have fulfilled exactly and fairly their obligations under the contract. When signing the contract Plaintiff knew that the Defendants could not transfer the small "completions" in the Land Registry but only the Municipality as the Town Planning Committee of Tel-Aviv, could do so. After having been accepted by the Municipality as a party to the contract, Plaintiff has no right whatsoever to claim anything from the Defendants. This principle is clearly stated in Art. 690 of the Mejelle, dealing with the effect of a "Hawaleh" (contract for transfer of debts) as follows :— "The effect of a contract for the transfer of a debt is that the transferor (in our case the Defendants) is liberated from all responsibility for the debt. The person in whose favour the contract is made then (in our case the Plaitiff) has the right of demanding payment from the transferee (in our case the Municipality)". After that the Municipality accepted the Plaintiff as a contracting party instead of the Defendants — the Defendants have fulfilled their obligations under the contract and are quit of it.

2. In clause 3 of the contract therefore the parties did not mention that the vendors (Defendants) have to register *all* parts of the plots in the Land Registry, since it never was their intention. All provisions of clause 3 of the contract regard only the transfer of the main plot, which actually was transferred by the Defendants in accordance with the contract.

3. The Plaintiff sold the main plot together with the "completions". According to Art. 312, 344, 359 of the Mejelle he has lost all rights to ask for the rescission of the contract having dealt with the property purchased in the way of an owner.

4. Plaintiff cannot rely on Sec. 11 of the Land Transfer Ordinance 1920 in claiming back his money paid for the "completing parts".

Besides the reasons mentioned under (1) and (3) — the principle laid down in the judgment of the Supreme Court sitting as a Court of Appeal in Civil Appeal No. 31/37 — can be applied only "subject to the terms of an agreement". The agreement made between the parties on 22.2.35 shows clearly the intention of the parties. The price was paid (a) for the transfer of the main plot in Tabu, (b) for the assignment of the rights of the Defendants as to the "completions" to the Plaintiff, *i. e.* for replacing of the Defendants by the Plaintiff as a party in a contract between the Defendants and the Municipality of Tel-Aviv. This latter is by no means a disposition of immovable property.

As there is no breach of contract on the part of the Defendants, the claimant is not entitled to claim damages according to Art. 106 of the Civil Procedure Code.

We therefore dismiss the claim with costs and £P. 5 advocate's fees for the Defendants.

Delivered this 10th day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 237/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Sheina Cohen. APPELLANT.

v.

Mordechai Abramovitz. RESPONDENT.

Judgment by default — No sufficient proof of claim adduced — Opinion of expert appointed by one party made in absence of other party insufficient — Duty of Magistrate to hear expert in person.

Appeal from a judgment of the Magistrate's Court dated 30.9.37, in file No. 5878/37, Appellant (Defendant) to pay LP. 24.— with interest, costs and advocate's fees.

JUDGMENT:

The Magistrate was wrong in giving his judgment in accordance with Rule 3(4) of the Judgments by default. (Magistrates Courts). Rules 1928 without sufficient proof. The expert on whose report the Magistrate based his judgment, was appointed only by the Claimant as he admits himself in his report — he made his enquiries on the spot in the absence of the Defendant and was *never* heard by the Magistrate — contrary to art. 36 of the Magistrates Law. —

We therefore allow the appeal set aside the judgment appealed against and remit the case to the Magistrate to hear it on its merits and give a fresh judgment.

Costs to follow the event.

Delivered in open Court this 20th day of October, 1937.

President.

Judge.

CRIMINAL APPEAL No. 51/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF:

Dov Rabio. APPELLANT.

v.

Ephraim Ben-Yehuda. RESPONDENT.

Charge of possession of stolen goods — Proof of goods having been stolen or reasonably suspected of being stolen required and inability to proof bona fide possession.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv in file No. 4714/37 dated 6.7.37, whereby the Accused was sentenced to pay a fine of 500 mils.

JUDGMENT:

In order to convict an accused of the offence of being in possession of stolen property (sec. 7 of the Criminal Law Amendment' Ordinance No. 2/1927, it is necessary that it should be proved that the property was stolen or reasonably suspected of being stolen and that the accused has not been able to prove that the property came into his possession in a legal way. In this case it was proved only that the bitch in question was lost. On the other hand the Magistrate himself accepted as proved that the Accused has purchased the bitch, so there were no grounds for a criminal prosecution. This case should be rather more in the nature of a Civil claim for the ownership of the bitch and for damages.—

We therefore set aside the judgment and dismiss the charge against the Accused.—

Delivered this 22nd day of November, 1937.

President.
Judge.

CRIMINAL APPEAL No. 67/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF:
The Attorney-General — APPELLANT.

v.

Leon Begerano. — RESPONDENT.

Appeal to increase fine of Magistrate's Court. — Address may be to the President District Court — Appeal as of right — Period of Appeal from the Magistrate's Court — thirty days.

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated the 4th October, 1937, in case file No. 12893/37, where the Respondent was convicted under Section 11(1)(a) of the Trades and Industries Ordinance, 1927, and sentenced to pay a fine of LP. 1.500; and obtain a licence for his cigarette factory within ten days.

JUDGMENT:

This is an application by the representative of the Attorney-General who asks that this Court should increase a fine of £P. 1.500 passed upon the Respondent. The Respondent objects to the appeal firstly on the ground that it is addressed to the President of this Court and not to the District Court itself.

We are not impressed by this objection because we treat the latter as an invitation to the President *to deal with the* matter according to Law. We therefore regard the matter as an appeal.

The Attorney General or his representative has the right to appeal from any judgment of a Magistrate's Court in a criminal case under Section 5(2) of the Magistrates Courts Jurisdiction Ordinance 1935.

It is further objected by the Respondent that the appeal is out of time. The judgment was delivered on the 1st July, 1937, and the appeal was not filed until the 8th October, 1937. Section 5(2) is silent as to within what period of time the Attorney General should appeal.

In our view the Law in Palestine which regulates the period within which an appeal by the Attorney-General to the District Court in a criminal case heard in a Magistrate's Court is Art. 64 of the Ottoman Magistrates Law which prescribes a period of thirty days from the date of the pronouncement of the judgment.

We refer to page 102 of Mr. S. G. Kermack's book on "Criminal Procedure in Palestine" published in 1928. The period of two months applied to appeals to the Court of Appeal under Art. 187 Criminal Prosecution Code, and that period is now retained and reproduced in Sec. 67(2) Trial Upon Information Ordinance (Laws of Palestine Cap. 36) ; but the period which now concerns us is, as stated above, thirty days from the date of pronouncment of the judgment. In the present case the Magistrate gave judgment on 1st July, 1937, and the appeal was not filed till 8th October, 1937.

Sec. 7 of the Magistrates Courts Jurisdiction Ordinance applies only to application for leave to appeal. Under Sec. 5(2) of that Ordinance an appeal by the Attorney General or his representative is an appeal as of right. The appeal being out of time, it must be and hereby is dismissed.

Delivered this 22nd day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 208/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Ch. Churgin — APPELLANT.

v.

Attorney General — RESPONDENT.

Action for recovery of amount of Bond — Form of bond immaterial — Right of Inspector General to release on bail any person recommended for deportation — Notarial Notice by government unnecessary.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 16392/36 dated 16.7.37.

JUDGMENT:

The bond signed by the Appellant is a document binding the Appellant in spite of the fact that it was not written in the form prescribed by the second schedule to the Crime (Prevention) Ordinance (Chapter 30 Drayton p. 420).

The allegation of the Appellant that this bond is illegal, is not based on Law. The bond was given in accordance with section 10 (1) of the Immigration Ordinance 1933 and rule 2 of the Immigration (Custody pending Deportation) Order dated 14.9.1933 (Drayton 3, p. 1766) giving the Inspector-General of Police and Prisons in his discretion a right to release on bail any person, in respect of whom a recomendation has been given by a Court with a view to the making of a deportation order under the Immigration Ordinance pending the completion of arrangements necessary for the deportation. As in accordance with the provisions aforementioned the man who is to be deported was in legal custody and the bail was given with a view to his release from such legal custody. There is no need for the government to send to the Appellant any notarial notice in accordance with Art. 106 of the Civil Procedure Code.

We therefore dismiss the appeal and confirm the judgment appealed against with costs.

Delivered this 22nd day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 240/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Hanoch Chefetz. APPELLANT.

v.

Palestine Engineering Corp. Ltd. RESPONDENT.

Time to enter appeal elapsed. — Application for extension of time. — Extension of time matter of discretion — Evidence of immediate parties to a promissory note admissible.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 16318/36 dated 28/7/37.

JUDGMENT:

The Judgment of the Magistrate's Court is dated 29/7/37. The time for entering an appeal expired 6/8/37. According to Rule 2(a) of the Civil Appeal Rules — when the notice of appeal has not been tendered in time, a party desiring to appeal, notwithstanding the delay, may within *one month* of the date on which the time for appeal has expired, apply to the Court for an extension of time. The Appellant applied for such an extension 23/8/37 *i. e.* within the month provided in the above mentioned Rule. As there is no provision in the Rule, when the Court of appeal has to give decision of the application and as the application was entered during the Court vacations, we use our discretion and grant now an extension of time for the entering the notice and grounds of appeal — of eight days after 6/9/37 *i. e.* until 14/9/37 — and allow the appeal dated 12/9/37 for which fees were paid 14/7/37.

As to the subject matter of the appeal itself we find inasmuch as the case is between direct parties of the promissory notes and in connection with a hire purchase contract the Magistrate should have heard the defence of the Defendant and should have allowed him to prove his defence by the evidence of the parties. Section 14 of the Evidence Ordinance, Drayton, chapter 54, p. 673.

We therefore set aside the judgment and remit the case to the Magistrate's Court for completion.

Costs to abide the event.

Delivered this 22nd day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 242/37.

IN THE DISTRICT COURT IN TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Iser Goldberg. — APPELLANT.

v.

Letuvos Kredith Bankas. — RESPONDENT.

Foreign Bills — Action on consideration — Immediate parties — Foreign Law immaterial — Rules of prescription of negotiable instruments inapplicable.

N. B.: Judgment confirmed on appeal C. A. 22/38, (1938, 1 S. C. J. 145, 3 Ct. L. R. 129).

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 8591/37 dated 16.9.37.

JUDGMENT.

The respondent as appears clearly from his statement of claim sued for repayment of money lent by him to the appellant.— In order to prove his claim he attached bills made in Lituania and negotiated by the defendant and to the claimant and protested for non payment in Lituania. Judgment was given in favour of the Plaintiff on the gound that he received consideration directly from the claimant and did not pay the money back. The appellant attacks this judgment for the reason that the Magistrate did not appoint experts in Lituanian Law as the Law of the place, in which the bills were given negotiated and protested in orda tc prove :—

a) That according to the Lituanian Law, when bills are given, the claimant can sue only on these bills and not go back to the consideration given to the defendants.

b) That the indorsements on the bills are not in accordance with the Lituanaian Law, and finally,

c) That according to the Lituanian Law the holder of a bill protested is prescribed to sue one of the indorsers after the lapse of one year from the date of the protest.

As the appellant had left Lituania and lives in Tel-Aviv the plaintiff was entitled to sue the defendant before the Magistrate's Court of Tel-Aviv.

In our opinion the Magistrate was right in disregarding this defence. Section 52 of the Bills of Exchange Ordinance 1929 states expressly.

> "When the drawer or indorser of a bill is discharged from liability on the instrument by reason of the holder's failure duly to present it or protest it or give notice of dishonour, the drawer or indorser shall not thereby be discharged from his liability, if any, on the consideration for the bill".

This section makes it quite superfluous to go into the questions of Lituania Law. In Palestine a holder in due course may always bring an action on consideration against a party of a bill which accepted this consideration directly from the holder.— In these cases all omissions, errors and laches on the part of the holder in due course with regard the form of time of protest are of no value. In Civil Appeal No. 151/33 and 79/1925 the Supreme Court held that a claim for money lent is distinct from an action on the promissory notes given in respect of this loan and that such a claim was not subject to the rules of prescription applicable to negotiable instruments.

As it was proved that the respondent and appellant are direct parties and that appellant received loans and did not repay them, the Magistrate was right in his decision.

We therefore dismiss the appeal and confirm the judgment appealed against with costs and LP. 2 advocate's fees for Respondent.

Delivered this 22nd day of November, 1937.

President.

CIVIL APPEAL No. 244/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Zvi Shachori — APPELLANT.

v.

1. L. Halperin
2. S. Tshertok. — RESPONDENTS.

Subject matter of claim LP. 10.— *Right to apply for leave to appeal only — No right of appeal.*

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 16581/36 dated 24/9/37. Appellant (Plaintiff's) action dismissed with costs £P. 1.— Advocate's fees.

JUDGMENT:

This appeal cannot be heard. The subject matter of the claim is £P. 10. According to Section 5(4) and section 7 of the Magistrate's Courts Jurisdiction Ordinance 1935 the Appellant has only the right to apply to the President of the District Court for leave to appeal and not to appeal directly to the District Court.—

We therefore dismiss the appeal. —

Delivered this 22nd day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 248/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Abraham Wulfman. APPELLANT.

v.

Moshe Genut. RESPONDENT.

Judgment by default — Opposition lodged before service of judgment — Period of time for lodging opposition applicable only where judgment was served.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv in file No. 8786/37, dated 28/9/37.

JUDGMENT:

The judgment by default issued by the Magistrate is dated 2/7/37. Before a copy of this judgment was served on the Defendant, the Defendant entered an opposition on 15/7/37.— The Magistrate rejected the opposition as having been entered at the wrong time. In our opinion there is nothing in Law precluding a Defendant against whom a judgment by default has been given by a Court from making an opposition before that Court before any service has been made on him of a copy the judgment in question. The delay of 5 days applies only when such service has been made. This opinion is based on the judgment of the District Court of Jaffa in Civil Appeal No. 49/33.

We therefore allow the appeal against the rejection of the opposition only for the aforementioned reason and remit the case to the Magistrate to decide whether there are other reasons for granting or refusing the opposition and to proceed accordingly.

Costs to follow the event.

Delivered this 22nd day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 249/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Isaac Hose & Co. APPELLANT.

v.

John Chandris. RESPONDENT.

Action before Magistrate — Defendant's application for adjournment to instruct advocate refused — Discretion of Magistrate must be reasonably exercised.

N. B. :Ealier proceedings in this case (C. A. D. C. 45/37) are reported *ante* on *p.* 3.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv in file No. 5175/37, dated 16/7/37.

JUDGMENT:

This is an appeal by the Defendant from a judgment of the learned Chief Magistrate of Tel-Aviv, whereby he gave judgment for the Respondent (Plaintiff) for LP. 189,686, interest and costs, etc., The main ground of appeal is that an adjournment was refused. This adjournment was applied for by the Defendant as his advocate apparently had withdrawn a few days before the date fixed for the hearing. According to the learned Chief Magistrate's own notes, it would appear that a new advocate Mr. Kahana, was later engaged by Appellant. It is not clear how long before the hearing Mr. Kahana was actually instructed. It would appear however, that Mr. Kahana did appear but intimated that he had no time to study the papers. His statement that he had no time to study the papers does not seem to have been seriously controverted. The learned Chief Magistrate seems to have thought that Mr. Kahana had wanted to withdraw from the case. It seems, however, to us that what Mr. Kahana probably wanted to convey to the court was that he had not had sufficient time to study the papers to enable him there and then to argue the Defendant's case. This is a very different thing from informing the Court that he wished to throw up his brief. In any event, an adjournment seems to have

been refused. The case then proceeded and it is obvious that, although the Defendant was present, the case proceeded without the defence (if any) being heard. The judgment of the learned Chief Magistrate clearly shows that he did not consider any defence. The judgment merely says "Judgment for plaintiff for so much etc.". No reasons were given for the judgment. It is therefore, obvious that the Court merely heard one side, the Defendant, not being prepared to put forward his defence and not having an advocate properly instructed to put forward his defence. In these circumstances the Defendant now appeals to this Court for the reasons set out in para. 6 of his written "Statement of appeal". Now, while we sympathize with the learned Chief Magistrate who presides over a very busy Court, and who doubtless has often to deal with frivolous applications for adjournments, we think that in this case, he should have granted an adjournment on terms, rather than deprive the Defendant entirely of an opportunity of adequately presenting his defence. After all, the learned Chief Magistrate has the widest powers as to costs, etc. The use of such powers will prevent parties from abusing any indulgence shown. In this case we allow the appeal set aside the judgment appealed and remit the case to the learned Chief Magistrate with instructions to him to rehear the case, giving both parties an opportunity to be heard but we shall order that the Defendant shall pay to the Respondent advocates fees, LP. 2, in respect of the adjournment, this sum of LP. 2 to be the Respondent's in any event ; each party to pay its own costs of this appeal ; the general costs of the action, apart from the LP. 2 already mentioned to abide the event.

Given in open Court this 22nd day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 260/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Morgan Inshatov. APPELLANT.

v.

Baruch Sidlovsky RESPONDENT.

Action for remuneration — Agency agreement — Necessity, kind and remuneration for work done in excess of agreement to be fixed by experts.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 7875/37, dated 23/7/37, whereby Appellant's (Plaintiff's) action dismissed with costs.

JUDGMENT:

As the agreement between the parties provides that the Appellant shall be entitled to incur some expenses on behalf of the Respondent in connection with his work as a patent agent of the Respondent and, as the Appellant claimed remuneration for some work and as it was not made clear in the Magistrate's Court whether this work is already contained in the agreements made in writing or is to be regarded as additional work and as in the latter case only experts can fix, if the work done by the Appellant and the expenses made by him were necessary, and in accordance with the agreement, and what is the adequate price for Appellant's work. — The Magistrate was wrong in deciding all these issues without the appointment of experts. — (563 of the Mejelle).

We therefore allow the appeal, set aside the judgment appealed against and remit the case to the Magistrate's Court for completion. — Costs to follow the event.

Delivered this 22nd day of November, 1937.

President.
Judge.

CIVIL CASE No. 160/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE: His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF:

1. Salomon Cohen,
2. Elia Cohen. — PLAINTIFFS.

v.

Jacob Drexler. — DEFENDANT.

Action for recovery of damages for breach of cantract — Main object of contract carried out — Omission to carry out minor undertaking — No right to damages (C. A. No. 97/35 followed).

JUDGMENT:

The facts in this case agreed upon by both parties are as follows :—

1. On the 24.2.36 an agreement was signed by both parties, by which the Defendant (vendor) undertook to sell to the Plaintiffs (purchaser) a plot situated in Tel-Aviv King Shlomo Street No. 7 together with a house constructed on this plot containing 32 rooms, and to transfer this immovable property in the Land Registry to the name of the Plaintiffs or their order not later than 24.5.36 — This date fixed for the registration in the Tabu was afterwards changed and the time prolonged to the 1.8.36.

2. In clause 11 of the contract a sum of LP. 1000 was stipulated as liquidated damages in case one of the parties should commit a breach or a non fulfilment of this contract in whole or in parts.

3. According to clause 12 of the contract the Defendant (vendor) undertook to give the Plaintiffs (purchaser) a guarantee of the Bank "Ashrai" for the repayment of LP. 1000 as advanced purchase price and the sum of LP. 1000 due as liquidated damages in case the vendor should not fulfill the conditions of the contract. This guarantee was given by the "Ashrai" Bank to the Plaintiffs.

4. On the 7.7.36 the parties signed an additional agreement, by which they reduced the purchase price from LP. 7425 to LP. 7050, fixed 1.8.36 as the date of the transfer of the immovable property to be sold in the Land Registry and decided in clause 6 "that all other clauses of the contract made on 24.2.36 and among them the clause relating to damages" remain in force.—

5. In this additional agreement the parties inserted a clause No. 5 that the vendor undertakes to supply to the purchasers a certificate of completion of the building from the Municipality of Tel-Aviv within 3 months.

6. Both parties agree that the Defendant transferred to the name of the Plaintiffs in the Land Registry Office the plot and the house sold, that the Plaintiffs have received this transfer, paid the price and returned to the Defendant the guarantee of the Bank "Ashrai" for the advanced purchase price and the eventually due damages. The Plaintiffs also admit that they have taken possession of the immovables

sold to them by the Defendant, that they let out all rooms and have received the rent from this house from the 1.4.36.—

Now counsel for Plaintiffs sues for LP. 1000 as liquidated damages and alleges that the Defendant committed a breach of the contract

We cannot agree with the Plaintiff's counsel's contention for the certificate of the Tel-Aviv Municipality as to the completion of the building and that according to clause 5 and 7 of the additional agreement Plaintiffs are entitled to damages.—

We cannot agree with the Plaintiffs counsel|s contention for the following reasons :—

(a) In the judgment given by the Supreme Court sitting as a Court of Appeal C. A. No. 97/35 in an identical claim the principle was laid down that by agreeing to the transfer and registration of the house and land which were the main object of the contract the Appellant (in our case the Plaintiffs) had waived his right to any claim for damages arising out of minor omissions subsidiary to the main objects of the contract. — The non supply of the aforementioned certificate in such a minor omission — in our opinion — and is of no importance and smaller than the omission mentioned in the case No. 97/35.—

(b) The intention of the parties to connect the clause of damages only with the transfer of the house and the land and not with the certificate of the Tel-Aviv Municipality is clear from the fact that they finished all accounts with the Defendant on the day of the transfer in the Tabu and returned to him all guarantees received by them in order to secure the payment of damages in the event of a breach of the contract.

(c) The certificate of the Tel-Aviv Municipality does not exist independently of the main object of the sale, *i. e.* the house and the land. It is an appurtenance or accessory within the meaning of art. 230-234 of the Mejelle and has to be dealt with according to the principles fixed in art. 48 of the Mejelle stating "an accessory to an object can not be dealt with separately" and art. 50 of the Mejelle stating "If the principal fails, the accessory also fails".—

For these reasons Plaintiffs' claim must fail. The only question which arises is the question of costs. Plaitiffs can not receive costs from the Defendant as they their claim has been dismissed, but we think that the Defendant who produced the certificate of the Tel-Aviv Municipality to the Court after the claim had been entered although he could have done it before, is by this his behaviour also not entitled to receive costs from the Plaintiffs.—

We therefore dismiss the claim without costs to the Defendant.—

Delivered this 23rd day of November, 1937, in the presence of Mr. Zeiger and Mr. Fogel.

President.

Judge.

CIVIL APPEAL No. 231/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.).
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Matetiahu Zisselman — APPELLANT.

v.

Yehuda Glazer — RESPONDENT.

Action on Promissory Note. — Receipt of money by transferor of Note after negotiation. — Duty to refund money to holder — but no liability on the Note itself.

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated the 25-7-37, in file No. 7812/37.

Appellant (Defendant) to pay LP. 6.— with interest and costs.

JUDGMENT:

As it was proved by the admission of the Appellant that he had received £P. 5 from Mrs. Grinblat on account of a bill signed by her late husband at a time when the bill was not in his possession but was negotiated to a certain Sessoun and by him to a certain Taxe and by him to the Respondent — he is obliged to pay to the Respondent this sum which he has taken without any legal reason.

The Appellant is not bound to pay on the ground of the bill, as the Magistrate apparently thought.

We therefore alter the judgment of the Magistrate with the direction

that the Appellant (Defendant) shall pay to the Respondent the sum of £P. 5 with legal interests as from 19/5/37 and costs of the first Court and this Court.

Delivered this 11th day of November, 1937.

President.

Judge.

CIVIL APPEAL No. 265/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Fishel Rudavsky. APPELLANT.

v.

Zvi Rudavsky. RESPONDENT.

Action for partition of immovable property — Decision of Magistrate based on written report of one expert appointed by one party — Failure to hear expert on oath — Article 36 of the Magistrates Law and article 39 of the amendment to the Civil Procedure Code 1911.

Appeal from the judgment of the Magistrates' Court Tel-Aviv, dated the 29/9/37 in file No. 17249. The immovable property to be sold and the proceeds divided between the parties in equal shares.

JUDGMENT:

The Magistrate was wrong in deciding the main question in this case *i. e.* whether the immovable property is divisible or not only on the ground of a written report of one expert proposed and appointed by the respondent, without having heard this expert on oath and without having given to both parties a chance to take part in his expertise and to examine him before the Court. This procedure is contrary to art. 36 of the Magistrates Law and to art. 39 of the amendment to the Civil Procedure Code 1911.

We therefore allow the appeal set aside the judgment appealed against and remit the case to the Magistrates Court to rehear it on its merits.

Costs to follow the event.

Delivered in open Court this 30th day of November, 1937.

President.

Judge.

CIVIL CASE No. 127/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Zvi Gaber. PLAINTIFF.

v.

"Migdal" Insurance Co. Ltd. DEFENDANT.

Action for recovery of money by mortgagor after execution of mortgage — Signature by mortgagor of mortgage deed conclusive proof of receipt of money — No oral evidence allowed — No specific performance allowed — Recision of mortgage deed only through Land Court — English Equity rule inapplicable — Followed C. A. 306/20, *C. A.* 117/29 *and* 60/37, *and* 96/36.

It was held on appeal (C. A. 2/38) that an admission made in the Land Registry creates an estoppel similar to that created, according to English Law, by the execution of a deed. Such an estoppel may be rebutted by proof of fraud and duress as regards which evidence is admissible but which had not been alleged in the present case. The judgment was therefore confirmed.
(C. A. 2/38 is reported in 1938, 1 S. C. J. 165, 3 Ct. L. R. 122).

JUDGMENT.

In this case the prayer in the Statement of Claim is as follows :—

> "Plaintiff prays that Defendant be summoned to Court and ordered to pay LP. 650.— plus interest as from the 27.12.36, costs and advocate's fees".

The Plaintiff alleges that he in fact mortgaged his property but that he did not in fact receive the sum of LP. 650 or any of it mentioned in the Deed of Mortgage, which is in the following terms :—

> "This deed witnesses that in consideration of the sum of LP.650.— paid by "Migdal" Insurance Co. Ltd., through their attorney advocate, I. Ben-Meir, in virtue of a general power of attorney of Jerusalem, to Zvi Gaber of Tel-Aviv, hereinafter called "mortgagor" (the receipt of which sum the said mortgagor hereby acknowledges), the said mortgagor hereby agrees to pay to the said mortgagee the sum on the quarterly consecutive instalments of LP. 22.730 each starting with the 12.2.37 and ending on the 12.11.43 together with interest at the rate of 7% included in the above instalments".

Mr. Karwassarsky (advocate for Plaintiff) asked to be allowed to lead oral evidence to prove that his client did not in fact receive the money. The full note of the arguments of Mr. Karwassarsky and of Mr. Horowitz (advocate for the Defendants) have been taken and are to be found on pages 1—6 of the President's manuscript notes.

Shortly stated, the defence is twofold, namely, first, that parol evidence cannot be led to contradict the admission made by the Plaintiff in the Land Registry, that he had received the sum of LP. 650 ; and in support of this, reference has been made to C. A. 306/20 (P. L. R., p. 1) and C. A. 393 of 1931 (P. L. R., p.4), and C. A. 78/28 (P. L. R., p. 432), and L. A. 14/32, L. A. 40/32, and C. A. 110/32.

The defence argue that the Plaintiff's only remedy is rescission of the Deed of Mortgage, and it is said the only Court that can deal with such a matter is the Land Court.

Now, it is clear that the Plaintiff in this case is not asking for rescission ; he is in fact asking for one thing only, namely, that we should order the Defendant to pay LP. 650. This seems to me to be an application for specific performance on the part of the Defendants of their obligation under the contract of mortgage. Whether or not we have jurisdiction to order specific performance is a matter on which at present I would prefer to express no opinion. It has, however, been decided in C. A. 117/29 (P. L. R., p. 585—7)- that the question whether a mortgage is or is not valid is a question of title to land and that is a matter in which the Land Court alone has jurisdiction. Whether or not C. A. 117/29 was o was not rightly decided is not for me to say. I think, however, that we are at present bound by it. It seems to me that the whole question in this case turns upon whether this mortgage is at present valid and that therefore any question regarding it must be decided by the Land Court.

In case I am wrong in this view, I think that Mr. Horowitz's first ground of defence is sound and must prevail. It has been urged upon us by Mr. Karwassarsky that we should not be bound by all the judgments of the Court of Appeal in which no arguments or at any rate

very slender arguments appear. In C. A. 306/20 the reasoning of the Court of Cassation in its judgment of June 13th, 1314, and November 6th, 1315, do not appear ; but in any event the Court of Appeal held that the admission in this case having taken place in an official Department, namely the Tabu Department, attention would not be paid therefore to the statement that it was false.

In that case the Court of Appeal held that the lower Court was wrong in allowing the Plaintiff to give the decisive oath to the Defendant.

A fortiori it would seem wrong to allow parol evidence to be led to contradict the written admission that the mortgagor in this case had received the LP. 650.—.

I feel that until C. A. 306/20 has been overruled by the Supreme Court, we should follow it.

Speaking for myself, I regret this result. The law in England was re-stated as recently as 22nd November, 1937, in the case of Greer and another *v.* Kettle, reported at page 143 of Vol. 54 "Times Law Reports", wherein Lord Maugham said : "The well known rule of the Chancery Courts with regard to a receipt clause in a deed not effecting an estoppel if the money has not in fact been paid is a good illustration of the equity view. The decision of Lord Romilly in Brooke *v.* Haymes (L. R. 6 Eq. 25) is even more closely in point, and it may be added that the statement of the law in that case appears never to have been doubted. The head-note begins as follows : "A party to a deed is not estopped in equity from averring against or offering evidence to controvert a recital therein contrary to the fact, which has been introduced into the deed by mistake of fact and not through fraud or deception on his part". Since the Judicature Act 1873, the rule in equity must prevail. It would seem to be clear that the case af Lainson *v.* Tremere (1 Ad. and E. 792), if it were tried on the facts at the present day, would be differently decided and that, in all those cases where the party against whom an estoppel by deed is sought to be raised has a right to rectification which would, so to speak, destroy the alleged estoppel, or a right to rescission on equitable grounds, he has an answer to the estoppel which would not have been open to him at Common Law". In this connection, the proviso to Sec. 8(1) of the Land Courts Ordinance is of interest. I merely mention this by the way.

It has been suggested by Mr. Karwassarsky for Plaintiff that the Palestine Courts (even as I gather from what he has said District Courts) nowadays in many cases hold that they are not bound by previous judgments of the Supreme Court of Palestine. In this con-

nection, I think that a note of warning should be sounded. I accordingly wish to quote from two recent judgments of this Supreme Court, *viz.* Civil Appeal 96/36 and High Court Case No. 60/37. In the former case the presiding Judge is reported as having said "The principle laid down clearly in Hamudeh *v.* Yorkshire Insurance Co. (C. A. 111/32) has been followed for some years and I think must now be taken to be settled law. I, at any rate, even though I may, with all respect, entertain some doubts as to its correctness, do not feel that I should be justified in over-ruling it. It is desirable that Courts should be consistent, and unless new arguments are advanced — which is not the case here — which might have influenced the original judgment, then principles laid down and acted upon for some years should not lightly be set aside, otherwise the state of the law would become chaotic. In justice to the District Court, I would point out that, from the record, it would appear that their attention was not called to the judgments of this Court to which I have referred".

In the later case the presiding Judge is reported as having said — "We should have, in any case, very considerable diffidence indeed in overruling a decision of ten years' standing and which has been followed, etc.,"

These two quotations from recent judgments of the Supreme Court (one dated 26th May, 1937, and the other dated 29th November, 1937) should show the need for caution.

I wish to add an explanation to my remarks in this Judgment dealing with specific performance. What I really meant to point out was this, *viz.*, that, although the claim is for payment of a monetary sum, *viz.* LP. 650.—, yet in effect what the Plaintiff asks is that the Defendant be ordered to perform their part of the obligation under the Deed of Mortgage, *viz.* to lend the Plaintiff the sum of LP. 650.—.

It follows therefore,, that, in my view, this action fails and should be dismissed with costs.

President.

In my opinion this Court has Jurisdiction to hear the case. It is a claim for repayment of a sum of money and not a claim for rescission of a Deed of Mortgage or cancelling and striking out this Mortgage in the Land Registry Office. Only in the latter case the Land Court would be the competent Court to deal with the matter, but so long as the claim remains a claim for a certain sum of money, it is within the Jurisdiction of this Court according to Art. 1 of the Amendment

to the Civil Procedure Code, — It may be that the Court after having heard all evidence will find that the claim has to be dismissed because there is no cause of action or grounds for relief or that it is an action for specific performance or for any other reasons — but all this does not influence the question of Jurisdiction. — I think further that we should rather hear the evidence proposed by the counsel for the Plaintiff *i. e.* go into the merits of the case. It is true, that the Supreme Court has stated its opinion to the contrary in the judgment C. A. 306/20 and until this judgment is overruled by an other judgment of the Supreme Court, we should follow it, but I think, that it may be also the duty of a lower Court to bring before the Supreme Court — seventeen years after some judgment were given — a case with a view to reconsider the former opinion, taking into consideration that during this relatively long period all economic and other conditions of life in Palestine have undergone many and radical changes. The judgments C. A. 306/20 refers to judgments of the Ottoman Court of Casation in Constantinople and is therefore based on Turkish authorities. It is absolutely clear that and why Turkish Courts made a great distinction between a bill, promissory note, or even a notarial deed on one hand and an admission before the Officer in the Tabu on the other. There was until lately only one Registry Office for the whole Turkish Empire in Constantinople, the residencee and admissions before this office made by the parties or their attorneys had a kind of solemn character a greater importance than all other admissions, and therefore the Ottoman Law did not allow to apply Art. 1589 of the Mejelle to these admissions. — But today we are faced with another situation. It became almost a rule in the practice of giving and receiving loans secured by mortgages that the respective Banks don't pay the money to the mortgagor in the Tabu, but in the Bank after all formalities in the Tabu have been arranged *i. e.* after the mortgagor admitted before the Officer, that he received the money. — When a claimant appears to day before a Court and alleges that he admitted in Tabu the receipt of the money lent, in confidence to the money lending Bank but that in fact did not receive any money by the behaviour of the attorney of this Bank amounting to fraud, his position in the Court cannot be worse than the position of a man, who signed a bill without consideration or another notarial deed containing a false admission. In a recent judgment of the Supreme Court sitting as a Court of Appeal C. A. No. 87/37 the following principle was stated: "I think that it is clear that whether a note expresses that value has been given or not extrinsic parol evidence is admissible between immediate parties to impeach the consideration

and show its absence, failure or illegality" and further: "I do not think there can be any doubt that parol evidence is admissible to show that a bill was negotiated in breach of faith". In my opinion this principle of English Law should be applied also to an admission in the Tabu, — especially when this my opinion is strongly backed by the Law in England as quoted in the Judgment of His Honour the President of this District Court.

For these reasons I would give a ruling to hear documentary and oral evidence proposed by the counsel of the Plaintiff and to give a Judgment on the merits of the case.—

This Judgment was issued publicly in the presence of attorneys for both parties, this 16th December, 1937, in Tel-Aviv.

Judge.

CIVIL APPEAL No. 257/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.).
His Honour Judge I. Many.

IN THE CASE OF:

Shem-Tov Shaltiel. — APPELLANT.

v.

Haim and Sara Wolberg. — RESPONDENT.

Action for recovery of possession of immovable property — Plaintiff produced Title-Deed — Defendant must prove adverse possession.

Appeal from the judgment of the Magistrates' Court, Tel-Aviv dated 4.6.37 in file No. 3636/36, whereby the Appellant's (Plaintiff's) action was dismissed with costs and LP. 3.— advocate's fees.

JUDGMENT:

This is an appeal from a judgment of the Magistrate's Court of Tel-Aviv whereby Appellant's action for recovery of possession has been dismissed on the ground that it involves a question or ownership which is solely within the purview of the Land Court.

After perusing the record of the case we find that the learned Magistrate's conclusion is based on no evidence whatsoever.

Since the Appellant's action is based on a title deed, the Respondent, in oder to defeat this action must prove by documentary and oral evidence that he is in adverse possession of the plot of land in question. Further the date of the Appellant's letter is immaterial inasmuch as the Appellant steps in the shoes of the previous owner.

The appeal is therefore allowed and the case remitted in order to hear evidence as to the real possession of the plot in question.

Delivered in open Court this 16th day of December, 1937.

President.

Judge.

CIVIL CASE No. 109/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

1. Ssmuel Broza,
2. Haim Greenberg. — PLAINTIFFS.

v.

Herzl Weinshinker. — DEFENDANT.

Action on breach of contract — Claim for return of money and damages — Clause fixing date of appearance at Land Registry — What amounts to a breach — Readiness and willingness to complete.

N. B.: Confirmed on appeal in C. A. 42/38 (1938, 1 S. C. J. 185, 3 Ct. L. R. 165).

JUDGMENT.

The facts in this case as partly agreed to by the parties and partly proved byq the evidence produced by the Defendant, are as follows :—

1. On the 11th March, 1936, the Defendant entered into an agreement with the Plaintiffs by which he undertook to sell and to transfer to the Plaintiffs a plot of land together with a building and some movables as described in clauses 1 and 2 of the agreement.

2. Clause 8 of the afore mentioned agreement reads as follows :—

> "The first party (defendant) undertakes to transfer the mentioned plot to the name of the second party (plaintiffs) within six months from the date of this contract, and the second party (plaintiffs) undertake to receive the transfer in the Tabu on the day which will be fixed by the first party (defendant) under the condition that the second party (plaintiffs) will be invited to appear in the Tabu by a registered letter signed by the first party (defendant) which wil be sent fourteen days before the day fixed by the first party (defendant) by this letter as the day of the transfer. Every delay in the arrangement of the partition, the registration of the house or the transfer by reason beyond the control of the first party (defendant) will not be regard as a breach of the contract".

3. Clause 9 of the contract states :—

> "The party who will go back on his obligations or will commit a breach or will not fulfill all or part of the conditions of this contract, will have to pay to the fulfilling party LP. 200.— as damages. If the first party (defendant) will be the one committing a breach, he will be obliged in addition to the sum of damages, to return to the second party (claimants) the money received from them".

4. On account of the purchase-price the Plaintiffs paid to the Defendant LP. 100, LP. 7.— a bill signed by the Defendant to a surveyor for a plan at the request of the Defendant and 950 mils werko tax amounting together to LP. 107.950.

5. Both parties agree that the plot could not be transferred within six months from the date of the contract, *i. s.* 11th September, 1936, and that the delay was due to causes independent of the Defendant's will. The immovable property sold became ready for transfer in the Tabu at the end of February, 1937.

6. The Defendant alleges that ten days before the 3rd March, 1937, he invited both Plaintiffs to appear in the Tabu in Nathanya in order to transfer the properties agreed to be sold. The Plaintiffs deny this invitation, but it was proved at the hearing, by the Plaintiffs, that they knew that he ransfer was o be arranged by he Defendant in Nathanya on the 3rd March, 1937, but that one of the Plaintiffs, Mr. Broza, informed the Defendant that he was prevented by some private engagement from appearing in the Tabu on the 3rd March, 1937 — so that it was useless for Defendant to appear in the Tabu on this date — (3.3.1937).

7. On the 8th March, 1937, the Plaintiffs on their part sent a notarial notice to the Defendant summoning him to appear in the Tabu in Nathanya on 17th March, 1937. between 9 a. m. and 1 p. m. in order

to transfer to them the immovables agreed to be sold and warned him that should he not appear, they would claim their money back and also LP. 200 damages. Now, the Plaintiffs allege that they did appear in the office of the Tabu in Nathanya on the 17th March, 1937, but that the Defendant did not appear, so that they now claim repayment of LP. 107.950 mls. as money paid by them to the Defendant and LP. 200 liquidated damages.

8. The fact that the Defendant did not appear in the Tabu in Nathanya on the 17th March, 1937, was denied by his Counsel and it was proved by the evidence of the Defendant, his wife, Assad Hissni, the Land Registry and his assistant, that the Plaintiffs waited in the office of the Tabu in Nathanya on the 17th March, 1937, until 1.20 p. m., that they left the Tabu although the office hours were from 7.30 a. m. till 1.30 p. m. and, almost immediately after they left the office, the Defendant and his wife appeared at 1.25 p. m. *i. e.* still during office hours. The file was ready and prepared for transfer, the Defendant was ready to sign the transfer, the Land Registrar was waiting for the Plaintiffs, but the Plaintiffs did not return to the office although the Office remained open from 1.20 till later than 1.30 p .m.

By reason of these facts as found by us, we cannot share the view of the Plaintiffs that the Defendant had committed a breach of the contract. On the contrary, Defendant cannot be made responsible for the delay in arranging the file after six months from the date of the signature, because the Plaintiffs agree that it happened from reasons beyond his control ; he invited the Plaintiffs to appear in the Tabu on the 3rd march, 1937 and it was not his but the Plaintiffs, fault that the transfer was not made on that date. According to Clause 8 of the contract, the Plaintiffs were not entitled to fix a new day or hours for the transfer, they had simply to wait until the Defendant would by a registered notice given fourteen days in advance, fix the new date for the transfer and then sue for damages if the Defendant had not so invited them. Nevertheless, the Defendant did appear in the Tabu on the day fixed by the Plaintiffs during office hours, ready and willing to transfer the property. Plaintiffs should have waited until the Office of the Tabu was closed.

We are therefore of the opinion that no damages can be awarded in favour of the Plaintiffs (Art. 106 of the Civil Procedure Code).

The Plaintiffs are entitled in accordance with Sestions 4 and 11 of the Land Transfer Ordinance to claim back the money paid in connection with a sale of immovable property. It was proved that they paid LP. 107.950.

We therefore give judgment for the Plaintiffs against the Defendant for the sum of LP. 107.950 mls., plus legal interest as from 23.4.1937, and dismiss their claim for LP. 200 damages.

Each party to pay its own costs.

Delivered in presence of Mr. Kehaty for plaintiff and of Dr. P. Joseph for defendant this 12th day of January, 1938.

President.
Judge.

LATER. Plaintiffs' Advocate asks for confirmation of provisional attachment.

COURT ADDS. : "And we confirm the provisional attachment".

President.

CRIMINAL APPEAL No. 77/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Shmuel Kouznitz. APPELLANT.

v.

The Attorney General. RESPONDENT.

Appeal from a judgment of the Magistrate ordering the demolition of a building — No record of the trial, evidence or of the pleading — No record of the selection of the Court by the accused — No reasons for accepting a Public Health Officer as prosecutor.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv, dated 25.10.37, in file No. 13767/37, whereby the Appellant (Accused) was ordered to demolish the building (Stable).

JUDGMENT:

After perusal of the file we find that it contains only the complaint and the Judgment. — It is true that in small cases for contraventions

the Magistrate is not obliged to write a record containing the evidence of witnesses. — But in our opinion the record must show :—

1. Who appeared.

2. Whether the accused pleaded guilty or not.

3. The names of the witnesses heard, although this may be done by a short remark on the complaint itself.

The case before us is not even a small case, because the closing of a stable is involved and such a decision may ruin the Accused financially. We further can find not a remark according the Magistrate's Courts Jurisdiction Ordinance 1935 as to the selection of the Court by the Accused. Section 10 of the Trade and Industries Ordinance 1927 states : "and in the case of a second or subsequent offence, to imprisonment for one month or a fine of fifty pounds or both such penalties". — A remark as to the selection of the Court by the Accused must therefore be inserted in the minutes. Finally the Magistrate has to give reasons why he accepted the representative of the Public Health Office as a Prosecutor in a case for a contravention against the Trade and Industries Ordinance 1927 whilst Dr. Oplatka is authorised by the Attorney General by his letter dated 20.2.32 to institute and appear in any prosecution of offences against Public Health Laws and Ordinances and Municipal Bye-Laws.

For all these reasons the Judgment appealed against is hereby quashed and the case remitted to the Magistrate in order to rehear it and comply with all remarks afore made.—

Delivered in open Court, this 20th day of January, 1938.

President.

Judge.

CIVIL CASE No. 157/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Shimon Khojahinoff. PLAINTIFF.

v.

Abraham Haim Khojahinoff. DEFENDANT.

Application for confirmation of award — Subject matter of the award outside the jurisdiction — Immaterial if included in the submission — Possibility of enforcement of award outside the jurisdiction irrelevant.

JUDGMENT:

The Plaintiff applied for the confirmation and enforcement of an award, attached to the file, issued unanimously by the five arbitrators dated 15.5.34.

The Defendant confined his defence only to the contention that there was an excess of Jurisdiction on the part of the arbitrators in two directions *viz* :—

1. One action of the award deals with immovable property in the City of Samarkand (in Russia) and contains a decision that 20% of all immovable property belonging there to Abraham Chaim Kojahinoff shall be transferred to the Plaintiff if after some time such legal possibility exists.

2. That the arbitrators awarded damages under an agreement made between the parties in London on the 11.2.31 in the sum of LP. 532,462. In the Defendants' contention both the immovable property in Samarkand and the aforementioned agreement were out with the terms of the submission to the arbitrators.

After having heard the arguments of the advocates of the parties, we cannot agree with the view of Defendants' counsel. The submission is clear and states : "Whereas there is between us litigation in connection with business which existed between us from the year 1917 until today (3/1/34) and among them all business which exists between us both and also business which existed between the Plaintiff and the partnership Kojahinoff Brothers. — "We agree between us ..... to remit the above mentioned case to arbitrators chosen by us".

No remark was made that the parties intended to remove some or any part of their business affairs from the purview of the arbitration. According to these clear words of the submission the arbitrators were entitled to deal with all misunderstandings differences and mutual claims of the parties existing between 1917 and the date of the signature of the submission. We therefore do not say any reason for refusing to confirm the award.

The question whether or not the Plaintiff will in future be in a position to execute that part of the award, which deals with the immovable property in Russia is not relevant to the application for con-

firmation thereof. This decision of the arbitrators does not effect to day any other parts of the award.

For these reasons and in accordance with section 14 of the Arbitration Ordinance we confirm the award and order that this award be enforced in the same manner as a Judgment of this Court with costs and LP. 3.— advocate's fees for the Plaintiff.

Delivered this 20th day of January, 1938 in presence of Mr. Levitzky for Applicant and Dr. Eliash for Respondent.

President.

Judge.

CIVIL APPEAL No. 258/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF:

Adolf Shaerf. APPELLANT.

v.

Rita Weiss-Shaerf. RESPONDENT.

Judgment by default — Opposition must be lodged within five days of service of copy of judgment — Notice from Execution Office not identical with service of copy of judgment.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv in file No. 7493/37 dated 6.8.37, whereby the opposition to the confirmation of an award was dismissed with costs and LP. 2.— advocate's fees.

JUDGMENT:

Rule 4(1) of the judgment by default (Magistrate's Court Rules) is clear. — According to this rule and the practice in this District Court, opposition can be made at any time before the judgment given in default was served upon the opponent or within five days after the date of service of a copy of the judgment. This rule must be

strictly interpreted. An information or a notice sent to the Defendant by the Execution Office is not identical with the service of the copy of the judgment.

We therefore set aside the judgment rejecting the opposition and remit the case to the Chief Magistrate to enquire as to whether there are any other reasons for accepting or rejecting the opposition and to proceed accordingly.

Costs to follow the event.

Delivered in open Court this 20th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 274/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Shmuel Raphael Arieh. APPELLANT.

v.

Esther Bechor. RESPONDENT.

Claim for damages for breach of contract — Arbitration clause — Power of Magistrate to order a stay of proceedings — No power to appoint arbitrator and fix conditions without consent of parties.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv, dated 2.11.37, in file No. 13103/37, Case to be remitted to arbitrators and Mr. M. Lurie to be appointed as Arbitrator.

JUDGMENT.

This is a claim for damages on the ground of a breach of contract between the parties. The Defendant (Appellant) pleaded arbitration under clause 32 of the above mentioned contract. We have not found in the minutes any mention that the parties applied to the Magistrate for the appointment of a third arbitrator or that they agreed to the

appointment of Mr. Lurie as third arbitrator. According to section 5 of the Arbitration Ordinance 1926 the Magistrate may in such cases as this — when he thinks that there is not sufficient reason why the matter should not be referred to arbitration make an order staying the proceedings, but he is not entitled to appoint an arbitrator and fix conditions for the issuing of his award unless there is a special application or a compromise of the parties made in his presence and recorded in the minutes.

We therefore confirm the judgment in so far as it ordered a stay of proceedings but otherwise set aside the judgment appealed against.

The Respondent to pay the costs of the appeal and costs in the Court below.

Delivered in open Court this 20th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 279/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Zila Barsky. APPELLANT.

v.

Marc L. Gorodisky. RESPONDENT.

Who is a proper party to an action — Document referring to party gives prima-facie right to that party even if he acted as agent for another person also.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, dated 26.10.37, whereby the Appellant's (Plaintiff's) action dismissed with costs and advocate's fees.

JUDGMENT:

This is an appeal from the judgment of the Magistrate whereby the Appellant's action was dismissed on the ground that the Appellant was not a proper party to the suit.

In our opinion, since the document produced by Appellant and signed by Respondent has reference to nobody but the Appellant and relying on Section 1461 of the Mejelle, the right to sue belong to the Appellant alone though he may have acted also as agent for other persons.

The appeal is therefore allowed and the case remitted for hearing on its merits.

Delivered in open Court this 20th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 283/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.), His Honour Judge I. Many.

IN THE CASE OF:

Shara Shupax. APPELLANT.

v.

Menahem Finkelman. RESPONDENT.

Action on lost Promissory Note — Sworn declaration to that effect insufficient — Proof of all material particulars of the lost note must be produced.

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 1.11.37 in file No. 5196/37, whereby the Appellant's (Plaintiff's) action struck out.

JUDGMENT:

The Appellant's claim before the Magistrate was purported to be based on a promissory note guaranteed by the Respondent.

The Appellant failed to produce the note in question alleging the loss of the said note and it was decided by this Court in a previous appeal that the Appellant must prove the loss of the note and the provision of the bills of Exchange Ordinance as to lost bills must be applied.

At the hearing of the case the Appellant produced a mere sworn declaration that the said note was lost. The Magistrate dismissed the case holding that the particular of the note must be proved without leaving any doubt as to the signatories, indorsers, guarantors.

We agree with the learned Magistrate that there was no evidence before him as to the essential particulars of the lost promissory note, without which the liabilities of the respective signatories could be ascertained.

The appeal is therefore dismissed with costs.

Delivered in open Court this 20th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 288/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF:

Yoseph Menashe Khasid. — APPELLANT.

v.

1. Bnei Daniel Aspormas,
2. Aharon Aspormas. — RESPONDENTS.

Action against partnership on a note signed by it — Partnership dissolved by death of one partner — No provision in Palestine law as to actions against dissolved partnership — English principle applied.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, dated 3.11.37 in file No. 12401/37, whereby Appellant's (Plaintiff's) action for LP. 100.— dismissed with costs.

JUDGMENT:

The Appellant brought an action against a partnership by the name of Bnei Daniel Aspormas on a promissory note. During the hearing a certain Aharon Aspormas, one of the parties of the said partnership

intervened as a third party declaring that the said partnership was dissolved by the death of the partner and the Appellant's action must therefore be dismissed. The Magistrate accepted the third party's plea and dismissed the Appellant's action giving him the right to bring a new case against the partners individually.

In our opinion, since there is no clear provision in our law as to action against dissolved partnership. The English Law must be applied and there is no doubt that according to English Law an action may be brought and judgment obtained against a firm in the firm name after its dissolution in respect of a cause of action which arose before its dissolution. In any event, we think that the Appellant ought, in this case, to be allowed to summon all the other parties without having to bring a fresh action.

The appeal is, therefore, allowed and the case remitted for hearing on its merits.

Delivered in open Court this 20th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 299/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Joseph Rotman — APPELLANT.

v.

Boris Weisbard — RESPONDENT.

Action on a Promissory Note — Plea of "not indebted". — Judgment by default as if in presence. — Duty of Magistrate to require proof.

N. B.: This is one of a number of Judgments to the same effect (*e. g.* C. A. 169/37, C. A. 235/37, C. A. 117/37).

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, in file No. 7932/37 dated 10.10.37, whereby the Appellant (Defendant) was ordered to pay £P. 25 with interest costs and advocate's fees.

JUDGMENT:

This claim is based on a promissory note signed by the Defendant. The promissory note does not contain a clause to order of whom the sum is to be paid. The Defendant denied that he is indebted to the Plaintiff under this promissory note and the Magistrate decided to hear the Plaintiff upon the demand of the Defendant. At the second sitting on 10.10.37 the Defendant did not appear seemingly having made a note on his file by mistake, that the hearing was adjourned to 14.10.37. At the hearing fixed for 10.10.37 the Magistrate did not hear the Plaintiff as he formerly decided, but gave a Judgment in favour of the Plaintiff. This procedure is in contrary to Rule 3(4) of the Judgment by Default (Magistrates Courts) Rules 1928.—

We therefore allow the appeal set aside the Judgment and remit the case to the Magistrate for rehearing.

Costs to follow the event.

Delivered in open Court this 20th day of January, 1938.

President.

Judge.

CIVIL CASE No. 28/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF:

Rachel Zabizunsky. PLAINTIFF.

v.

Yehezkel Ziskind Zabizunsky. DEFENDANT.

Application for Exequator — Polish judgment for alimony — No exequatur without international agreement — Grant of exequatur a matter of discretion — Foreign judgment must itself be enforceable.

N. B.: Appeal dismissed on technical point: C. A. 87/38 (1938, S. C. J. 278, 3Ct. L. R. 230).

JUDGMENT:

The Plaintiff produced to this Court a Judgment given on the 27.11.31 by the District Court at Lodz in Poland whereby the Defendant was ordered to pay to the Plaintiff alimony at the rate of 200 Zlotys per month for the remainder of her life plus 10% as from 1.1.35 and costs amounting to 150 Zlotys and applied for this Judgment to be confirmed thus enabling the Plaintiff to execute it in Palestine as required by Law.—

Every opportunity was given to the advocates for both parties to present their arguments, moreover written pleadings were exchanged between them and produced to the Court. Finally an expert in Polish Law was heard by the Court and examined by both advocates.

Having considered all arguments in favour of and against the Plaintiff's claim we think that we cannot give Judgment in her favour for the following reasons *viz* :—

1. The application in the form in which it was brought before us is an application for an *exequatur i. e.* an application to make the attached foreign Judgment executable in Palestine just as if it had been a Judgment given by a Court in Palestine. Counsel for Plaintiff tried to emphasize at the trial and in his written pleadings that his claim is merely an action based upon a foreign judgment, but his contention is not in accordance with his statement of claim. In the case of an action upon a foreign judgment he would have to apply for a judgment ordering the Defendant to pay to the Plaintiff a certain sum of money and not as he actually has applied for *viz*.:— a confirmation of a foreign judgment. In our opinion an *exequatur* can only be granted upon a judgment issued in a country with which there is a special international agreement with regard to the mutual execution of judgments. Such agreement does not exist between Palestine, or England and Poland.—

2. The Foreign Judgments Rules 1928 are applicable both to actions upon a foreign judgment and also to grants of *exequatur*. In particular Rule 7(2) of these rules states that "the Court may reject the application for the enforcement of a judgment of the Court of any state upon proof that execution of Palestinian Judgments is refused by the Law of the state". The expert in Polish Law has quoted Art. 528 of the Polish Civil Procedure Code, 1933, providing that the Polish Courts will not execute foreign judgments in the absence of an agreement to this effect between Poland and the country where the Judgment was given, and that no agreement exists as to the

reciprocal enforcement of Judgments between Poland and Palestine — We do not think that it would be fair and just as regards inhabitants of Palestine to enforce Polish Judgments against them, when there does not exist provision in law for enforcement in their favour of Judgments given by Courts in Palestine against Polish citizens in Poland.

3. The argument of the Defendant that the attached Judgment as it is — would not be executable even in Poland, because it lacks a most essential clause namely the so-called "Execution clause", was confirmed by the expert in Polish Law. We are not of the opinion that the Plaintiff can be afforded greater rights in Palestine on the basis of the judgment than she could have had in Poland.—

All the other arguments against the enforcement of the judgment are of minor importance and need not be decided by this Court.

We therefore dismiss the Plaintiff's application with costs and LP. 3.— advocate's fees to the Defendant.—

Delivered this 24th day of January, 1938, in the presence of Mr. Spindel for Plaintiff and Mr. Serlin for Defendant.

President.
Judge.

CIVIL CASE No. 189/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF:

Moshe Smilansky. PLAINTIFF.

v.

A. Z. Ostrovsky. DEFENDANT.

Action by guarantor (Aval) on Promissory Note against a co-guarantor for the recovery of half the amount paid by him — Defendant original payee of Note and subsequent co-guarantor — Law governing Aval guarantees — Aval a creation of Palestine Law, English Law, therefore, inapplicable — Application of Mejelle (Art. 647).

JUDGMENT:

The facts in this case are as follows :—

1. Two persons Zwi and Baruch Shapiro signed six promissory notes each for LP. 100 to the order of the Defendant A. Z. Ostrovsky with a view to borrowing money from him or through him from a bank, or some other person.

2. Plaintiff, the father-in-law of Zwi Shapiro one of the makers of the six promissory notes — signed all six per aval. He put his signature under a printed form "I guarantee and I am liable joint and several guarantee (aval) for the makers of the p. n. M. Smilansky" *i. e.* (Planitiff).

3. When the Plaintiff put his signature to the bills in question, he know that the payee of the bills was the Defendant A. Z. Ostrovsky, a money lender and financial broker, whose business is to arrange loans for other people from his own money or money of other persons. Neither when he signed nor at the date of signing nor after that date did the Plaintiff speak to the Defendant.

4. The Defendant received the promissory notes signed by the Plaintiff pour aval and discounted them with a number of money lenders some days later. When he proposed the discounting of the promissory notes they asked him to put his signature as the giver of an aval — besides his signature as an endorser and the Defendant signed all six promissory notes as an endorser on the back of the notes and as the giver of an aval on the face of them.

5. At the date of maturity the promissory notes were not paid by the two makers, so that Plaintiff was called upon to pay the sums due to the different money lenders and did in fact pay LP. 600 in respect of the said promissory notes.

Now the Plaintiff claims from the Defendant a refund of LP. 300 *i. e.* one half of the sum paid as a contribution on the ground of joint and several guarantee of both the Plaintiff and the Defendant for the makers of the promissory notes in question.

It appeared at the trial that on one promissory note for LP. 100 (Exhibit No. 6) the signature of the Defendant as endorser and giver of an aval was erased. Then the advocate for the Plaintiff, in whose possession the said promissory note was, asked to be allowed to tender to the Defendant the decisive oath under art. 1818 of the Mejelle and Defendant swore ; "I swear by Almighty God that my signature on the promissory note (Exhibit 6) was not erased by me or my

representative". According to art. 1818 Plaintiff's claim under this promissory note (Exhibit 6) must fail.

As regards all the promissory notes both Plaintiff and Defendant were heard as witnesses and after having heard the pleadings of their respective advocates we give the following Judgment :—

1. Section 57(3) of the Bills of Exchange Ordinance states that "when a giver of an aval pays the bill he has a right of recourse against the party whom he has guaranteed and against the parties liable to that party". This section is silent as to the recourse of such a giver of an aval against an other giver of an aval *inter se,* when there are more than one. In our opinion the law as to the rights and liabilities of persons who sign a bill, is to be found within the four walls of the Bills of Exchange Ordinance 1929. Every signature on a bill creates a contract, the nature of which, the rights powers and obligations of all parties to which are defined by the respective sections of the Bills of Exchange Ordinance. This Law is a formal and strict one. The liabilities of an accomodation party (Section 27), the rights and powers of a holder of a bill (Section 37), of an acceptor (Section 54), of a drawer or endorser (section 55) of an acceptor for honour (section 65 of the Bills of Exchange Ordinance) — are strictly defined. In addition all their rights of recourse are similarily defined. An "Aval" is a creation of the Palestine Bills of Exchange Ordinance, *i. e.* of the Law of Palestine and we cannot go to English Law for its interpretation because such a creation is unknown to English Law. An aval must be interpreted strictly in accordance with the Bills of Exchange Ordinance. When Section 57(3) confines the right of recourse a "giver of aval" to the party for whom he has guaranteed the consequence is that he has no right of recourse to any other person who has signed the bill as in this case to another giver of an aval. The fact that section 57(3) of the Bills of Exchange Ordinance is silent as to the right of recourse between the givers of an aval *inter se,* is not a *lacuna,* which has to be filled up by way of interpretation from English or from Palestinian Civil Law. This silence means, that an aval is a contract of such a nature that the giver of it has no other right of recourse than those rights mentioned in section 57(3) of the Bills of Exchange Ordinance.

2. We agree with the advocate for the Defendant that the relations between the two givers of an aval on the same promissory note are outside the bill. It is a question of fact, whether such two guarantors are co-sureties, or whether the second guarantor (in this case the Defendant) is only a surety for a surety (the Plaintiff) Art. 647

of the Mejelle states: "If there are several guarantors of one debt, who became guarantors for such debt separately action may be taken against any one of them for the whole amount of the debt. If they became guarantors *at one and the same time,* action shall be taken against each one for his share of the debt. But if they also each guaranteed the amount to be paid by the others, each of them is liable for the whole amount of the debt". Although this article does not deal directly with the relations of several guarantors for one debt *inte se,* yet indirectly we find here a definition of co-surety and surety for a surety. The criterion is, whether a guarantee was given by more than one person at the same time or separately at different times. In the first case the guarantors are co-guarantors and not obliged to pay more than their share and should they have paid they are entitled to claim back the surplus from the others by way of contribution. In the second case each and every one is responsible to the creditor for the whole debt and when he has paid it he is not entitled to claim any contribution from his fellow guarantors. In this case it has been proved beyond any doubt that the Defendant put his signature after the Plaintiff's signature some days later; in the absence of and without any knowledge of it on the part of the Plaitiff. For this reason also Plaintiff's claim must fail.

3. At page 247 of the Text Book of Judge Shems a Judgment of the District Court of Haifa Civil Appeal No. 79/36 is reported. The circumstances in this case seem to be similar to those in that case. The Judgment is based on a statement in Halsbury's Laws of England (1911) Vol. 14 p. 527 and in the case of Whiting *v.* Buske (1871) reported in Chancery Appeal Cases p. 342. We think that we can accept the opinion expressed in this Judgment *viz.,* that if the first surety pays the amount of the debt he has no right of contribution from a subsequent surety. In accordance also with principles of English Law it is necessary that the right to contribution must arise at the time of inception of the contract of guarantee. . It may be based on the ground of equality of burden and benefit. In the present case it is clear that the Defendant is a surety to a surety and is under English Law not entitled to contribution (Halsbury's Laws of England 1911 Vol. 15, page 529).

For those reasons we dismiss the claim with costs and LP. 3.— advocate's fees to the Defendant.

Delivered this 27th day of January, 1938, in presence of Mr. I. Levin (for Mr. A. Levin) and Mr. Zalmanov.

President.

Judge.

CIVIL APPEAL No. 294/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Abraham Masouri. APPELLANT.

v.

Zvi Haim Zissman. RESPONDENT.

Action for eviction — Application of the Landlords and Tenants (Ejection and Rent Restriction) Ordinances — Meaning of "Premises" — Land not included.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, dated 11.10.37 in file No. 12937/37, whereby the Appellant (Defendant) was ordered to vacate the premises with costs and advocate's fees.

JUDGMENT:

This Court has on several occasions decided that the Landlords and Tenants (Ejection and Rent Restriction) Ordinances do not apply to land but only to premises as defined in these Ordinances themselves.

In other words "premises" do not include land. There is nothing in this appeal to show that the Magistrate erred in law or drew wrong inferences from the facts.

The appeal is dismissed.

Delivered in open Court this 27th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 322/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Chevra Lekirur Chashmali Umakshirim. APPELLANT.

v.

M. Intrator. RESPONDENT.

Confirmation of award — Lack of jurisdiction "ratione materiae" — Duty of the Court to dismiss the claim of its own motion.

Appeal from a judgment of the Magistrate's Court, Tel-Aviv in file No. 8335/37, whereby the Arbitration award confirmed with costs.

JUDGMENT:

This is an appeal from the judgment of the Magistrate confirming an award on an arbitration.

The appeal contains many grounds, one of those grounds being to the effect that the Magistrate who dealt with this case had no jurisdicion since the subject matter of the arbitration was a claim of LP. 157.550.

It is admitted that the question of jurisdiction was not raised before the Court of Trial.

In our view, art. 48 of the Civil Procedure is quite clear on this subject. This article provides that in case of lack of Jurisdiction *"ratione materiae"* the Court must dismiss the claim of his own motion at any stage of the proceedings.

The appeal is therefore allowed and the judgment of the Magistrate set aside with costs and LP 2.— advocate's fees.

Delivered in open Court this 27th day of January, 1938.

President.

Judge.

TRANSLATION.

CIVIL APPEAL No. 262/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour Judge I. Many.
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Ephraim Harlap & Sons. PLAINTIFF.

v.

1. Dr. Fritz Moses,
2. Dr. Hans Lachman. DEFENDANTS.

Assignment of debt — Consent of debtor immaterial — Admission of Defendants in previous action between them and Assignor Admissible — Estoppel.

JUDGMENT:

This is an action by a partnership based on an assignment of a debt made by a contractor, by the name of Noah Havkin, in favour of the Plaintiff of money due to the said contractor from the Defendants.

The Defendants did not deny the assignment but pleaded :

a) That the assignment was not made in the name of the Plaintiff but in the name of one of its partners, Mr. Harlap.

b) The assignment was made without the consent of the Defendants.

c) The Defendants are not indebted to the contractor Mr. Havkin to the sum of LP. 300 — but less.

As to the Defendants' first plea — in their letter dated 7/8/1938 (Exh. No. 6) they write expressly that the assignment was made in the name of the firm Harlap & Sons, — *i. e.* the Plaintiff itself and not one of its partners.

As to the second plea of the Defendants — there is nothing in the Assignment of Debts Ordinance, 1928, whereby the assignor of a debt must obtain the consent of the Debtor so as to effect the assignment. Furthermore it is clear from the course of trial and from the Defendants admission in an action between them and Mr. Havkin No. 277/35 (Exh. No. 2) and the account submitted by the Defendants at the said trial (Exh. No. 3) that the Defendants did in fact accept the

assignment and debited Mr. Havkin's account in the sum of LP. 300 which is the present amount of claim. It follows therefore that the said assignment is entirely complete and is governed by the rules of assignment as laid down in section 690 of the Mejelle.

As to the third plea of the Defendants — since the Defendants accepted the assignment of the debt and debited Mr. Havkin's account by the amount of the present claim, they cannot now come and plead that they do not owe the whole of the said amount.

We therefore give judgment for the Plaintiff against the Defendants for the sum of LP. 300, costs, legal interest from date of action being 10/10/37 and LP. 3.— advocate's fees.

Judgment delivered by us on the 30/11/37 in the presence of Defentants' attorney in open Court.

Judge.

Judge.

For Plaintiff : R. Hutory & Dr. P. Joseph.

For Defendants : Dr. M. Nusbaum.

CIVIL APPEAL No. 305/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Joseph Tishler. — APPELLANT.

v.

Abraham Vaksman. — RESPONDENT.

Action for recovery of money paid in respect of purchase of land — Section 11 of the Land Transfer Ordinance, 1920 — Right to recover prior to official registration — Delivery of possession is immaterial.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, dated 15.11.37, in case No. 1446/37, whereby the Appellant (Defendant) was ordered to pay LP. 250.— with interest, costs and advocate's fees.

JUDGMENT:

This is an appeal from the Judgment delivered by the learned Chief Magistrate, whereby Appellant was adjudged to pay to the Respondent the sum of LP. 250.—.

The Respondent's action was based on Section 11 of Land Transfer Ordinance, 1920, which gives to a purchaser of land the right to recover money paid for land before registration is effected.

On behalf of the Appellant it is argued that the provision of the Land Transfer Ordinance applied only when the purchaser is not yet in possession of the land and has not yet received any benefit from it.

In our opinion, the question is quite irrelevant and in view of the numerous decisions on this subject it is settled law in this country that a purchaser of immovable property can always claim the return of the money paid by him so long as the Official Registration of the property has not been completed.

The appeal is therefore dismissed.

Delivered in open Court this 28th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 11/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF:

Shlomo Sheinis. APPELLANT.

v.

Leah Polonsky. RESPONDENT.

Order to eviction — Appeal addressed to wrong Court — Section 5(3) of the Magistrates Courts Jurisdiction Ordinance.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 14087/37, dated 10.12.37, whereby the Appellant (Defendant) was ordered to vacate the premises with costs and Advocate's fees.

JUDGMENT:

This is an appeal against an order for eviction given by the Magistrate against the Appellant.

Without entering on the merits of this appeal, we find that it must be dismissed on the ground it has been addressed to the District Court instead of the Land Court contrary to Section 5(3) of the Magistrate's Court Jurisdiction Ordinance.

Delivered in open Court, this 31th day of January, 1938.

President.

Judge.

CRIMINAL APPEAL No. 74/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF:

Attorney General. — APPELLANT.

v.

Itzhak Feigin. — RESPONDENT.

Appeal from sentence of Municipal Court — Failure to obtain licence under Trades and Industries (Regulations) Ordinance — Power of Court to order the closing of the premises but not grant time for obtaining the licence.

Appeal from the judgment of the Municipal Court, Tel-Aviv, dated 7.10.37, in file No. 3402/37, whereby Respondent was sentenced to pay LP. 0.200 and to close the premises if Respondent will not obtain the required license within 3 months.

JUDGMENT:

This is an appeal by the representative of the Attorney General against a sentence of fine of 200 mils and an oder given by a Municipal Court whereby they purported under the Trades and Industries (Regulation) Ordinance Cap. 143 Revised Laws to order

that the premises in question be closed if the Accused (Respondent) should not obtain a licence within three months from the date of the conviction. It is said, firstly, that the sentence of a fine of 200 mils is inadequate. We agree and we increase the fine to a fine of LP. 3.—. Secondly, it is said that the Court had no power to make the order regarding three months as (it is contended) that would be tantamount to the Court condoning the continuance of an unlawful act. In our views, the trial Court may order under Section 10(2) the closing of the premises in respect of which no license has been obtained but has not power to allow the convicted man to carry on, after conviction, a classified trade without having a licence. In our view the proper order for us to make on this appeal is to increase the sentence from a fine of 200 mils to one of LP. 3.— and to quash the other order made by the Court in so far as the period of three months extension is granted. The order for closure will remain a simple order under Section 10(2). We order accordingly.

Delivered in open Court, this 31th day of January, 1938, in the presence of Mr. T. Shahor for A. G. and in absence of Respondent (not served) unable to be found by process Server.

President.

Judge.

CIVIL APPEAL No. 333/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF :

1. Ch. Cohen,
2. M. Beker. APPELLANTS.

v.

1. D. Amrami,
2. A. Krinikzi. RESPONDENTS.

Plea of Arbitration clause — Order to stay proceedings — Power to stay proceedings a matter of judicial discretion.

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 8.12.37 in file No. 18953/37, whereby the Appellant's action was dismissed.

JUDGMENT:

This is an appeal from a decision of the Magistrate staying proceedings under Section 5 of the Arbitration Ordinance.

The Appellants argue that inasmuch as the Respondent failed to appoint an Arbitrator as requested to do so by Appellants the Respondent must be considered as *not ready and willing to go to arbitration,* within the meaning of the Arbitration Ordinance and proceedings should not be stayed.

In our opinion, the power to stay proceedings is entirely one of discretion. The Magistrate has judicially exercised this discretion and we are not prepared to interfere with.

The appeal is dismissed.

Delivered in open Court, this 31th day of January, 1938.

President.

Judge.

CIVIL APPEAL No. 3/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge I. Many.

IN THE CASE OF:

Boris Sonberg. APPELLANT.

v.

Heinrich Witshtok. RESPONDENT.

Claim for brokerage — Plaintiff unlicensed broker — Article 564 of the Mejelle to be applied — Essential elements (1) *Request to do work* (2) *Promise to pay* (3) *Actual performance.*

Appeal from a judgment of the Magistrate's Court, Tel-Aviv in file No. 1567/37, dated 9.12.37, whereby Appellant (Defendant) was adjudged to pay LP. 30.— with interest, costs and advocate's fees.

JUDGMENT:

This is an appeal from a judgment of the learned Chief Magistrate, whereby the Appellant was ordered to pay to the Respondent the sum of LP. 30.— as brokerage at 2% on a sum of LP. 1500.

The Respondent in his statement of claim before the Magistrate is described as a financial broker and he alleged that he had procured for the Appellant a loan of LP. 12750 in respect of which he now claims commission amounting to LP. 250. The appeal is basis on the following grounds *viz.*

a) That the Respondent is not entitled to sue for fees, being an unlicensed broker.

b) That the Respondent failed to make out his case.

c) That the Magistrate refused to hear witnesses for the Appellant.

As to the first point, we agree with the Learned Magistrate, on the authority of case Leman *v.* Aspour C. A. 121/34, that the provisions of the Brokerage Ordinance do not apply to the facts of this case. As to the second ground of appeal, it has already been decided by this Court in many cases that a claim for brokerage or commission which is not based on the Brokerage Ordinance must be dealt with in accordance with the provisions of Art. 564 of the Mejelle. Under this article three ingredients are necessary to found a claim for money for service rendered, *viz.* :

a) A request to do a certain work.

b) A promise to pay for such a work.

c) The actual performance of the work requested by the Defendant to be done.

Now from the evidence led before the lower Court, it is impossible to infer that these three elements exist in Respondent's action.

The Court below seemed to base its findings on the existence of an implied contract of agency between the Plaintiff and the Defendant. We have perused the notes of proceedings taken by the learned Chief Magistrate. All that we can find that suggests a contract of Agency is in the Plaintiff's own evidence. "I said as Com'n Agent I w'd try. Defendant asked where I sh'd get it. I said I had already dealt with Kotler, he said no use because I have already dealt with him and the negotiations failed. I said 'leave it to me'." Now we are unable to infer from this a request to do the work as contemplated by Art. 564 Mejelle, or, even under English Law, a valid acceptance of

an offer which would constitute a binding contract. In order to enable a commission agent to recover commission there must be proved a valid and subsisting contract of employment of the Plaintiff as agent (vide the case of George Trollope & Sons. *v.* Mastyn Brothers, Vol. 50, Times L. R. Page 544, a case in which the word "employment" is stressed). In this case we are satisfied from the record of evidence before the learned Chief Magistrate that there is no evidence on which the Magistrate could find that the Appellant (Defendant) ever employed the Respondent (Plaintiff) as agent. It might be argued that :—

a) The fact that previously the Respondent had done work for Appellant, which work had been abortive and resulted in the negotiations falling through, and

b) The apparent silence of the Appellant (*i. e.* if the Respondent's evidence is to be believed) when Respondent said "Leave it to me" are facts sufficient to infer a valid and binding contract of employment of the Respondent as agent. We do not think so. It must be remembered that even the Plaintiff (Respondent) in evidence never alleged in his evidence, that after he (Respondent) said "Leave it to me" the Appellant said one thing or another. From the whole evidence, therefore, we are of the opinion that the learned Chief Magistrate was *not* entitled to find that there had been a binding contract of employment of the Respondent as agent. There was, in any event, not proved (as is required by Art. 564 Mejelle, which is the Civil Law in force in Palestine to day in such matters) any promise express or implied to pay for any work done by the Respondent as agent. In view of the foregoing it is in our opinion unnecessary for us to deal with the third ground of appeal *viz*, that the Magistrate refused to hear the Appellant's witnesses. We, accordingly, set aside the Judgment appealed against and we order that the Plaintiff's (Respondent's) claim be dismissed.

We, accordingly, allow the appeal with costs here and in the Court below and we order the Respondent to pay LP. 2.— advocate's costs of this appeal.

Delivered in open Court, this 2th day of February, 1938.

President.

Judge.

CIVIL CASE No. 7/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE : His Honour the R/President (Shaw, J.),
His Honour Judge I. Many.

IN THE CASE OF :

Shimon Dov (Baer) Lande. APPELLANT.

v.

Abraham Rindzunsky. RESPONDENT.

Application for exequatur of foreign judgment — Effect of absence of reciprocal treaty — Extent and powers of Rules of Court — Extent and scope of Foreign Judgments Rules.

N. B.: The proceedings on appeal ended in 60 and 61/38 (1938, 1 S. C. J. 316) — and see annotations thereto for earlier proceedings on appeal.

JUDGMENT:

The Applicant, Shimon Dov Lande, has applied to this Court under the Foreign Judgments Rules, (which are to be found in pages 2332 and 2333 of the Laws of Palestine, Vol. 3) for the grant of an *exequatur* so that a judgment obtained from the Landgericht of Chemnitz, Germany, may be made executory in this country.

The Respondent, Abraham Rindzunsky, has led evidence with a view to proving that the execution of Palestinian Judgments is refused by the law of Germany, but after hearing this evidence we find that he has failed to prove this point. At the most he has proved that the German Courts would probably refuse an *exequatur* if it were applied for.

The only question remaining for consideration is whether an *exequatur* can be granted in this country in respect of the judgment of a German Court. It has been conceded by the Plaintiff that there is no treaty or convention between this country and Germany with regard to the reciprocal enforcement of judgments. We have been referred to the judgment, dated 16.12.32, of the Jaffa District Court in Civil Case 15/32 — Rose Katz against Moritz Katz — in which the Plaintiff prayed for the grant of an *exequatur* in respect of a Judgment of the Supreme Court of the State of New York. The Court, in a reasoned judgment in which reference was made also to the Law of England, held that in the absence of a supporting ordinance application could not be made to the District Court for an *exequatur* on a foreign judgment. The Court held, and we agree with their finding, that a Rule of Court cannot create law but can only apply

a law, and that the Foreign Judgments Rules apply to "those" foreign judgments which are made enforceable in Palestine by Ordinance, Treaty, or Convention having the force of a Treaty, but in the absence of such Ordinance, Treaty, or Convention they have no application.

We have been referred to the Judgment of the Court of Appeal in C. A. 65/35, but a copy of the judgment has not been produced. It appears, however, from the report which appears in Haaretz dated 25.6.36, that the Court of Appeal dismissed an appeal from a judgment to the District Court of Jerusalem without giving reasons, and we therefore do not feel bound to follow it in the present case.

The Applicant has submitted that — it must be inferred from the judgment dated 29.11.37 — of the Court of Appeal in C. A. No. 102/37 — an appeal which was preferred from our judgment dated 20.4.37 in the present case — that the Court of Appeal has held that the Foreign Judgment Rules enable the grant of an *exequatur* to be made in this case.

There is no such direction in the judgment, and the case was sent back to this Court for a further hearing on the basis that the German judgment was a judgment within the meaning of the Foreign Judgment Rules.

In the circumstances we feel that it is open to us to hold that although the German judgment is a judgment within the meaning of the Foreign Judgments Rules an *exequatur* in respect of it cannot be granted. We have seen no clear decision by the Court of Appeal which would bind us to hold to the contrary.

Delivered in open Court, this 4th day of February, 1938.

R/President.

Judge.

CIVIL APPEAL No. 298/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

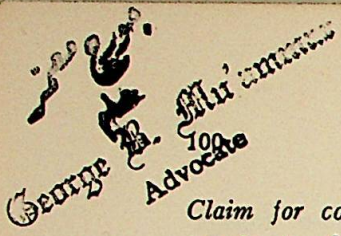
BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

M. Gorodisky. APPELLANT.

v.

E. Krumer. RESPONDENT.



Claim for contribution between partners — Appointment of an advocate to defend the partnership is within the meaning of sect. 31(2)(b) of the Partnership Ordinance.

Appeal from the Judgment of the Magistrate's Court, Tel-Aviv, whereby Appellant's (Plaintiff's) claim for LP. 8.— was dismissed by the Magistrate on the 9.11.37 in file 298/37.

JUDGMENT:

The most important question in this case was whether the Respondent was a member of a partnership together with Plaintiff, when a claim of LP. 950.— was brought against the partnership and the Appellant instructed an advocate to appear on behalf of the partnership.

From the record of the case it appears that the Defendant denied this fact. No evidence was heard to prove Plaintiff's allegation which was denied by the Defendant.

The Magistrate seems to have been of the opinion that even if it had been proved that the Defendant was a partner, he would not be liable to contribute because the instructing of an advocate does not come within the definition of "acts for carrying on, in the usual way, business of the kind carried on by the firm".

The Magistrate has overlooked the fact that the relations of partners with one another are regulated by Part 4 of the Partnership Ordinance and especially by Sec. 31(2) stating "The Firm shall indemnify every partner in respect of payments made and personal liabilities incurred and proper conduct of the business of the firm". or

b) in or about anything necessarily done for the preservation of the business or property of the firm".

An appointment of an advocate to defend the partnership against a claim for LP. 950.— made against the partnership obviously comes within the meaning of Sec. 31(2)b.

We therefore allow the appeal, set aside the judgment appealed against and remit the case for rehearing and further giving of fresh judgment on the above lines.

Costs to follow the event.

Delivered in open Court this 21th day of February, 1938, in presence of Mr. Ishayevits for Appellant and of Respondent in person.

President.

Judge.

CIVIL APPEAL No. 280/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV, IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Aba Lemberg. — APPELLANT.

v.

Nissan Rubinstein. — RESPONDENT.

Private arrangement with creditors not "composition in Bankruptcy" — Separate agreement with one creditor valid and enforceable even if prejudicial to other creditors.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 280/37 dated 25.10.37, whereby Appellant (Defendant) was ordered to pay LP. 47.800 with costs and advocate's fees.—

JUDGMENT:

The Appellant was indebted to many creditors in varying sums of money. Among them was the Respondent.

Not feeling able to pay 100% to all his creditors the Appellant proposed to his creditors among them the Respondent that they should relinquish 30% of their claims and recover only 70%.

All the creditors agreed and they and the Appellants signed a deed, and the creditors received payment of 70% of their debts. He, however, alone held out and declared that he would not make it difficult for the Appellant to arrange with the others provided that he would receive payment of his claim in full. Appellant agreed and paid to him 70% as to all the other creditors and handed to the Respondent bills for the 30%.

Now the Respondent claims these bills.

The Magistrate gives judgment in favour of the Respondent basing his decision on the fact that the agreement made between the Appellant and his creditors was a private contract and not a composition in bankruptcy proceedings (Sect. 16 of the Bankruptcy Ord.) and that only in Bankruptcy proceedings is any agreement made between a debtor and one of the creditors to give or secure to this

debtor an additional benefit regarded as a fraud upon the others and contains an illegal consideration.

We think that the Magistrate was right in this opinion. All citations made by the Appellant in his appeal from Halsbury's Law of England, Chitty on Contracts and the English Empire Digest, clearly relate to arrangement known as a "composition". So long as no Bankruptcy proceedings have been commenced against the debtor, he is free to make all kind of different arrangements with different creditors and each creditor is entitled to secure the payment of his debt in whole. If we were to accept the views of the Appellant that he is free from liability to pay the additional 30% to the Respondent, who finally claims only money belonging to him we should be putting a premium on the Appellant for his intention to grant to one creditor what in Bankruptcy proceedings would be fraudulent preference.

For these reasons we dismiss the appeal and confirm the judgment with costs and LP. 2.— advocate's fees for the Respondent.

Delivered in open Court this the 22nd day of February, 1938, in the presence of Mr. Silberg for Appellant and Mr. Lipkin for Respondent.

President.
Judge.

CIVIL APPEAL No. 328/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF:
Shalom Tik. APPELLANT.

v.

Moshe Kleiner. RESPONDENT.

Action on promissory notes drawn by two persons jointly and severally — The cancellation of the signature of one drawer not a material alteration.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 6762/37 dated 3.12.37, whereby the Appellant (Defendant) was adjudged to pay LP. 15.500 with interest, advocate's fees and costs.

JUDGMENT:

The appeal as it is directed against two promissory notes signed by the Appellant and a certain Ephraim Segall, is based on the assumption that these two bills were materially altered within the meaning of Section 64 of the Bills of Exchange Ordinance and are therefore avoided.

The facts in this case are : The promissory notes in question were signed by the Appellant and the said Segall as makers directly to the order of the Respondent.

Both were jointly and severally liable to the Respondent. After the date of maturity Segall paid half of the sum due to the Respondent and the Respondent struck out his name from the bill and at same time made a remark on the back of the bill, that he had received half of the sum from Segall.

Now he claims the other half of the Appellant. In our opinion, he is entitled to recover for the following reasons : Section 64(2) sets out *seriatim* what alterations are material, namely : "any alteration of the date, the sum payable the time of the payments, the place of payments etc." Nothing of this kind happened in the case before us.

What actually happened falls within the provision of Section 63(2) of the Bills of Exchange Ordinance stating "any party liable on the bill may be discharged by the intentional cancellation of his signature by the holder or his agent.

"In such case any indorser who would have a right of recourse against the party whose signature is cancelled is also discharged". From this provision it is clear that the Respondent was entitled to cancel the signature of one of two makers of a promissory note. The Promissory note is not invalid or avoided and the Respondent may claim from the Appellant half of the sum.

With regard to the promissory note for LP. 3.— Appellant is a giver of an aval under Section 57 of the Bills of Exchange Ordinance and no protest is necessary.

The appeal is therefore dismissed and the judgment confirmed with with costs and LP. 2.— advocate's fees for the Respondent.

Delivered this 22nd day of February, 1938, in presence of Mr. Herman for Appellant and Mr. Goldberg for Respondent.

President.

Judge.

CIVIL APPEAL No. 332/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

I. L. Shlouger. APPELLANT.

v.

A. G. Hanoch. RESPONDENT.

Appeal from decision of Rent Tribunal — Evidence taken in writing — Date from which rent is to be paid is within the discretion of the Rent Commissioner or the Rent Tribunal.

Appeal from judgment of the Rent Tribunal, Tel-Aviv, in file No. 332/37 dated 30.11.37, whereby Appellant was ordered to pay rent at the rate of LP. 26.— per month.

JUDGMENT:

The only mistake that was made by the Rent Tribunal was, that the evidence of Mr. Pinhas, the Director of the Mizrahi Bank, as to the rent paid by this Bank in the year 1351 (1933/34) was taken in writing and not from him or one of his clerks in person. We cannot find in the minutes any mention that both parties agreed to this method of procedure. But as it seems beyond doubt that the Director of the Mizrahi Bank even if he were to give evidence as a witness in person he is not likely to alter his evidence given in writing, and as it is irrelevant as to why the landlord agreed to take a smaller rent, and as it was proved by the contract that all necessary repairs are to be done on the tenant's account and that the tenant is obliged to return the premises in the same condition as they were at the date of signing the contract, we see no reason to interfere with the judgment of the Rent Tribunal as to the rent.

As to the date from which the reduced rent has to be paid by the Tenant. In our opinion, the Rent Commissioner and the Rent Tribunal may in its discretion fix this date having regard to all the circumstances of the case.

The appeal and cross appeal are therefore dismissed and the Judgment of the Rent Tribunal confirmed.

Each party will pay its own costs.

Delivered this 22nd day of February, 1938, in the presence of Mr. Wiesel and Mr. Herouti.

President.

Judge.

CIVIL APPEAL No. 8/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Zlatko Rosenberg. APPELLANT.

v.

Desiderius Ronay. RESPONDENT.

Preliminary objections must be raised at first hearing — Plea of "Chose jugee" although of a preliminary nature may be raised at any time during trial.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 7148/37 dated 9.12.37, whereby the Appellant (Defendant) was adjudged to pay 5623,87 Yugoslavian dinari with interest costs and advocate's fees.

JUDGMENT:

According to art. 23 of the Magistrate's Law only the plea of Jurisdiction, prescription, privity and arbitration must be pleaded at the first session of the trial. The defence of "Chose jugée" even when brought later, is an important one and the Magistrate ought to have given to the Defendant a chance to prove his defence.

We therefore set aside the Judgment appealed against and remit

the case to the Magistrate in order to give to the Defendant time to prove his allegation.

Costs to follow the event.

Delivered in open Court this 22nd day of February, 1938.

President.

Judge.

CIVIL APPEAL No. 17/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV,
IN ITS APPELLATE CAPACITY.

BEFORE : His Honour the President (Edwards, J.),
His Honour Judge Ph. Korngrun.

IN THE CASE OF :

Bank der Tempelgesellschaft. APPELLANT.

v.

1. Levy Gomberg,
2. Jacob Gomberg,
3. Abraham Shaor,
4. Halvaa Vehissachon. RESPONDENTS.

Claim against guarantors on promissory notes — Guarantor's obligations cannot be greater than those of principal — except by special stipulation — Guarantee "Aval" in separate document mentioning other bills also is nevertheless good.

Appeal from judgment of the Magistrate's Court, Tel-Aviv, in file No. 15293/37, dated 26.12.37, whereby Appellant's claim for LP. 59.350 was dismissed with costs.

JUDGMENT:

In our opinion, the Magistrate was right in his decision in dismissing the claim. It is a general principle of Law, that a guarantor sannot be called upon to bear more obligations than the principal debtor so long as he himself did not do so by an express stipulation. The guarantee is an obligation additional to the original obligation of the debtor and must fall with the latter. This principle is expressed in

articles 50, 52, and 662 of the Mejelle. Especially when it is the fault of the Claimant who allowed the time of prescription fixed in section 95 of the Bills of Exchange Ordinance to elapse and did not claim the sum from the principal debtor — or take any steps to preserve his rights against him. For this reason the Appellant cannot argue that the cause of action against the guarantor begins from the date, when the guarantor received a notice from the Appellant that the debtor had not paid the bill. The date of the maturity of the bill is the date mentioned in art. 1667 of the Mejelle stating "The period of limitation begins to run as from the date at which the Plaintiff had the right to bring an action in respect to the subject matter of his claim".

We do not agree with the Magistrate that the letter of guarantee dated 2.9.31 is not an aval within the meaning of section 57(2) of the Bills of Exchange Ordinance. The fact that besides the bills claimed other bills were mentioned in the guarantee or that a clause concerning advocate's fees is inserted in the letter does not change the nature of it. The guarantee is connected with the bills and falls under the provisions of section 95 of the Bills of Exchange Ordinance.

We therefore dismiss the appeal and confirm the Judgment with costs and LP. 2.— advocate's fees for the Respondent.

Delivered in open Court this 22nd day of February, 1938.

President.

Judge.

תיק מס' 37/183.
בית המשפט המחוזי
בתל־אביב.

בפני: כב' מעלת השופטים ד"ר י. מני וד"ר פ. קורנגרין.

התובע: יעקב גולדשטין, ע"י ב"כ עו"ד פורטר, מורשה לקבלת כספים.

הנתבעים: 1) פרץ פסקל, פתח־תקוה.
2) י. ד. ברורמן, פתח־תקוה.

פסק־דין

תביעת התובע מבוססת על שטר חוב מתאריך 1.11.36 בסך של 371.260 לא"י. השטר חתום על ידי הנתבעים לפקודת אדם בשם איזידור רבינוביץ ומועבר על ידי האחרון בהעברה „בלנק".

הנתבע ברורמן לא הופיע והחלט לברר את המשפט שלא בפניו.

בשם הנתבע פרץ פסקל הופיע ב"כ מר פינשטין: טען את הטענות דלקמן:

א) יפוי הכוח המוגש על ידי עוה"ד פורטר בשם התובע הוא לקוי בזה שהוא יפוי כוח כללי ואיננו מאושר על ידי הנוטריון, בנגוד לפקודת עורכי־הדין וחוק הנוטריון.

ב) שהתובע יעקב גולדשטין איננו בכלל מחזיק בשטר, היות וההעברה נעשתה לבנק, והבנק לא העביר את השטר לתובע.

ג) שהתובע איננו מחזיק בדרך הרגילה במובן החוקי היות והוא ידע שיש מום בשטר וקבל אותו מתוך קנוניה עם מר רבינוביץ איזידור כדי לשלול מהם את האפשרות לטעון את אותן הטענות שיש להם נגד המעביר איזידור רבינוביץ.

הטענה הכי חזקה שיש להם נגד איזידור רבינוביץ היא שהשטר הזה ניתן בקשר עם מכירת פרדס שלא העבר בטאבו, ושמר רבינוביץ אינו יכול לתבוע על פי שטר זה, כי הוא בטל על פי חוק העברת קרקעות, 1920.

בנוגע לטענה הפרלימינרית הראשונה בית המשפט מוצא שהכוח וההרשאה של עוה"ד פורטר הוא כוח והרשאה פרטי במובן החוק וניתן לו בשביל התביעה הנוכחית בסך של 371.280 לא"י, נגד הנתבעים הנוכחים ולא נגד מי שהוא אחר. יוצא מזה שיפוי הכוח הנ"ל הוא חוקי בהחלט.

אשר לטענה השניה — השטר העבר על ידי איזידור רבינוביץ בהעברה בלנק, ומי שמחזיק בפועל בשטר הוא הוא האיש שיכול לתבוע על פיו.

ואשר לטענה השלישית: אחרי ששמענו את עדי הנתבע אנחנו סבורים שלא הוכחה שום קנוניה בין המעביר איזידור רבינוביץ ובין התובע הנוכחי, יתר על כן בשטר המוגש אין שום סימן שהוא ניתן בקשר עם מכירת קרקע, ולא יכול היה התובע לדעת שבשטר יש מום.

לכן החלט לחייב את הנתבעים באופן סולידרי לשלם לתובע סך 371.280 לא"י והוצאות המשפט, וריבית חוקית מיום 1.5.37, ושכר עו"ד 3 לא"י.

פסק דין זה ניתן שלא בפני הנתבע ברורמן ומקבל התנגדות ובנוכחות הנתבע פסקל וניתן לערעור, והודע בפומבי ביום 30.1.38.

שופט.

שופט.

תיק אזרחי מספר 262/37.

בית המשפט המחוזי
בתל־אביב.

בפני: כב' מעלת השופטים ד"ר י. מני וד"ר פ. קורנגרין.

התובעת: שותפות אפרים חרל"פ ובניו, ע"י ב"כ עוה"ד ר. חוטורי וד"ר פ. ג'וזף.

הנתבעים: 1) ד"ר פריץ מוזס,
2) ד"ר הנס לחמן, ע"י ב"כ עוה"ד ד"ר פ. נוסבוים.

פסק־דין

תביעת השותפות התובעת מבוססת על העברת חוב שנעשתה ע"י קבלן אחד בשם נח חבקין, לטובת התובעת מהכספים שהיו מגיעים לקבלן הנ"ל מאת הנתבעים.

הנתבעים לא הכחישו את ההעברה אלא טענו:—

א) שההעברה נעשתה לא לשם התובעת אלא לשם אחד משותפיה, ה' חרל"פ.

ג) הנתבעים אינם חייבים לקבלן מר חבקין את הסך 300 לא"י, כי אם פחות.

בנוגע לטענת הנתבעים הראשונה, — הרי במכתבם מתאריך 7.8.1935 (מוצג מס' 6), — הם כותבים בפירוש שההעברה נעשתה לשם הפירמה חרל"פ ובניו, — ז"א התובעת בעצמה ולא אחד משותפיה.

ואשר לטענה השניה של הנתבעים, — הרי אין שום דבר בחוק העברת חובות משנת 1928, — שהמעביר חוב זקוק להסכמת החייב כדי לעשות את ההעברה. יתר על כן הלא הוברר מתוך מהלך המשפט ומהודאת הנתבעים במשפט שהיה בין הנתבעים לבין מר חבקין מספר 277/36 (מוצג מס' 2) והחשבון שהגישוהו הנתבעים במשפט הנ"ל (מוצג מס' 3), — שהנתבעים קבלו בפועל את ההעברה ואף חייבו את חשבונו של מר חבקין בסכום של 300 לא"י שהוא סכום התביעה הנוכחית. יוצא איפוא שההעברה הנדונה היא שלמה בהחלט וחל עליה דין ההמחאה במובן סעיף 690 מהמג'לה.

ואשר לטענה השלישית של הנתבעים, — הרי לאחר שהנתבעים קבלו את העברת החוב וחייבו את חשבון ה' חבקין בסכום של התביעה הזאת, — אינם יכולים לטעון כעת שאין הם חייבים את הסכום הזה בשלמותו.

לפיכך, בית המשפט מחליט לחייב את הנתבעים לשלם לתובעת את הסך 300 לא"י, הוצאות המשפט, רבית חוקית מיום הגשת התביעה שחל ב־10/10/37 ו־3 לא"י שכר עו"ד.—

פס"ד זה ניתן על ידינו היום 28.1.38 והודע לב"כ הנתבעים בפומבי.

שופט.

שופט.

TABLE OF CASES

Abu Houssa v. Arousi 39
Adlerstein v. Weinrib 42
A. G. v. Begerano 49
A. G. v. Feigin 93
Arieh v. Bechor 77
Ashriky v.. Moses 8
Baner v. Brind 19
Bank der Tempelgeselschaft v. Gomberg &ors. 106
Barsky v. Gorodisky 78
Briker v. Chodorow 17
Broza v. Weinshinker 70
Chandris v. I. Hose & Co. 5
Chefetz v. Pal. Eng. Corp. Ltd. 52
Chevra Lekirur &c v. Intrator 89
Chudakow v. Aharonov 6
Churgin v. A. G. 51
Cohen v. Abramovitz 47
Cohen & an. v. Amrami & an. 94
Cohen & an. v. Drexler 59
Elias v. Resnitsky 11
Elinson v. Gorlin 16
Finkelman v. Schupak 20
Franco v. Alman & Co. 23
Gaber v. "Migdal" Insurance Co. Ltd. 64
Goldberg v. Letuvos Kredith Bankas 53
Goldstein v. Pascal & an. (*in Hebrew*) 109
Gorodisky v. Krumer 99
Halperin v. Schlesinger 24
Harlap v. Moses & an. (*in Hebrew*) 110
" " (*translation*) 90
Hochgloben v. Rosenblat 29
Hose & Co. v. Halperin 40

Hose & Co. v. Chandris 57
Illgovsky & an. v. Halperin 15
Inshatov v. Sidlovsky 58
Khasid v. Aspormas & an. 80
Khojahinoff v. Khojahinoff 74
Klaks v. First 25
Kouznitz v. A. G. 73
Kupat Milve &c v. Zarkow 18
Lande v. Rindzunsky 98
Lederberg v. British Thomson Houston 26
Leghziel v. Ben-Tiqva 27
Lemberg v. Rubinstein 101
Levant Trade Co. v.. Matalon 14
Masouri v. Zissman 88
Mielboyer v. Pass 13
Mitelman v. Dagan 7
Palatnik v. Huri & ors. 44
Palestine Credit Utility Bank, Ltd v. Etkind 36
Panicz v. Rosenberg 21
Rabio v. Ben Yehouda 48
Rechtman v. Rechtman 30
Rosenberg v. Ronay 105
Rosenman v. Katzperovsky 54
Rosin v. "Hakibutz Hameuchad" &c 10
Rotman v. Weisbard 81
Rudavsky v. Rudavsky 63
Shachori v. Halperin & an. 55
Shaerf v. Shaerf 76
Shaltiel v. Wolberg 69
Sheinis v. Polonsky 92
Sheinkar v. Sherman 41
Shlouger v. Hanoch 104
Shupax v. Finkelman 79
Smilansky v. Ostrovsky 84
Sonberg v. Witshtok 95
Tietz v. Veisel 9
Tik v. Kleiner 102
Tishler v. Vaksman 91
Wulfman v. Genut 56
Yehezkiel v. Kahana 38
Zabizunsky v. Zabizunsky 82
Zisselman v. Glazer 62

NUMERICAL TABLE OF CASES

CIVIL CASES

1937		Page
7	—	98
28	—	82
52	—	33
95	—	15
109	—	70
111	—	27
127	—	64
154	—	19
157	—	74
160	—	59
176	—	44
180	—	30
183	—	107
169	—	84
297	—	42

CIVIL APPEALS

1937		Page
11	—	6
29	—	7
45	—	5
50	—	8
59	—	9
60	—	11
67	—	13
113	—	21
129	—	13
134	—	16
138	—	17
144	—	18
152	—	20
172	—	24
192	—	29
194	—	23
195	—	51
208	—	39
211	—	36
213	—	25
219	—	38
220	—	62
231	—	40
232	—	26
233	—	47
237	—	52
240	—	53
242	—	55
244	—	41
245	—	56
248	—	57
249	—	69
257	—	76
258	—	58
260	—	90
262	—	63
265	—	77
274	—	78
279	—	101
280	—	79
288	—	80
294	—	88
298	—	99
299	—	81
305	—	91
322	—	89
328	—	102
332	—	104
333	—	94
1938		
3	—	95
8	—	105
11	—	12
17	—	104

CRIMINAL APPEALS

1937		Page
51	—	48
67	—	49
74	—	93
77	—	73

INDEX

N. B. The report of Civil Case No. 176/37 (p. 44) which has been overruled on appeal is not included in the Index.

ACCOUNT
action on an, ... 33
for, not entertainable by Magistrates Court 23

ACTIONS
for account 23
for return of specific object 26
vendor need not be joined 26
should not be tried piecemeal 7
when same cause of, new claim may be made in same file ... 9
See als STRIKING OUT

ADJOURNMENT
discretion to refuse, must be reasonably exercised 57
to instruct advocate 57

ADVOCATE
appointment of, to defend partnership right of contribution by partner 100
withdrawing from case or applying for adjournment 57

AGENT
—'s lien 35
contractin in own name 42
in name of principal 79
principal may sue 79
for indisclosed principal 42
deduction of items in —'s account... 34
of foreign unregistered company 40
liability of, ... 40
payment or settlement by, how far bind principal 35

AMENDMENT
of notice of appeal 41

APPEAL
addressed to President District Court instead of to District Court 50
District Court instead of Land Court 41, 93
application for leave to, by Attorney General 50
Attorney General, by, against insufficient fine 50, 93–4
time to file, ... 50
filed against wrong respondent — dismissed 10
from Magistrates Court — copy of judgment need not be served 12
from judgment under LP. 10 — leave to, required 55
time to enter, ... 52
application for extension of, ... 52
made during vacation 52
wrongly addressed 50, 93
not fatal to, ... 50
Court may not amend, on own motion 41

APPROPRIATION
of payments by debtor 38

ARBITRATION
award — application for confirmatio of, ... 75
subject matter of, abroad 75
enforcement of, outside jurisdiction 75
court — jurisdiction to confirm where subject matter of over LP. 150 89
power of, to stay proceedings 8, 19, 37, 95
no, to refer parties to, ... 36
or strike out temporarily 37
reference to, may be by accepted unilateral undertaking ... 7
stay of proceedings 77–8
discretion of court to order where matter submitted to, ... 8, 19, 37, 95
if applied for before any other step in proceedings taken 37
but not to appoint arbitrator 77–8
submission referring to property abroad 75

ARBITRATION ORDINANCE
Sec. 5 ... ... 36, 37, 78, 95

ASSIGNMENT OF DEBT
consent of debtor not required 90–1, 109

ATTORNEY GENERAL
appeal by, from Magistrates Court 50, 93–4
application for leave to, ... 50

AWARD
See ARBITRATION

BAIL BOND
under Immigration Ordinance 51

BANKING BUSINESS
making loans does not constitute, ... 18
meaning of, ... 18

BANKING ORDINANCE
1921 18
1937 18

BANKRUPTCY
arrangement with creditors not a composition 101–2
before proceedings in, debtor may make any arrangements
with creditors 101–2

BANKRUPTCY ORDINANCE
Sec. 16 101

BILLS OF EXCHANGE
action upon, and on consideration distinguished 54
foreign, action upon 53
or upon consideration 54
See also PROMISSORY NOTES

BILLS OF EXCHANGE ORDINANCE
Sec. 27 86
28 29
37 86
52 54
55 86
57 103
57(2) 107
57(3) 86
63(2) 103
64 103
64(2) 103
65 86
95 107

BOUSTEAD ON AGENCY
8th ed. p. 334 35

BOND
to release from custody 51
notarial notice not required 51

BROKERAGE
claim for, not base on Brokers Ordinance 96
contract of employment to be proved 97
contract of, not customarily reduced to writing 13
financial, ... 96

BROKERS ORDINANCE
applicablility of, ... 96

CASES CONSIDERED
C. A. 306/20 ... ... 61, 66, 86
C. A. 95/23 37
C. A. 79/25 54
C. A. 78/28 65
C. A. 117/29 65
C. A. 393/31 65
C. A. 110/32 65
C. A. 111/32 67
C. A. 151/33 54
C. A. 163/33 32
C. A. 99/34 34
C. A. 121/34 96
C. A. 65/35 98
C. A. 97/35 61
C. A. 96/36 67
C. A. 112/36 32
C. A. 87/37 68
C. A. 102/37 98
C. A. 138/37 39
C. A. D. C. Ja. 49/33 56
C. A. D. C. Ha. 79/36 87
C. D. C. Ja. 15/32 98
H. C. 60/37 67
L. A. 14/32 65
L. A. 40/32 65

CAUSE OF ACTION
not changed — additional claim may be made in same action 9

CERTIFICATE OF COMPLETION
failure to supply 60–1

CHOSE JUGEE
not a preliminary objection 105

CIVIL APPEAL RULES
2(a) 52

CIVIL PROCEDURE CODE
Art. 48 89
80 13
106 ... ... 28, 51, 72
106–111 28
186 does not apply to appeals from Magistrates Courts 12
Amendment
Art. 1 67–8
39 63

COMMISSION ROGATOIRE
right to have Plaintiff examined by, ... 16

COMPANY
not registered in Palestine — liability of agent 40

COMPOSITION
arrangment with creditors not a, ... 101
need all be same for all creditors 101

CONTRACTS
breach of, ... 70–3, 61
by failure to obtain consent of third party 28
damages for, ... 61
minor, no damages can be claimed 61
readiness and willingness to complete 70–3
brokerage, not customarility reduced to writing 13
cancellation of — whether former, revives 28
return of deposit 40–1
construction of, ... 61
evidence of existence of, ... 97
novation 96–7
offer and acceptance 96–7
preliminary 42

CONTRACTS (*continued*)

privity of, ... 40, 43
time to complete 70–3
delay in, ... 70–3

CONTRAVENTION

contents of record of case in, ... 74

CONVENTION REGARDING LEGAL PROCEEDINGS IN CIVIL AND COMMERCIAL MATTERS BETWEEN THE UNITED KINGDOM AND POLAND

extension of, to Palestine 29

COOPERATIVE SOCIETIES

appeal against, other than in registered name 10
are bodies corporate under registered name 10
when registration of, under Banking Ordinance required ... 18–9

COOPERATIVE SOCIETIES ORDINANCE

Sec. 21 10
62(2) 18

CO-OWNER

order to be appointed as receiver of share of, ... 15
will not be made if parties in Palestine 15

COUNTERCLAIM

a separate claim 37
effect upon, by stay of proceedings 37

COURT OF CASSATION DECISIONS

of 13 June, 1314 66
of 6 November, 1315 66

COURTS

jurisdiction of Rabbinical, ... 30–2

CRIMES PREVENTION ORDINANCE

bond under, ... 51

CRIMINAL LAW AMENDMENT ORDINANCE (No. 2), 1927

Sec. 7 49

CRIMINAL PROCEDURE CODE

Art. 187 50

CRIMINAL PROCEDURE (TRAIL UPON INFORMATION) ORDINANCE
Sec. 67(2) 50

CUSTOM
See WRITING

CUSTOMS AGENT
right of, to indemnity for payments to customs 24

CUSTOMS ORDINANCE, 1929
Sec. 149(1) 24
166(1) 24

DEBT
See ASSIGNMENT OF DEBT

DEBTOR
appropriation of payments by, ... 38

ELECTION OF COURT
note of, should be made in record 74

ENGLISH CASES CONSIDERED
Brooke v. Haymes 66
Greer & an. v. Kettle 66
Lainson v. Tremere 66
Trollope & Sons v. Masty Bros. 97
Whiting v. Burke 87

ENGLISH RULES OF EQUITY
considered 66

ESTOPPEL
by acceptance of assignment of debt 51, 109
by declaration in Land Registry 64–9
See also SILENCE

EVICTION
appeal from order of, to be addressed to Land Court ... 93
estimated rent may be claimed after, ... 9

EVIDENCE
See PARTIES, WRITING

EVIDENCE ORDINANCE
Sec. 14. 52

EXEQUATUR
application for, ... 83–5, 98–9
grant of, a matter of discretion 83–4
effect of absence of reciprocity 98–9
foreign judgment must be enfoceable 83–4

EXPERTS
acting in the absence of one party 48
must be heard and examined 63
to fix amount of remuneration of patent agent 59

FOREIGN COMPANY
See COMPANY

FOREIGN JUDGMENT
See EXEQUATUR

FOREIGN JUDGMENT RULES, 1928 98
Rule 7(2) 83

FOREIGN LAW
how far relevant in action of a bill 16, 53

GUARANTOR
liability of, ceases with that of person guaranteed 160
not liable to a greater extent than principal debtor 106

HALSBURY'S LAWS OF ENGLAND (OLD ED.)
Vol. VII, p. 505 28
Vol. XIV, p. 527 87
Vol. XV, p. 529 87

HIRE
if benefit of lost but not through inherent defect — rent payable 39

HIRE PURCHASE AGREEMENT
evidence of parties re, ... 52

IMMIGRATION ORDINANCE
Sec. 10(1) 51

IMMIGRATION (CUSTODY PENDING DEPORTATION) ORDER 49

INDEMNITY
of customs agent 24

INJUNCTION
insufficient grounds for grant of, ... 20

INSPECTION
carried out in absence of one party 48

JUDGMENT BY DEFAULT
based on insufficient proof 48, 82
after plea of "not indebted" 82

JUDGMENT BY DEFAULT (MAGISTRATES COURTS) RULES
Rule 2(1) 37
3(4) 48, 82
4(1) 76
5 40

JUDGMENTS
notice of, not equivalent to service of, ... 76–7
of Court of appeal binding 66
unless no reasons given 99
of Rabbinical Court, whether separate 32

JUDICATURE ACT, 1873 64

JURISDICTION
choice of, cannot be altered 32
lack of, *ratione materiae* — Court should dismiss case on own motion 89
of religious and civil courts 30–2

KERMAK'S CRIMINAL PROCEDURE IN PALESTINE ... 50

LAND
not premisses within the Landlords and Tenants Ordinance 88
See also SALE OF LAND

LAND COURTS ORDINANCE
Sec. 8(1) 66

LANDLORD AND TENANTS (EJECTION AND RENT RESTRICTIONS) (EXTENSION) ORDINANCE, 1935
Sec. 12(1) 22
13 22
does not apply to land 88

LAND REGISTRY
declaration before, how far binding 64–9

LAND TRANSFER ORDINANCE
Sec. 4 72
11 ... ... 72, 92

LIABILITY
of clerk signing for firm 25

LIQUIDATION
of partnership — claim against firm may be proferred in court 12

MAGISTRATES COURTS JURISDICTION ORDINANCE, 1935
Sec. 5(2) 50
5(3) 41, 93
5(4) 55
7 ... ... 50, 55
election under, ... 74
jurisdiction of magistrates under, ... 23

MAGISTRATES LAW
Art. 16 5
23 105
36 ... ... 48, 63
42 (addendum) 40
64 50

MEJELLE
Art. 48 61
50 ... ... 61, 107
52 107
67 35
312 46
344 46
359 46
478 39
563 59
564 96–7
647 86–7
662 107
690 ... ... 46, 91
730 9
774 35
779 35
794 35
1313 15

MEJELLE (*continued*)

1449 24
1461 ... ... 43, 79
1463 35
1506 24
1589 68
1632 36–8
1635 26
1636 26
1775 38
1818 ... ... 35, 85

MORTGAGE
allegation that loan was not received 64–9
English principles of equity applied 64–9
foreclosure of, does not preclude action on promissory notes for interest 9
validity of, whether matter for Land Court 65

NOTARIAL NOTICE
not required in case of bail bond 51

NOVATION 28

OPPOSITION
to judgment by default — time to file 76–7
may be filed before service of judgment 56

PALESTINE ORDER IN COUNCIL
Art. 46 34
53(i) 30
53 (i) (ii) 32

PARTIES
duty of court to hear, ... 8
evidence of, ... 52
in action for recovery of specific object 26
may be heard by commission rogatoire 16, 29
but costs must be deposited 29

PARTITION
expert on possibility of, to be heard 63

PARTNER
death of, dissolves partnership 12, 81
jointly and severally liable for debts of firm 12

signature by, on behalf of firm 11
when entitled to indemnity for payments 100

PARTNERSHIP
action against dissolved, ... 81
English principles applied 81
claim against, may be made in court although liquidation continuing 12
dissolved by death of partner 12
partners jointly and severally liable 12
although liquidation proceeding 12
signature by partner on behalf of, ... 11
to indeminify partners 100

PARTNERSHIP ORDINANCE
Sec. 4 100
18 11–2
31(2) 100
31(2)(b) 100

PATENT AGENT
expenses incurred by, ... 59
remuneration of, ... 59

PAYMENT
See DEBTOR, RENT

POLISH CIVIL PROCEDURE CODE
Art. 528 83

POSSESSION
action for recovery of, ... 69
plaintiff step into shoes of predecessor 70

POSSESSION OF STOLEN PROPERTY
proof that property was stolen required 49

POWER OF ATTORNEY
signature of foreign how authenticated 29

PRELIMINARY OBJECTIONS
chose jugee not a, ... 105
not raised at first hearing for lack of opportunity may be raised later 6

PRELIMINARY CONTRACT
See CONTRACT

PREMISES
in Landlords and Tenants Ordinance does not include land 88

PRINCIPAL AND AGENT
See AGENT

PRIVITY OF CONTRACT
See CONTRACT

PROMISSORY NOTES
action on, plea of not indebted 82
alteration by striking out name — not material 103
aval — liability of, ... 85–7
a creation of Palestine law 86
by separate document — valid 107
erasure of, oath administered 85–6
liability of giver of, ... 107
when more than one — *inter se* 86
by joint makers — one name struck out 103
erasures on, ... 85–6
for interest on mortgage 9
may be sued upon although mortgage foreclosed 9
lost, guarantee required in action upon 17
proof or loss required 19
oath of defendant insufficient 21
nor sworn declaration 80
holder need not prove his title to, ... 29
may be sued upon by holder who received it after maturity 12
of partnership 81–2
payment of, to other than holder 62
right of recourse as between avalists 86
signed by partner on behalf of firm 12

PROSECUTIONS
who is entitled to appear in, ... 74

RABBINICAL COURT
concurrent jurisdiction of, ... 30–2
effect of submission to jurisdiction of, ... 30
jurisdiction of, in claims for maintenance 30
submission to jurisdiction of, ... 32
cannot be revoked 32

RECEIVERS
of partnership property — appointment of defendant 20
under Mejelle, 1313 15
will not be made if parties in Palestine 15

RECORD
of court — contents of, ... 74

RENT
estimated, may be claimed after eviction and until delivery 9
excess, paid under protest — may be recovered 14
in excess of assessment — when may be recovered 14
payable even if premises cannot be used save for inherent defect 39
reduced — Rent Tribunal may decide from when payable ... 104
reduction of, by Rent Tribunal 22

RENT TRIBUNAL
may decide from when reduced rent payable 104
may reduce rent below maximum 22
reasonable exercise of powers of, ... 22

RES JUDICATA
See CHOSE JUGEE

RULES OF COURT
can only apply — not create a law 98–9

SALE OF LAND
recovery of purchase price before transfer 92

SET OFF
a creation of statute of rules of court 34
cannot be claimed in Palestine 34
explained 35

SHEM'S MANUAL OF BILLS OF EXCHANGE 85

SIGNATURE
of clerk — liability on, ... 25
on power of attorney made abroad — authentication 29

SILENCE
does not create an estoppel unless there is a duty to speak ... 35

SPECIFIC PERFORMANCE
in connection with mortgage contract 64–9

STAY OF PROCEEDINGS
at what stage may be ordered 37
court has jurisdiction to stay when matter referred to arbitration 8, 95
but court may not strike out temporarily 37
or appoint arbitrator 77–8
effect of, on counterclaim 37

STRIKING OUT
action may not be struck out for failure of witness to appear 5
or where matter submitted to arbitration 37
when action may be struck out 5

SUBMISSION
to religious court 30–2
See also ARBITRATION

TRADES AND INDUSTRIES ORDINANCE, 1927
Sec. 10 74
10(1)(a) 49
10(2) 94
licence under, ... 94
court may not grant time to obtain 94

TRIAL UPON INFORMATION ORDINANCE
Sec. 67(2) 50

WITNESSES
failure of, to appear 5
plaintiff must be given an opportunity to name and summon, 5
to contradict admissions in Land Registry 64–9

WORDS AND PHRASES
"acts for carrying on, in the usual way, business of the kind carried on by the firm" — Partnership Ordinance ... 100
"banking business" — Banking Ordinance 18
"order staying the proceedings" — Arbitration Ordinance ... 37
"premises" — Landlord and Tenants Ordinance 88
"striking out" — Judgment by Default Rules 37

WRITING
brokerage contracts not reduced to, by custom 13
evidence in, ... 103