LAW REPORTS

OF THE

DISTRICT COURT

IN

TEL AVIV

1938

Acc

George B. Mu'ammar
Advocate

ג'מיל שלהוב
עורך-דין
חיפה רח' ארלוזורוב הנביא 1
ת.ד. 3087 טל. 66495

George B. Mu'amman
Advocate

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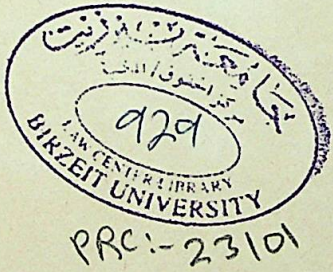




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*NOTE.*

In addition to the persons responsible for the first volume of the "Law Reports of the District Court in Tel-Aviv", Dr. Hans Kitzinger has, this year, prepared the index.

CIVIL APPEAL No. 309/37.

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 APPEAL OF:
Shlomo Fleisher — APPELLANT.

v.

1. Yirmiahu Hillel,
2. Meir Hirshfeld. — RESPONDENTS.

*Action on a Promissory Note — Unqualified "Aval" deemed to be for drawer — Presumption rebuttable — Evidence in rebuttal admissible.*

Appeal from a judgment of the Magistrate's Court of Tel-Aviv, in case No. 12686/37, dated 21.11.37, whereby Appellant's (Plaintiff's) action was dismissed with costs.

JUDGMENT:

Section 57(2) in connection with section 90(2) of the Bills, of Exchange Ordinance is binding on the Magistrate, provided nevertheless, that the Plaintiff is able to prove that the aval guarantee was given for the drawer of the bill. The Magistrate was right in allowing the claimant to bring evidence. Section 57 (2) of the Bills of Exchange Ordinance states only that "in default of a statement on whose account the aval is given it is deemed to be given for the drawer". The word "deemed" indicates that it is possible for the Plaintiff to rebut this presumption. But when the Plaintiff has not proved this contention, the Magistrate was right in basing his Judgment on these aforementioned sections.

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

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

*For Appellant:* Dweck. *For Respondents:* Segal.

*President.*

*Judge.*

CIVIL APPEAL No. 286/37.

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 APPEAL OF:

1. David Payess,
2. Benzion Cohen,
3. Batia Payess,
4. Zipora Payess,
5. Zipora Payess, as guardian of the minor Yehuda Payess.

APPELLANTS.

v.

Itzhak Berger.

RESPONDENT.

*Action for damages — Adjournment requested and refused — Adjournment a matter within the discretion of the Magistrate — Damages a finding of fact.*

Appeal from the judgment of the Magistrate's Court dated 3.10.37 in file No. 18474/36, whereby Appellants (Defendants) were ordered to pay jointly and severally LP. 250 with costs and advocate's fees.

JUDGMENT:

The matter of the grant of an adjournment is a matter within the discretion of the Magistrate. Except in rare cases the exercise of this discretion will not be interfered with. In this case we do not consider that we should interfere with the exercise of the Magistrate's discretion. The allegation of the Appellant that the adjournment was applied for by both parties does not seem to be borne out by the record. The question of damages was a matter of fact and the Magistrate made a finding of fact with which we do not think we should interfere.

The appeal is dismissed.

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

*For Appellants:* P. Joseph. *For Respondent:* Ischajewitz.

*President.*

*Judge.*

CIVIL APPEAL No. 307/37.

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 APPEAL OF:

Zalkind Peer. APPELLANT.

v.

David Margolit. RESPONDENT.

*Clain for price for goods sold — Denial of debt — Evidence produced for part of claim only — Finding by Magistrate, a finding of fact.*

Appeal from the judgment of the Magistrate's Court Tel-Aviv, dated 17.11.37, in file No. 15761/37, whereby the Respondent (Defendant) was ordered to pay LP. 108,949 with interest, costs and advocate's fees.

JUDGMENT:

All the grounds of appeal are based on the assumption that the claim is an action on promissory notes. This assumption is not in accordance with the statement of claim made by the Appellant (Plaintiff) himself. This statement reads: "The Defendant in consideration of merchandise sold and delivered to him by the Plaintiff, executed and delivered to the Plaintiff 9 promissory notes...". The sum claimed by the Plaintiff LP. 165,568 was therefore the price for goods sold and delivered, and as the Defendant (Respondent) denied the debt, it was for the Plaintiff (Appellant) to prove it. The Chief Magistrate found, that the Plaintiff proved only LP. 108,000. This is a finding of fact and is not appealable, being based on evidence both oral and in writing.

We therefore cannot find any reason to interfere with the Judgment appealed against.

The appeal is dismissed, and the Judgment confirmed with costs and LP. 3 advocate's fees for the Respondent.

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

*For Appellant:* Zakheim. *For Respondent:* P. Joseph.

*President.*

*Judge.*

CIVIL APPEAL No. 314/37.

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 APPEAL OF:

Israel Gurevitz. APPELLANT.

v.

Benyamin Rosenkranz. RESPONDENT.

*Action against guarantor "Aval" — Admission that guarantee was given for maker of note — Subsequent insertion of word "Aval" immaterial — Protest unnecessary.*

Appeal from a judgment of the Magistrate's Court, dated 23.11.37, in file No. 15679/37, whereby Appellant (Defendant) was ordered to pay LP. 95, with interest and costs.

JUDGMENT:

In our opinion, since the Appellant admitted before the Court below that he signed the promissory note as guarantor for the maker of the said note, the Magistrate was right in giving judgment for the Respondent without discussing further details, as for instance as to who wrote the words "Aval for the maker" and when or as to whether any protest was made or not. The Appellant is liable on his own admission as guarantor for the maker and there is no necessity for a protest in order to make such a guarantor liable.

The appeal is therefore dismissed with costs.

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

*For Respondent:* P. Goldberg.

*President.*

*Judge.*

CIVIL CASE No. 311/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

Anglo-Palestine Bank, Ltd. APPLICANT.

v.

Bank of Tel-Aviv, Ltd. RESPONDENT.

Application for winding up of a company.

*Application for the winding up of a company — Section 148 (e)—(g) of the Companies Ordinance — Defence must traverse allegations, mere statement that a settlement would prove more beneficial to creditors insufficient to oppose application.*

JUDGMENT:

This is an application for the winding up of a company under the name Bank of Tel-Aviv Ltd. on the ground that the said company is unable to pay its debts.

The Applicant produced two unsatisfied judgments for a total of LP. 621.784 and also an affidavit.

A witness was heard to the effect that the two judgments remained unsatisfied till this date.

The only defence in writing put forward by the Respondent is contained in the affidavit sworn by the manager of the said Company, on 18 January, 1938. Now that affidavit does not traverse any of the allegations of the Petitioner. All that the Manager of the Company says is that a great number of creditors oppose the petition as it will be more beneficial to them to obtain a settlement than if the Bank be wound up. We are satisfied that the Bank of Tel-Aviv Ltd. is unable to pay its debts and it is just and equitable that it should be wound up. We make an order accordingly under section 148 (e) — (g) of the Companies Ordinance. The Official Receiver is a provisional liquidator by operation of law (Section 162 (2) (b)). Petitioner to have costs out of the assets and LP. 3 advocate's fees.

Dated this 16th day of March, 1938.

*For Appellant:* J. Levin. *For Respondent:* P. Joseph.

***President.***

***Judge.***

CIVIL CASE No. 54/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE: His Honour Judge D. Edwards, President (sitting alone).

IN THE CASE OF:

David Taler. APPLICANT.

v.

1. Abraham Bitker,
2. Sarah Barmak. RESPONDENTS.

IN RE: The Workmen's Compensation Ordinance — (Revised Laws, Cap. 154).

and

IN RE: An arbitration between —

David Taler. (APPELLANT).

and

Abraham Bitker and another. (RESPONDENTS).

In the matter of an appeal, by way of case stated, from the award, dated 6th September, 1936, of an Arbitrator (Mr. J. Azulai).

*Workmen's Compensation Ordinance — Appeal from an Award of an Arbitrator under the Ordinance by way of case stated on a point of law — Meaning of terms "Employer", "Undertaker" and "Principal". (Zugg v. Cunningham Ltd. (1908) Session Cases 827, reported in Butterworth's Workmen's Compensation Cases 257, discussed and followed).*

JUDGMENT:

This is an appeal, by way of case stated, from the decision of an arbitrator on a point of law under Para 3 of the Third Schedule to the Workmen's Compensation Ordinance (Cap. 154, Revised Laws). It was argued before me at the Bar, by way of preliminary objection to the hearing of this appeal, by Mr. Goldenberg, advocate for the Respondents to this appeal (hereinafter referred to as the "Employers") that I ought not to hear the appeal. Having, however, heard the advocate for the Appellant (hereinafter referred to as the "Employee"), *viz.* Mr. Bar-Shira, advocate, and having perused all the various files, documents, etc., I am quite satisfied with Mr. Bar-Shira's explanation (see also my own manuscript notes of proceedings before myself, pages 2, 3, 4, 5 and 9 of my notes) and I, accordingly, hold that the question of law stated by the arbitrator is properly before me and apt

and ready now to be decided by me. For the sake of convenience and ready reference, I append to this Judgment a copy of the Arbitrator's award and finding. I consider that I should accept the Arbitrator's findings of fact. In this connection, however, it is right to say that Mr. Bar-Shira produced to me an English translation of the record of the evidence of the witnesses who gave evidence before the Arbitrator. That translation did not appear to me to be contested by the advocate for the "Employers". Accepting as I did, and as I still do, the findings of fact of the Arbitrator (Mr. Azulai) it merely remains for me to say, whether, in the light of the arguments of the respective advocates before me, at the Bar, I consider that the Arbitrator came to a right conclusion in law. The question turns on Sec. 5 of the Ordinance. In the text-book "Elliott on Workmen's Compensation" 9th (1926) Edition at pages 164 and 165 one finds references to two Scottish cases, *viz.* the case of Stalker *v.* Wallace, reported in (1900) 2 F. 1162, and also in 37 S.L.R. 898, and the case of Zugg *v.* J. & J. Cunningham Ltd. (1908) Session Cases 827, and also reported in 45 S.L.R. 670, and also again in B. (*i.e.* Butterworth's Workmen's Compensation Cases) 257. For the convenience of the parties, I append to this judgment copies of the law reports of both those cases, although, of course, the "Zugg" case is also reported in 1 Butterworth's Workmen's Compensation Cases 257. Giving the best consideration I can to the award and findings of the Arbitrator in the case now before me, I am of the opinion that the judgment in the "Zugg" case more nearly fits the facts as found by the Arbitrator in the case now before me. It is of interest to note that, in the "Stalker" case, Lord Justice Clerk felt very great doubt upon the point, although he was not prepared to dissent from the judgment of the other members of the Court. It only remains for me to say that, in the case now before me, the Arbitrator held that the Respondent was an upholsterer; this case, therefore, is like the "Zugg" case where the so-called "employers" were chemical manufacturers, that is to say, neither was a builder.

I think that I ought to say that, for the purposes of this case stated, I accept the question of law as drafted by Mr. Bar-Shira, *viz:* "Whether or not a person who is erecting a commercial house for himself with the help of various contractors with whom he contracts for the execution of certain branches or parts of work, the construction and execution of the work, however, taking place under his own personal management, direction and supervision and/or under the management, direction and supervision of his architect, whether or not such person is a principal within the meaning of Sec. 5 of the Workmen's Compensation Ordinance".

I would point out that the essential differences between the Stalker case and the case now before me, are as follows, *viz:* (1) in the Stalker case the person found liable in compensation was himself a builder; here the person sought to be made liable is an upholsterer; (ii) in the Stalker case the person found liable to pay compensation was a person who had undertaken to build a house for himself. In the words of Lord Trayner "He has contracted with others to do for him that which he cannot do for himself, such as the plumb and plaster work. The Appellant is the Undertaker". Now, in the case before me, this upholsterer was, it seems, unable to do any part of the work for himself. Any ordinary individual who is having a house built for himself, whether as a residence or for his business premises, naturally takes some interest in the erection and, possibly, employs an architect. But the above does not make him an undertaker. No doubt, the doctor, envisaged by the learned Lord President in the Zugg case, superintended the work of the electrical engineers who fitted up the installation. But, in my view, the absurdity mentioned by the learned Lord President in supposing that the doctor should be liable for injuries received by a servant of the firm of electrical engineers applies equally in the case of the present Respondent, Mr. Bitker, whose business is that of an upholsterer. In this connection, I must remember the finding of the Arbitrator (Mr. Azulai) — "But I have had no sufficient evidence before me to satisfy me that the Defendants have prepared for themselves — and for the purpose of their trade and business, a special shop to serve as an upholstery factory. Moreover, I had witnesses on behalf of the Plaintiff who have rejected this allegation, etc., etc.". On the whole matter, as I have said, I think the facts and reasoning in the Zugg case more nearly fit the facts of the case now before me.

I am, accordingly, of the opinion that the Arbitrator (Mr. Azulai) reached a right conclusion in law in holding that the Respondents were not liable to pay compensation to the Applicant (Workman), *i. e.* to the present Appellant. The answer to the question of law propounded by the Arbitrator is, therefore, in the affirmative, *i. e.* that he was right in law. I, accordingly, dismiss this appeal, (by way of case stated), with costs and LP. 1 advocate's fees.

Judgment delivered at Tel-Aviv, this 19th day of March, 1938, in the presence of Mr. Goldenberg for Employers and Mr. Degani for Workman.

*President.*

CIVIL APPEAL No. 22/38.

## 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 APPEAL OF:
Joseph Gurion. APPELLANT.

v.

Abraham David Shlas. RESPONDENT.

*Appeal against the dismissal of an opposition — Lack of usual summons to appear before the Court — Note contained in a report of a provisional attachment is not a proper summons and cannot replace it.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 14231/37, dated 14.12.37, whereby Appellant (Defendant) was adjudged to pay LP. 50 with interest and costs. Opposition dismissed.

### JUDGMENT:

This is an appeal from a Judgment whereby the Magistrate dismissed the Appellant's opposition to a Judgment by default ordering him to pay to Respondent the sum of LP. 30.

It is admitted that the Appellant did not receive the usual summons to appear before the Court at the day fixed for the hearing.

The Magistrate held that the note contained in the part of the report made by the Officer who carried out the order of provisional attachment is a proper summons to the Appellant to appear before the Court.

In our view a proper summons must be issued and served in accordance with Art. 11 of the Magistrates' Law. Nothing could replace it.

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

Delivered in open Court, this 21st day of March, 1938.

*President.*

*Judge.*

*For Appellant:* Shohat-Kadury. *For Respondent:* Henigman.

CIVIL APPEAL No. 45/38.

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 APPEAL OF:
Continental Steel Trading Co. Ltd. APPELLANT.

v.

1. Moses Shkolnik,
2. Moses Weissberg. RESPONDENTS.

*Action on a contract and Promissory Notes — Signature of agents on behalf of unincorporated body — Personal liability of signatories where there is no disclosure of the principals.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 3287/37 dated 26.1.38, whereby the Appellant's (Plaintiff's) action was dismissed with costs.

JUDGMENT:

The Respondents in this case entered, as representatives of "Kebura Beer Sheva", into a contract with the Appellant whereby the Appellant undertook the boring of a well for the said "Kebura Beer Sheva".

In clause 11 of the contract provision is made for the modus of payment. Part of the price had to be paid in cash and part by promissory notes.

These promissory notes had to be signed by the Respondents on behalf of the "Kebura". Under the same clause the Respondents are stated to be liable for all the "Kebura".

It is admitted that the said Kebura Beer Sheva is not a corporate body.

There were before the Magistrate long pleadings as to the nature of the Respondents' liability. Is this liability a kind of guarantee or a principal debtor liability? The Lower Court gave contradictory rulings on this subject. Finally the Appellant's action was dismissed without the Court entering on the merits.

In our view, there is no doubt that under the terms of the contract the Respondents are personally responsible for all the payments. The

persons comprising the said Kebura being not disclosed on the contract, the only party responsible towards the Appellants are the Respondents.

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

Judgment delivered in open Court this, 21st day of March, 1938, in the presence of Dr. Grunwald and Mr. Goldberg.

*President.*

*Judge.*

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CIVIL APPEAL No. 56/38.

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 APPEAL OF:

Mordehai Spivak. — APPELLANT.

v.

Eliahu Klingbil. — RESPONDENT.

*Claim before the Magistrate for arbitration fees — Subject matter of the arbitration outside the jurisdiction of the Magistrate's Court — Claim for arbitrator's fees is independent of the subject matter of the arbitration, and may be claimed separately.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 15003/37, dated 9.1.38, whereby the Magistrate ruled that he had no jurisdiction to enter into the merits of the case.

JUDGMENT:

This is an appeal from a Judgment of the Magistrate dismissing the Appellant's action on the ground of lack of jurisdiction.

The Appellant sued the Respondent for the payment of LP. 25 as arbitrator's fees.

It was argued on behalf of the Respondent that the arbitration proceedings in respect of which arbitration fees are claimed exceed the Magistrate's jurisdiction.

The Magistrate agreed with Respondent's contention and dismissed Appellant's action.

In our view a claim for arbitrator's fees is quite independent of the arbitration proceedings in respect of which the fees are claimed and since the present claim is one which is in itself within the Magistrate's jurisdiction, the Magistrate erred in refusing to hear it on its merits. We do not agree with Mr. Schwartzman's argument that, in a case where neither party asks the Court to enforce or set aside an award, the arbitrator may himself apply to the Court which has jurisdiction to enforce an award, for the enforcement of the award or that part of the award which concerns his own fee.

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

Judgment delivered in open Court, this 21st day of March, 1938, in the presence of Mr. Schwartzman and Mr. Heinsheimer.

*President.*

*Judge.*

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CIVIL APPEAL No. 59/38.

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 APPEAL OF:

1. Shmuel Ashkenasi,
2. I. M. Sacharov.

APPELLANTS.

v.

1. Eliezer Burko,
2. Beila Burko.

RESPONDENTS.

*Claim before the Magistrate for the recovery of possession of land, based on Title Deed — Defendant's alleged purchase of the land from the Plaintiff and declared intention to bring action in Land Court claiming ownership cannot oust the Magistrate's jurisdiction to hear the case.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 15126/37, dated 4.2.38, whereby the Appellant's (Plaintiff's) action was dismissed with costs.

## JUDGMENT:

This is an appeal from a Judgment whereby the Magistrate dismissed Appellant's action for recovery of possession of a plot of land on the ground of lack of jurisdiction.

The Appellant based his claim on a title deed.

The Respondents argued that they had bought from Appellant the plot of land in question, had paid the price and taken possession of it with the consent of Appellant. They also argued that they intended to bring an action before the Land Court in order to be declared owners of the said land.

The Magistrate held that since the Respondent intended to claim ownership before the land Court, he had no jurisdiction to give an order for recovery of possession.

In our opinion the action which the Respondent intended to bring before the Land Court has nothing to do with the present case which is within the exclusive jurisdiction of the Magistrate.

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

Judgment delivered in open Court this 21st day of March, in the presence of Mr. Schwartzman and Mr. Hutory.

*President.*

*Judge.*

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CIVIL APPEAL No. 61/38.

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 APPEAL OF:
Shaul Kalmany. APPELLANT.

v.

1. Z. Barnbaum,
2. J. Proujansky. RESPONDENTS.

*Claim on promissory notes given as security against liability as guarantors — Production of judgment against guarantors — Alleged payment of debt by the defendant — Defendant not being a party to the original action, and being prejudiced by the judgment is entitled to lodge incidental opposition — Article 54 of the Magistrates' Law.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 22/37, dated 4.1.38, whereby the Appellant (Defendant) was adjudged to pay the sum of LP. 30.— with interst, costs and advocate's fees.

## JUDGMENT:

This is an appeal from a Judgment of the Magistrate whereby the Appellant was ordered to pay Respondents the sum of LP. 30 with costs legal interest and advocate's fees.

The Respondents' action was based on promissory notes.

It is common ground that the said promissory notes were given to Respondents as security for Respondents' liability on joint notes given by them, at Appellant's request, to one J. Robinson. The latter had agreed to be the guarantor for a loan of LP. 35 granted to Appellant by the Bank Lehalvaot Jerusalem, and Respondents' notes were intended to secure him against his liability as guarantor.

Apart from the promissory notes the Respondents produced to the Court below a judgment from the Magistrate's Court Tel-Aviv whereby the Respondents were ordered to pay to the heirs of the said J. Robinson the sum of LP. 35.

The Respondents' action is therefore meant as a recourse against the above mentioned judgment.

The Appellant's plea is that he paid to the Bank the whole amount of the loan and Robinson was not called upon to pay as a guarantor and the notes were kept unduly long by him. After the death of J. Robinson his heirs brought an action on Respondents' notes and obtained the above mentioned judgment without the Appellant being called.

In our view, the Appellant, not being a party to the action between Robinson's heirs and the present Respondents and the Judgment issued in that action being prejudicial to him, he is entitled under Article 54 of the Magistrates' Law to challenge that judgment by an incidental opposition.

The appeal is allowed and the case remitted in order to hear the Appellant's incidental opposition against the judgment produced and give judgment in this case in accordance with the result of the said opposition.

Judgment delivered in open Court, this 21st day of March, 1938, in the presence of Mr. Benjamini and Mr. Goldenberg.

*President.*

*Judge.*

CIVIL CASE No. 2/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

Arieh Bin-Nun. PLAINTIFF.

v.

1. Office Efficiency Institute,
2. Zvi Chimi,
3. A. L. Zvilinger. DEFENDANT.

*Application for the appointment of an arbitrator — Section 6(2) of the Arbitration Ordinance — Meaning of Hebrew term "Beit-Din" in arbitration clause. Contract must be read as a whole.*

JUDGMENT:

This application for the appointment of an arbitrator is based on a submission clause in a contract signed by both parties. By this contract which is named "contract for work" the Respondents appointed the Applicant as the manager of the branch of their business in Haifa and the parties settled the mutual relations existing between them. The arbitration clause is contained in clause 12 of the contract. The advocate for Defendants pleaded before this Court, that under clause 11 of the agreement he is not obliged to go to arbitration as this clause states: "When the second party (The Applicant) will have some claims against the first party (Respondents) he is obliged to bring his claim *to a Tribunal (Lebeit din)* and he is not entitled to retain any sum whatsoever in cash in bills or in goods belonging to them (Respondents) of his own motion". — The advocate for Respondents requiring parties to bring claims before *the Court,* contended that there is a contradiction between this clause and the arbitration clause 12, which has invalidated the whole contract or at least the obligation of the Respondents to go to arbitration, and that the Applicant can only bring his claim directly before the Court.

In our opinion there is no contradiction whatsoever between clauses 11 and 12 of the contract for the following reasons: —

(a) In clause 11 nothing is said about "The Court" that is to say within the meaning of a Government Court. The Hebrew words *"Beit-Din"* are not a translation of the English word "Court", as the

advocate for Respondents alleges. The proper word for a Government Court is *"Beit-Mishpat"*, as is used in the official Hebrew translation of the Laws of Palestine. In the Hebrew Official edition of the Revised Laws the Magistrate's-Court is named *"Beit-Mishpat Hashalom"*, The District Court *"Beit-Mishpat Hamhozi"*, The Assize Court *"Beit-Mishpat Lepshaim Hamourim"* etc. The word *"Beit-Din"* is regularly used in its meaning as a *Tribunal.* Clause 12 of the contract explains what kind of a Tribunal has to be applied to by the parties in the event of a dispute. "12. Both parties oblige themselves in case of a dispute to refer the matter to arbitration. By each party one arbitrator will be appointed and the two arbitrators will appoint a third". The intention of the parties is absolutely clear.

(b) This intention becomes clearer still when we read clauses 11 and 12 together with the whole contract and especially clause 7. The Applicant was appointed manager of a branch of Respondents' business. He had in his hands money bills, documents and goods belonging to the Respondents. He could easily retain all these in the event of a claim against the Respondents without applying to any tribunal. In order to avoid this danger clause 11 was inserted stating that in such an event the Applicant is not to be entitled to retain arbitrarily at his own will any money, bills, etc., but that he has to bring his claim before "a tribunal". This is the real meaning of clause 11. The tribunal itself is described in clause 12 of the contract.

For these reasons we disregard the objections of the Respondent and appoint Mr. George Levy, Eliezer Ben-Yehuda Street 47, Tel-Aviv, as arbitrator for the Respondent in accordance with Section 6(2) of the Arbitration Ordinance. Respondent to pay costs of the application and LP. 2 advocate's fees.

Delivered in open Court this 22nd day of March, 1938 in the presence of Mr. Zeiger for Plaintiff and Mr. Foguel for Respondent.

*President.*

*Judge.*

CIVIL APPEAL No. 58/38.

## 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 APPEAL OF:

1. Zvi Kaler,
2. Yehuda Levi. — APPELLANTS.

v.

Joseph Bein. — RESPONDENT.

*Judgment in absence as if in presence — General denial by defendant of plaintiff's allegations — Plaintiff must prove his case.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 6928/36, dated 15.7.36, whereby the Appellants (Defendants) were adjudged to pay LP. 10 with interest, costs and advocate's fees.

### JUDGMENT:

According to rule 3 (4) of the Judgment by Default (Magistrates' Courts) Rules the Plaintiff has to prove his claim when the Defendant has not appeared at a subsequent stage of the proceedings after having appeared at the first sitting. As there are no sufficient proofs on which the Judgment of the Magistrate could be based, and as the defence that the Defendant had paid the rent was disregarded, —

We allow the appeal, set aside the Judgment appealed against and remit the case to the Magistrate in order to hear it on its merits.

Costs to follow the event.

Delivered in open Court this 22nd day of March, 1938, in presence of Mr. Herman for Respondent and Appellant in person.

*President.*

*Judge.*

CIVIL APPEAL No. 46/38.

## 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 APPEAL OF:

Yehezkel Jacob Darwish. APPELLANT.

v.

Continental Caoutchouc Export A. G. RESPONDENT.

*Foreign bills expressed in foreign currency payable in Palestine — Rate of exchange computed on date of actual payment — Parties may fix payment to be at a rate of exchange prevailing on a certain date pointing to an existing exchange.*

*Note:* C.A. 39/32 and C.A. 85/32 are reported in C. of J. 658, P.P. 27.VI.33, and C. of J. 664, P.P. 14.VII.33. respectively.

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 12318/37, dated 27.1.38, whereby the Appellant (Defendant) was adjudged to pay 600 German Marks with interest, costs and advocate's fees.

### JUDGMENT:

The Appellant complicates the matters in dispute which are simple and clear. In this case the Defendant admitted and acknowledged the debt based on the three promissory notes attached to the file. There are only two questions in this case.

1) Whether the Defendant should pay the value of 600 German Marks in Palestinian currency at the rate of exchange at 17.5.37, 17.6.37, 17.7.37, the days when the promissory notes became payable or at the rate of exchange at the day of actual payment.
2) What is the meaning of the clause "Payable in Berlin through Haavara". —

With regard to the first question the Supreme Court sitting as a Court of Appeal has laid down the principle that if a bill is drawn and is made payable in Palestine and the instrument is silent as to the rate of conversion into the local currency the amount is payable at the rate of exchange prevailing at the actual date of payment. (C. A. No. 39/32 and C.A. No. 85/32). The Magistrate followed this principle but overlooked the fact that the instruments in question contain a clause that

can not be understood otherwise than that the Defendant agreed to pay the promissory notes in Palestinian currency at a rate which the Haavara in Tel-Aviv should pay for German Marks on the days of the maturity of the promissory notes. The Plaintiff and the Defendant are direct parties to the promissory notes and may fix by common accord the rate of exchange prevailing on any day they like.

With regard to the second question the Appellant is mistaken when he is of the opinion that the promissory notes are invalidated and void by reason of the fact that the Defendant when accepting them respectively *(sic)* making the promissory notes, added a clause to them "payable in Berlin through *Haavara*". This clause does not alter the sum of money (200 German Marks) put on the promissory notes, Sec. 3 (1) the Bills of Exchange Ordinance. The parties may by common consent fix the rate of exchange by pointing to an existing exchange or a bank or any other business house as the firm deciding the rate of exchange of foreign currency for a special translation made by the parties.

As it appears clear from the promissory notes that the parties agreed to pay and to accept 600 German Marks in Palestinian Pounds at the rate accounted for or paid by the Haavara at 15.5.37, 15.6.37 and 15.7.37, the Magistrate ought to have ascertained this rate of exchange from witnesses or experts and given Judgment accordingly.

We therefore allow the appeal set aside the Judgment and remit the case to the Magistrate for completion on the aforementioned lines.

Costs to follow the event.

Delivered in open Court this 22nd day of March, 1938, in presence of Mr. Foguel and Dr. Fleischer.

*President.*

*Judge.*

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CIVIL CASE No. 32/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV

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

IN THE CASE OF:
Emmanuel Vorchheimer. PLAINTIFF.

v.

Trust and Transfer Office "HAAVARA". DEFENDANT.

*Agreement for transfer of money from Germany to Palestine — Contract*

*"Sui-Generis" — Agency and trusteeship — Liability and discretion of the trustees — Mejelle Book XI; articles 1463 and 1774.*

*Note:* This Judgment was confirmed on appeal in C.A. 105/38. 1938, 2 S.C.J. 25.

## JUDGMENT:

Plaintiff's claim is based on an agreement made between him and the Defendant Company on the 14th August, 1934, whereby, as he alleges, the Defendants undertook to transfer 50.000 German Marks paid to them in Germany by the Plaintiff, to Palestine and pay their equivalent in Palestine currency — after deducting 6% from the above amount for transfer costs and expenses. Plaintiff further alleges that he was entitled to receive as the equivalent the sum of LP. 3806,564, but that he received only LP. 3232.054 so that he now sues for the difference *viz.* LP. 574,510. There is no dispute between the parties as to figures.

The question to be decided in this case is a mere question of interpretation of the nature of the contract made between the parties and especially of the clause concerning the transfer costs, expenses and other amounts to be deducted by the "Haavara" Co. in connection with the transfer of Plaintiff's capital from Germany to Palestine. The contract is attached to the file and is marked "Exh. 5". The clause regarding expenses reads as follows : —

> "2. The Haavara is bound to place at the disposal of every "payor" (the person paying money into special account I) the equivalent in Palestine Pounds of the amount so paid in by him at a rate to be computed in accordance with art. 4, after deduction of the transfer costs (art. 2. para. 2) as soon as his transfer payment has been applied to paying for German goods in accordance with articles 1 and 3.
>
> "The transfer costs amount to 6%. This rate contains all expenses payable by the "Haavara" in carrying through the transfer. They are to be defrayed in such a manner that 1% of the "Transfer Payment" will, before payment, go to the Palestine Trust Advisory Bureau for German Jews and 5% of the "Transfer Payment" will be retained by the Haavara. *Should a situation occur by which, in the interest of the payors, extraordinary measures become necessary for accelerating the transfer, then the "Haavara" shall be entitled to claim the extra expenses* arising through this and to apportion them among these payors, who, up to that date, have not yet been paid out".

The Defendants plead, that the sum claimed by the Plaintiff is due to them under clause 2, para 2, because of the following reasons: — The contract between the parties is not a simple sale of German marks

by the Plaintiff to the "Haavara" in Germany on condition that the "Haavara" shall pay to him the equivalent in Palestine Pounds in Palestine after deducting 6% — as the Plaintiff seeks to suggest — but a contract *sui generis* (Art. 64 of the Civil Procedure Code) intended to save the money of the Plaintiff (which money was frozen in Germany) by transferring it as quickly as possible to Palestine; and the "Haavara" undertook to effect this transfer only in the manner allowed by the German Government, *i. e.* by paying in Germany out of these sums to German exporters the price of German goods acquired by Palestinian purchasers and importing them into Palestine. Clause 1 of the contract signed by the Plaintiff reads :

> "The Trust and Transfer Office "Haavara" Ltd. hereinafter called "Haavara" has the power to apply Reichsmark amounts, which, with the permission of the German authority in control of Foreign Exchange, are paid in its favour into Special Account I opened with the Reichbank for the Bank of the Temple Society Ltd. to payments for German goods acquired by Palestinian purchasers for importing them into Palestine".

Clause 3 of the same contract reads :

> "the Transfer Payments shall be applied in chronological order to paying in accordance with art. 1. — A payor shall only then be credited with the amount in Palestinian currency resulting from the application of Transfer money, when all "payors" whose transfer payments preceeded him in point of time shall have been credited with the amounts in Palestine currency due to them".

It appears from these clauses that it was the right and the duty of the "Haavara" to use every possible means to accelerate the acquisition of German goods by Palestinian importers in order to transfer (in turn) the money entrusted to them in Germany. From clause 2 para 2 of the contract it is clear that each one of the payors authorised the "Haavara" to incur expenditure in excess of the agreed 6% and to place such extra expenditure against the accounts of the payors should a situation occur by which, in the interest of the payors in general, such expenses should become necessary for the acceleration and increase of the purchase of German goods by Palestinian merchants. The "Haavara" now alleges that in the year 1935 the situation occurred that, on one hand, considerable sums were paid in on the "Haavara" account for transfer in Germany and, on the other hand, the German Government granted allowances or bonuses to those who were exporters of goods into all countries of the world except Palestine so that German merchandise became dearer in Palestine than in the neighbouring countries and it was accordingly clear that Palestinian importers would cease to order German goods, unless they would receive some incentive or bonuses when purchasing German goods. In order to avoid this

danger, the "Haavara" was bound and entitled to grant such bonuses the granting of which resulted in the reduction of the rate of exchange for German marks and in consequence it became necessary to distribute the burden of paying these bonuses among all the persons whose money would otherwise never have been able to be transferred from Germany. The difference claimed by the Plaintiff is his proportionate amount of expenses so paid by way of bonuses as above to Palestinian importers in accordance with clause 2 para 2 of the contract.

The Defendants brought two witnesses *viz.* Mr. Sally Hirsch a member of the Board of Directors of the Defendant Company and Mr. A. N. Young chartered accountant, partner of Messrs. Russell and Co. The latter produced a statement of gross proceeds in Palestine Pounds of Reichsmark sales, and their analysis into groups in respect of rates of bonuses and extra bonuses paid thereon for the period from July, 1934 to May, 1936 ("Exh. A. 2."). As these witnesses were not contradicted by any evidence brought by the Plaintiff, the Court must accept their evidence.

The advocates for the Defendants, in addition, raised the question whether it is for the Defendants at all to prove that in the year 1935 such a situation as provided in clause 2 para 2 of the contract occurred that it became necessary to resort to the extraordinary measures, taken by the Defendants and necessary for accelerating the transfer, and which made the extraordinary expenses connected with them justified. They alleged that the contract gives to the "Haavara" full discretion to decide all these questions and that it is for the Plaintiff to prove that this discretion was used arbitrarily.

In our opinion the contract between the parties is a contract of agency and trusteeship as defined in Book XI of the *Mejelle* — by which the Plaintiff entrusted to the Defendants a sum of money in German marks and authorised the Defendants to take all necessary steps in order to transfer this sum to Palestine under the general conditions which the "Haavara" observes in the transfer of all other sums for German Jews emigrating into Palestine. No special condition was made out for the transfer of Plaintiff's moneys, as is clear from the wording of the contract and the forms in which the Defendant has signed it. There is no provision in the contract which fixes a special rate of exchange for German marks to be sold by the "Haavara" to Palestinian importers. In clause 4 of the contract only the mode of calculating the rate of exchange is described. From the nature of the "Haavara" business it is clear that this rate of exchange could not be fixed because it depends on many different conditions. All clients, and among them the Plaintiff, trusted the Defendants to sell their German

marks in Germany by applying them as a price for German goods to be imported into Palestine at the best possible price to be obtained. Even the Plaintiff does not contend that the difference between the rate of exchange in German marks, as he calculates it, and the price reduced by reason of the bonuses, was taken by the "Haavara" themselves. He even does not allege that the "Haavara" (his trustee and agent) has abused the trust. He simply disregards clause 2 para 2 as if it were not in existence. Under the *Mejelle* Art. 1463 "property in the possession of an agent which he has received in his capacity as agent for sale or purchase . . . is considered to be property deposited with him for safe keeping. If it is destroyed without fault or negligence the loss need not be made good". It is the person who entrusted the money who has to prove that the trustee has committed some fraud or negligence, or acted against the clear instructions of the principal. According to Art. 1774 of the *Mejelle* he, the agent, is to be believed on his oath.

We therefore decided to give to the Plaintiff the opportunity to prove that the Defendant, the "Haavara" Co. Ltd., used the discretion accorded to them by the contract in a fraudulent or arbitrary way. But the advocate for the Plaintiff refused to avail himself of this opportunity and remained content to rely solely on his statement of claim, which he merely repeated.

We therefore dismiss this action, with costs and LP. 4.— advocate's fees for the Defendants.

Delivered this 22nd day of March, 1938, in the presence of Mr. Benjamini for Plaintiff and Messrs. Rosenbluth and Smoira for Defendant.

*President.*

*Judge.*

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CIVIL APPEAL No. 47/38.

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 APPEAL OF:
Yerucham Gartner. — APPELLANT.

v.

Belgo-Palestine Bank. — RESPONDENT.

*Consolidation of cases — Privity of parties — Proof of foreign custom.*

Appeal from the judgment of the Chief Magistrate's Court, Tel-Aviv, in file No. 1072/38, whereby Judgment was given for the Respondent (Plaintiff) for LP. 110.816, with interest, costs, and advocate's fees.

## JUDGMENT:

It was the fault rather of the representatives of both parties that they consolidated two cases: —

a) 17458/37 between Meier Gartner Plaintiff *vs.* Belgia-Erez Israel Bank Ltd. for LP.187.800 and

b) 1072/38 between the Belgia-E. I. Bank Ltd. *vs.* Yerucham Gartner for LP. 110.816.

The consolidation did not help much to clear up the actual relationship between the three parties interested

1. Meier Gartner.
2. Jerucham Gartner.
3. The Belgo-Palestine Bank.

In order to see, whether the Chief Magistrate was right in his decision, it will be necessary for this Court to separate the claims and to give their opinion on each one separately.

a) 17458/37. In this claim Meier Gartner appears as a plaintiff in his own name. In his statement of claim he alleges that Belgo-Palestine Bank Ltd. agreed to transfer an account opened in common with him and his brother Yerucham Gartner — only in his, Meier Gartner's name. As the Bank denied this fact, it was only a question of privity between the parties, *i. e.* a question of who is entitled to claim. Meier Gartner alone or Meier and Yerucham Gartner together, and as the Plaintiff did not succeed in proving the transfer of the common account to his name the Magistrate was right in dismissing his claim.

b) 1072/38. In this case the Defendant argued, that the Bank purchased the shares that he ordered to be purchased for him on the Exchange in New-York, not in accordance with the instructions given by him, so that he is not bound to acknowledge this purchase of shares as made for him. The answer given by the Manager of the Bank was that the Bank followed a custom of the Stock Exchange in New-York. This custom is that where a limited price is given and ordered to buy *at close of market*, if the limit is not reached on the morning of the order, the purchase may be made on the next day or on the following days as soon as the limit is reached whether at closing of the market or not. The learned Chief Magistrate found that this is a very reasonable custom and drew the inference that the Bank dealt in accordance

with the instructions received by the Defendant. This opinion of the Chief Magistrate may be right but it is based only upon the evidence of one witness, the Manager of the Plaintiff Bank. In our opinion this is not sufficient and it is for the Plaintiff to prove, in a legal way, that such a custom exists on the Stock Exchange in New-York.

We therefore dismiss the appeal and (1) confirm the Judgment given in the case No. 17458/37 with costs and LP. 3 advocate's fees for the Respondent, (2) set aside the Judgment in the case No. 1072/38 and remit the case to the Chief Magistrate for completion on the aforementioned lines.

Costs in this case to follow the event.

Delivered in open Court this 22nd day of March, 1938, in the presence of Mr. Fishman and Mr. Bar-Shira.

*President.*

*Judge.*

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CIVIL APPEAL No. 52/38.

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 APPEAL OF:
Rivka Suchodoler. — APPELLANT.

v.

1. A. Soskin & Co.
2. Sigmund Suchodoler. — RESPONDENTS.

*Conditional judgment by Magistrate — Duty of Magistrate to ascertain the exact position of the matter in dispute and give final judgment.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 17467/37, dated 9.1.38, whereby the provisional attachment was partially confirmed.

JUDGMENT:

The Magistrate has given a judgment containing a condition that the attachment has to be released from some furniture, unless it will appear that they are partly made of walnut-tree. In our opinion the

Magistrate could not give a conditional judgment. He had himself to identify exactly the furniture and give a definite judgment.

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

Costs to follow the event.

Delivered in open Court this 22nd day of March, 1938, in the presence of Mr. Kleinzeller and Mr. Sommerfeld.

*President.*

*Judge.*

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CIVIL APPEAL No. 69/38.

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 APPEAL OF:

Abraham Cohen. APPELLANT.

v.

Haim Weiner. RESPONDENT.

*Action on a promissory note — Endorser's discharge on failure of protest — Direct parties may sue and be sued on the consideration irrespective of the holder's failure to comply with the formalities required by the Bills of Exchange Ordinance.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in the file No. 15392/37, dated 11.2.38, whereby Plaintiff's action was dismissed.

JUDGMENT:

The judgment is based on a promissory note for LP.30 signed by one Zelberg to the order of Chaim Weiner (the Respondent). This Chaim Weiner negotiated the promissory note to Abraham Cohen (the Appellant) and, as the Appellant alleges, received from the Appellant the consideration. On his part Abraham Cohen negotiated the promissory note to the Bank Petah-Tiqva and in turn this Bank to one Izhac Chaim. This man Izhac Chaim, when the promissory note was not paid by its maker — claimed from the indorser Chaim Weiner and lost his

case (File 13131/35 of the Magistrate's Court, Tel-Aviv) because he had not protested the promissory note in due time and form. Then he returned the promissory note to one of the prior indorsers, Abraham Cohen (the Appellant), and the Appellant sued Chaim Weiner (the Respondent) for LP. 30. The Magistrate dismissed his claim on the same ground as the claim of Izhac Chaim was dismissed namely that this promissory note was not protested. In our opinion the Magistrate overlooked the fact that the Appellant alleged to have paid to the Respondent full consideration for the promissory note in question, that they are direct parties in connection with the consideration and that the Respondent is not discharged from his liability by reason of the holder's failure to comply with all formalities required by the Bills of Exchange Ordinance for the presentment, protest and notice of dishonour, according to section 52 of that Ordinance.

We therefore allow the appeal, set aside the Judgment appealed against and remit the case to the Magistrate in order to give to the Appellant the opportunity of proving consideration.

Costs to follow the event.

Delivered in open Court this 22nd day of March, 1938, in presence of Mr. Pardo and Mr. Silberg.

*President.*

*Judge.*

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CIVIL CASE No. 340/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

BEFORE: His Honour Judge D. Edwards, President.

IN THE CASE OF:

Pessia Iting-Westerman. APPLICANT.

v.

Shlomo Iting. RESPONDENT.

*Application for a Declaratory Judgment — Effect of a Palestinian Rabbinical Divorce on the personal status of foreign subjects — Jurisdiction of Courts in matters of divorce and dissolution of marriage — Power of Court to give Declaratory Judgments — Palestine Order-in-Council, 1922, Article 64 and Palestine (Amendment) Order-in-Council, 1935, Article 2(b).*

## JUDGMENT:

In this case the Applicant seeks a declaration from this Court to the effect that the divorce granted to her by the Rabbinical Court of Safad on 14th November, 1937, was such a divorce as would be recognized by the National Law of the parties, *i. e.* the Law of Lithuania. The Respondent (the husband) did not oppose the grant of the application. As the matter seemed to me to be novel and to raise a matter of some public importance, I decided to follow the practice adopted in England by Mr. Justice Bucknill in the case of Herd *v.* Herd, reported at Vol. 52 Times L. R. page 709, and I accordingly caused the Attorney General to be served with notice of the application. When the application came on again for hearing before me on 25th February, 1938, the Attorney General was represented by Mr. Kantrovitch, who placed before me the views of Government. I am indebted to Mr. Kantrovitch for his assistance; I am also indebted to Dr. Silberg, advocate for the Petitioner, for the manner in which he argued the case. Mr. Kantrovitch argued that, if the Applicant wished me to declare that what she had obtained from the Rabbinical Court of Safad has the effect of dissolving the marriage, then I had no jurisdiction to make such an order confirming the so-called divorce. He argued that the effect of the decision in the case of Volkenberg (Supreme Court Civil Appeal 22/34) was not to say that the "Get", because it is not a divorce, is valid in Palestine if granted to foreigners. On the contrary, the decision shows that the divorce was invalid because the Courts had no jurisdiction. It is clear that I have no power to grant, or to purport to grant, a decree of divorce to foreigners. Mr. Kantrovitch said that if, however, what the Appellant wanted from this Court was merely a declaratory Judgment to the effect that under the national law of the parties a divorce which the Applicant stated she had obtained, would be valid under the national law, then I have jurisdiction (Mr. Kantrovitch says) to make such a declaration. Mr. Kantrovitch pointed out that, under Jewish Law, which, in this respect, is unlike Moslem Law, parties cannot divorce themselves. Mr. Kantrovitch argues as follow, *viz:* — "Such a declaration would not amount to a divorce in Palestine, but it would merely be a declaration as to the national law of the parties. Against the making by this Court of such a declaration there is no prohibition. What, in effect, the parties are saying is this, *viz:* "Under our national law we have a certain status and we desire to prove that status, and, thereafter, we shall ask for a declaratory judgment declaring that is is our status under our national law". I think that Mr. Kantrovitch's argument is sound.

The next question is whether I can give a declaratory Judgment at all. Dr. Silberg says that there is nothing in law to prevent my doing so. The Judgment in Civil Appeal 64/32 (Supreme Court) reported at p. 885 Palestine Law Reports does not say that a District Court cannot give a declaratory judgment at all. The judgment merely says that, on the facts of that case, the Court could not give a declaratory judgment "of the nature claimed by the Appellant" in that case. Reference has been made to Civil Appeals 76/33 and 34/31 (Rotenberg's Collection of Judgments, Vol. 3, pp. 1052, 1053 and 1084 and 978) and to Civil Appeal 5/27, Palestine Law Reports p. 135, and to the *Mejelle* Art. 533. I have also been reminded that this Court is in use to make declarations, *e. g.* in Succession cases and as to age, *e. g.* of persons wishing to become advocates. It is clear that this Court is the Court (if any) to give declaratory Judgments of the nature sought (see Palestine Order-In-Council, 1922, Art. 64, and also Supreme Court High Court Case 12/31, Palestine Law Reports page 549, wherein it is said "The District Court has Jurisdiction in all civil actions not specially assigned to another Court"). I have also been referred to Art. 2 (b) Palestine (Amendment) Order-In-Council 1935. I am in agreement with Mr. Kantrovitch in thinking that I have power to make the order in the terms suggested by him.

The next question is whether the Appellant has satisfied me that the Courts of Lithuania would recognize the divorce of 14th November, 1937. As to this, I have heard evidence from the following witnesses, *viz* : Dr. Raphael Rabinovitch, an advocate of Tel-Aviv, who had practised as a lawyer in Lithuania, and also Mr. Gershonas Valkaruskass, the Secretary to the Consulate-General of Lithuania in Palestine. There is also before me a certificate from three Rabbis in Lithuania, authenticated on the 9th March, 1938, by His Britanic Majesty's Consul at Kovno. A consideration of the evidence and a study and perusal of all the documents now before me enable to me declare as follows, *viz.*: "I find and declare that, under the national law of the parties, which is Lithuanian Law, the divorce granted at Safad, Palestine, by the Rabbinical Court there on 14th November, 1937, to Mrs. Pesia Iting (Westerman) and Shlomo Iting would be regarded as valid in Lithuania.

I declare accordingly.

Delivered this 23rd day of March, 1938, in the presence of Mr. Silberg for Applicant.

***President.***

CIVIL CASE No. 207/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

"Lodzia" Ltd. PLAINTIFF.

v.

Elias Danon & Co. DEFENDANT.

*Action for the revocation of a patent under section 22(2) (b) (III) of the Patents and Designs Ordinance — Meaning of term "Publicly" — Proof of actual manufacture of similar goods, even before date of registration of the patent, insufficient.*

JUDGMENT:

This is an action brought by the Plaintiffs, "Lodzia" Textile Co. Ltd., against the Defendants Elias Danon and the Partnership Avigdor Danon and Co., for the revocation of a patent granted to the Defendants on the 3.6.36, for the manufacture of socks which are approximately of the same height as a shoe, consisting of an integrally woven or knitted hollow body without any seam on the sole, being reinforced on the heel with a piece of leather or some like similarly tough material and having around the opening an elastic band or cord fastened to the edge of the sock. The Plaintiffs base their claim on Section 22(2) (b) (III) of the Patents and Designs Ordinance alleging that they as manufacturers in Palestine of considerable numbers of socks, had publicly manufactured, used and sold in Palestine the socks which type of manufacture is claimed by the Defendants as having been invented by them before the date of the patent, *i. e.* 3.6.1936. This allegation having been denied by the Defendants, ample opportunity was given to the Plaintiffs to prove their claim. The advocate for the Plaintiffs then brought a number of witnesses, one of them being Mordechai Patzanowski, a mechanic of the Lodzia, who swore that he was the actual worker who, on the 17.5.36, manufactured seven dozens of the same socks and that on that day he sent these socks to the section of partially completed goods in the Plaintiffs factory "Lodzia". Another witness Menahem Goldgang swore that on the 18.5.36, 20.5.36, 22.5.36 and 29.5.36 quantities of such socks exactly of the same type as those made by the patentee were sent to him by two workers of the "Lodzia" for completion

in his section and that, after doing the necessary work, he passed the socks on to the dyeing section of the "Lodzia" factory where the socks usually remain for a day or two, before they reach the section of completed goods of the "Lodzia" and the store of this factory. Another witness, Israel Droni, deposed to the fact that on the 24.5.36 these socks reached the store complete in bundles of one dozen each packet in cases ready for sale. Finally a witness Mordechai Shenkar deposed to the fact that on the 24.5.36 the goods were handed to the driver of the "Lodzia", Lichtenstein, who is also the salesman of the "Lodzia" for him to sell these socks to customers of this factory. As to this essential point, *i. e.* the point as to the time when the socks manufactured in the interior of the Plaintiff's factory came out of it the evidence of the Plaintiff is silent. The driver Lichtenstein was not even called as a witness and no invoice was produced or any evidence whatever led to show that the socks were brought to any customer of the "Lodzia" before the 3.6.36. The manager of the stockings Department, Mordechai Shenkar, could only depose that the socks in question were sold in Haifa on the 7.6.36, *i. e.* four days after the date of the patent.

In our opinion Plaintiffs have not succeeded in proving that they publicly manufactured the socks for which the patent was granted to the Defendants. "Publicly" means that the public know something about the manufacturing. The evidence brought by the Plaintiff merely proved the internal process of manufacturing in the interior of the factory "Lodzia", which was not accessible to the public, and was approachable only by the Plaintiff's workers and technical manager. No evidence was brought to show that Plaintiffs had before 3.6.36 sold these socks or that they had exposed them for sale, or advertised them in any way. In order to succeed in a claim for the revocation of a patent evidence of all the conditions mentioned in Section 22(2) (b) (III) is expressly required.

In his final pleadings advocate for the Plaintiffs attacked the patent on the ground also that there must be some novelty in an invention. In the case of Franc-Shtrohmeyer Cowan (Inc.) *v.* Peter Robinson Ltd. reported at page 579 of Vol. 46 Times Law Reports Mr. Justice Maugham (as he then was) held that the patent was invalid for lack of subject matter and the action for an injunction was dismissed. He also held that there was not sufficient subject matter to support the invention (see typewritten sheet annexed, for extract from Vol. 46 Times Law Reports p. 579).

In our view the stocking manufactured by the Defendants in this case may perhaps be no more an invention for which a patent should

have been granted than the necktie in Peter Robinson's case. It might well be that if the present Defendants were to ask for an injunction against the present Plaintiffs, the present Defendants might fail to obtain an injunction. But what we are now being asked to do here is to act under Section 22(2) (b) (III) of Cap. 105 Revised Laws of Palestine. As we have said, we think that the Plaintiffs have failed to make out a case under that section. We, accordingly, dismiss this action with costs and LP. 3 advocate's fees.

Delivered this 30th day of March, 1938, in the presence of Mr. Pevsner for Plaintiff and Mr. Pardo for Defendants.

*President.*

*Judge.*

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CIVIL APPEAL No. 19/38.

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 APPEAL OF:

Carl Rubin. APPELLANT.

v.

Alexander Kaufman. RESPONDENT.

*Claim by employee for compensation for dismissal — Agreement signed by Trade Union of which plaintiff was a member — Effect of expiration of the Agreement prior to date of action — Applicability in Palestine of English Statute Law and Common Law — Common Law and Custom. Effect of Custom under the Mejelle. Proof of Custom.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 5970/37 dated 24.12.37, whereby the Appellant (Defendant) was adjudged to pay LP.44.700 with costs, interest and LP.4 advocate's fees.

*Note:* An appeal from this decision was dismissed on technical grounds in C.A. 191/38 (1938, 2 S.C.J. 141). C.A. 240/37, referred to in the judgment, is reported in P.P. 13—14.III.38, 1938, 1 S.C.J. 148, 3 Ct.L.R. 104, P.L.R. (1938) 159, *Ha'aretz*, 14, 28.IV.38.

## JUDGMENT:

*(Edwards, J., President):*

This is an appeal from a Judgment of the Magistrate of Tel-Aviv, whereby the Defendant (now Appellant) was ordered to pay a sum of LP. 44.700, costs etc.

The main point at issue is whether the Respondent was entitled, at the conclusion of two years' service, to a month's salary in respect of each year of service, in addition to the pay which he actually earned. It is admitted that the Respondent was not discharged for misconduct and that he was willing to continue in the employment of the Appellant. Now, the Respondent originally entered into the employment of the Appellant at a time when there was in existence and in force an agreement between the Labourers' Council, Tel-Aviv, and the present Appellant. It is admitted that the present Respondent was a member of that Trade Union. Now, this case has already been appealed before this Court in Civil Appeal No. 168/37. I quote the whole Judgment in that appeal: —

> "It is admitted by both parties that when the Respondent was dismissed the contract had already expired.
>
> "We therefore hold, without expressing any opinion as to the validity of the contract, that the Respondent could not sue on the contract.
>
> "As to the custom it must be formally proved. We allow the appeal and remit the case to the Magistrate in order that he may be able to tender evidence as to the custom, and give a fresh Judgment".

With all respect to the Members of the Court who gave the decision in that appeal, I am unable to agree that the Respondent could not sue on the contract for the reasons given by the Court then, namely, that the contract had already expired. It seems to me that he could sue for any breach of it until such time as the law of limitation of actions, or prescription, forbade him. I do not think that in this appeal we are bound by that expression of opinion given in Civil Appeal No. 168/37. It seems to me that there are two matters now ripe for consideration by us, namely,

(1) Whether the present Respondent, being a member of the Trade Union with which the Appellant entered into an agreement, can rely on that agreement and sue on it, although he did not himself sign the agreement, and,

(2) Whatever be the answer to question (1), whether the Respondent can rely on a custom to pay an extra month's salary, on termination of employment, for each year's service, and whether

that custom has been proved and, if it has been proved, whether the Respondent can enforce compliance by the Appellant of that custom.

With regard to question (1), we have been referred to a Judgment of the District Court of Jerusalem sitting as a Court of Appeal in Civil Appeal 55/32. Some reference is made in that Judgment to the parties being entitled to rely on English Law. The law with regard to Trade Unions in England is statutory, and under the Palestine Order-In-Council, 1922, Art. 46, it is only English Common Law which can be applied in Palestine and not the provisions of English Statutes. I quote from Chitty on Contracts 19th (1937) Edition, page 487, as follows: —

> "Trade Unions are bodies of a somewhat anomalous character. Prior to the passing of the Trade Union Act, 1871, they were unincorporated associations, usually of an illegal character by reason of their rules being in unreasonable restraint of trade".

Section 4 of the Trade Union Act, 1871, provides: —

> "Nothing in the Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely: —
>
> (1) Any agreement between members of a trade union as such concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed".

But this Statute does not apply in Palestine. The question, therefore, whether under the law in force in Palestine to-day, the Respondent can enforce as against the Appellant the contract or agreement entered into between the Appellant and the Labourers' Council, Tel-Aviv, is not easy.

Now, as regards the question whether the present Respondent can sue the present Appellant on the agreement entered into between the Respondent's Trade Union and the Appellant, the question arises whether he (Respondent) can sue under (a) Palestine Law, or (b) a Palestine Ordinance or (c) English Statute Law or (d) English Common Law.

One may say, at the outset, that he has no hope of succeeding under either of heads (b) or (c) because as regards (b) there seems to be no Ordinance dealing with the matter, and as regards (c) under Art. 46 of the Palestine Order-In-Council 1922, it is only English Common Law, *i. e.* not Palestine custom, that can be applied. We are left with the two alternatives, *viz.* (a) and (d). As regards (a), the Law seems to be found in the *Mejelle*. In this connection, it is well to remember the terms of the Judgment of the Supreme Court in Civil Appeal 240/37

wherein it is said: "Where, however, there exists an Ottoman Law on particular subjects, such as sale, hire, guarantee or agency, then that law both extends and applies to all questions that have to be determined with reference to these species of contracts". ("Palestine Post", 13th March, 1938). In the case now before us the Ottoman Law is to be found in Articles 562 and 563 *et seq.* of the *Mejelle*. Now, it seems to me that, although it may well be said that the *Mejelle* is not exhaustive, one has yet to approach with caution the matter of applying *holus bolus* English Common Law. In this connection, I wish to guard against a certain confusion of thought, that may well be introduced (unless one approaches the matter with caution) if one lightly regards "custom" and "Common Law" as being synonymous terms. What is Common Law in England? It certainly is not necessarily synonomous with custom. "Common Law" was in its origin the "universal custom of the realm", and owed much to the discouragement of the peculiar local customs. Many local customs, however, still survive, and upon proof that they satisfy certain rather exacting conditions, are as binding in their locality as the Common Law. The word "custom" will be found to have been applied even by the highest legal authorities to habits or usages not conforming to the foregoing usages. In strictness the word "usage" is applied to what are usually termed "trade customs", "customs of the port", or "customs of the country". The general effect of a usage, is to annex a term to a contract. Thus, to take a very common example, there is a usage for "domestic servants" who are hired at an annual wage to be entitled to a month's notice if no specific period of notice is agreed upon at the time of hiring. A term stipulating for such notice is thus annexed to or implied in every such hiring, when the parties themselves make no agreement as to notice (Stephen's Commentaries on the Laws of England, 19th (1928) Edition, Vol. I, pages 32 to 35). But, in my view, because of the existence of Article 562, 563, *et seq. Mejelle,* there is no room to import into Palestine English Common Law or customary law on such a point.

But where are we to-day? We are in Palestine. It is, however, quite clear that one cannot interpret Art. 46 of the Palestine Order-In-Council, 1922, as enabling one to import into the law here the custom prevailing in Palestine (except in so far as Art. 36 *Mejelle* may help, and with this I shall deal later in this judgment). Now, is there, or, rather, let us say, was there, or has there ever been, under the Common Law of England a custom recognized by the Law (apart from Statute) whereby an employer as party to a service agreement can be bound by the terms of an agreement entered into between him (the employer) and a body, such as an Association purporting to act on behalf of a body of prospective

employees, when an employee (although he may be and is a Member of such an Association) has not himself signed such service agreement? Speaking for myself, I have been unable to find that there ever was such a provision of law under the Common Law of England. We are, therefore, driven back to the *Mejelle*, and I do not find in the *Mejelle* either any such provision.

In my view, therefore, the present Respondent must fail in so far as his claim is based on the agreement entered into between the present Appellant and the Trade Union called "The Council of Labourers Tel-Aviv". Clause 8 of that agreement provided as follows: — *viz.*: "The second party (*i. e.* Karl or Carl Rubin), (*i. e.* Appellant), undertakes to pay to the discharged labourer compensation at the rate of one month's salary in respect of each year's service".

It remains to consider whether the present Respondent can succeed on the basis of the existence of a custom. Leaving aside for the moment the question whether the existence or the prevalance of a custom was sufficiently proved before the Magistrate — a matter with which I shall deal later in this judgment — I should like now to ask myself whether, even if the existence and prevalance of such a custom, as regards persons like the present Respondent, is proved, such a custom can compel the present Appellant, in law, to comply with it. Here again one must turn to a Palestine Ordinance, or Palestine Law *(e. g. Mejelle)*, or English Common Law. Again I should like to emphasize the need for caution. Palestine custom cannot help one unless one invokes the aid of Art. 36 *Mejelle*. There is no Ordinance in force in Palestine to-day which can help. So that, apart from Art. 36 *Mejelle*, one must turn to English Common Law. Now, I can find nothing in the Common Law of England which requires an employer to give to an employee of the type of the present Respondent an additional month's salary for each year of service. What I *do* know is that English Common Law recognized and enforced the custom whereby, if an employee is engaged in domestic service, the hiring without any engagement as to duration of the service will be construed to be a hiring for a year, *i. e.*, if it was a contract to engage in domestic service and, if his contract of service was terminated through no fault of his own, but at the wish of the employer, then he (the employee) was entitled either to a month's notice or a month's wages in lieu thereof (Chitty on Contracts, 19th (1937) Edition, page 894). But that is not what the present Respondent relied on before the Magistrate. I wish to reserve to myself the right of deciding on some future occasion (should the necessity of so deciding arise) whether, under the Law of Palestine to-day, an employee, on a monthly wage, would, at the termination of employment, be entitled to receive either

a month's notice or a month's wages in lieu thereof. But as I have just said, the present Respondent did not rely, before the Magistrate, on such a custom. That being so, it seems to me that the present Respondent must fail both on his reliance on (a) the agreement entered into between the present Appellant and the Trade Union, *viz.* The Council of Labourers, Tel-Aviv, and also on (b) the alleged custom. It may, of course, be asked, "Of what use, then, was the agreement entered into between the Appellant and the Trade Union?". While it is not for this Court to answer such a hypothetical and, perhaps, self propounded question, several possible answers may occur to one, *e. g.* if the Appellant failed to comply with all the terms of that agreement, he (Appellant) might suffer by reason of being boycotted by members of the Trade Union, *i. e.* members of the Trade Union might withhold their labour or services from him, to his obvious detriment. Other possible answers and possibilities readily occur to me; but it is unnecessary to set them all out here. I think, therefore, that the present Respondent should have been unsuccessful before the Magistrate. In the event, however, of my having reached a wrong conclusion in law as to the question of "custom", I think it right and only fair that I should express my opinion as to whether I think that the Respondent sufficiently proved, to the satisfaction of the Magistrate, the existence and prevalence of the custom. At the hearing in open Court, before us, of the appeal the Appellant's advocate (Mr. Turtledov) argued that the finding of the Magistrate on the point of custom was against the weight of evidence, alternatively, he asked that we (*i. e.* the District Court) should allow him to call further evidence before us to rebut the evidence as to the existence and prevalence of custom.

Now, speaking for myself, I say frankly that, had I been able to come to a different conclusion in law, I should have been content to rely on the findings of fact of the Magistrate. I should not have held that his findings of fact were against the weight of evidence. The mere fact that the Magistrate may have preferred the evidence of the witnesses for the Respondent is not sufficient ground for saying that he decided against the weight of evidence. Moreover, I should not have allowed the Appellant to bring additional rebutting evidence. It is all very well to say (as Mr. Turtledov said to us) that the finding of the Magistrate came as a surprise to the Appellant; that is no ground for asking, on appeal, to be allowed to bring additional rebutting evidence. In my view of the law, however, the appeal should succeed. I would allow the appeal and set aside the Judgment of the Magistrate, and I would dismiss the claim of the present Plaintiff (Respondent). But I wish to deal with two other matters, *viz.* (first) the question of the

relevance of Art. 36 *Mejelle*, and (second) the question as to whether it can be said that when the Trade Union, *viz.* the Council of Labourers, signed the agreement with the Appellant, the Council of Labourers were acting as agents of the Respondent within the meaning of Art. 1449 *et seq.* of the *Mejelle*. Firstly, with regard to the question of custom (*i. e.* Art. 36 *Mejelle*), I merely wish to say that, in my view, Art. 36 cannot be interpreted too broadly or widely as to be extended so as to import into a service agreement an extension of wages agreed to in the agreement. After all, in the *Mejelle*, Introduction Art. 1 (Mr. Hooper's translation), it is stated that "Ninety nine rules have been collected together. Muslim jurists have grouped questions of Muhammadan Jurisprudence under certain general rules". Art. 36 is one of these ninety nine general rules. On the contrary, the provisions of the *Mejelle* with regard to remuneration for the hire of personal services are quite clear, and, in my view, cannot, and ought not to be extended beyond their own terms. These provisions are to be found in Article 562 *et seq.* of the *Mejelle*, *i. e.* if the contract between the employee himself and his employer provides for a certain wage, he will get that wage, no more and no less; if there is no contract, regarding wage, then he gets what is laid down in Art. 563, no more and no less.

As regards the agreement entered into between the Appellant and the Council of Labourers, I do not think that it can be said that the Council of Labourers can be regarded as the agents of the Respondent within the meaning of Arts. 1449 *et seq. Mejelle.*

In connection with "custom", it is of interest to note the following from the Judgment of the Judicial Committee of the Privy Council in the case of Amissah *v.* Krabahy Privy Council Appeal No. 156 of 1931, delivered on 3rd March, 1936: — "The material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the Courts, become so notorious that the Courts take Judicial notice of them". In spite of this statement, however, and paying due regard to the statement of the law in Halsbury's Laws of England, 2nd Edition, 1933, Vol. 10, pp. 2—22, I do not think that this Court should, in this case, disturb the finding of fact of the Magistrate as to the custom. But, as I have said, what I feel about he matter is that under the Law of Palestine to-day, even although a custom may be proved, that custom cannot compel an employer to pay more wages than the provisions of the *Mejelle*, which I have cited, contemplate or envisage. I have already sufficiently dealt with what I conceive to be is the legal position as regards the agreement entered into between the

present Appellant and the Respondent's Trade Union, *viz.* The Council of Labourers of Tel-Aviv.

It follows that, in my view, the appeal should be allowed, the Judgment against the Appellant should be set aside in so far as it requires the Appellant to pay LP. 28.— and the Respondent's (Plaintiff's) action for LP. 28.—, *i. e.* two month's wages, should be dismissed. The Respondent's (Plaintiff's) claim for LP. 16.700 mls should be allowed and that part of the Magistrate's Judgment allowing the Plaintiff LP. 16.700 mls should be upheld.

But, as my brother Korngrun *J.*, holds a different view, and the Court being thus divided the appeal will be dismissed with costs and LP. 2 advocate's fees.

Judgment read in open Court in the presence of Mr. Barshira and in absence of Appellant, duly served.

Dated this 12th day of April, 1938.

*President.*

*(Korngrun, J.):*

In this case there are two important questions: —

(a) Whether the contract made between the Appellant and the association of Engineers is of any importance in deciding the relations between the Respondent (an employee) and the Appellant (an employer).

(b) Whether a custom was proved that any employee dismissed for reasons not connected with his behaviour is entitled to claim one month's salary for each year of service.

This Court in an another composition decided that the Plaintiff cannot rely upon the contract made between the employer and the organisation of the employees, because this contract had already expired, when the Plaintiff was dismissed and that he can base his claim only upon a custom assuming that he will be able to establish the existence of such a custom. We have heard the appeal from the beginning in our present composition in open Court and His Honour the President expressed his opinion that the mere fact that the period of the contract had expired is not sufficient to deprive it of any importance. I agree with this opinion and think that we are not bound by the decision given by two other Judges.

In this case there was only one contract between the Appellant (the employer) and the Association of Engineers. In this collective agreement, clause 8 states that the employer has to pay to the employee an indemnity of one month's wages in respect of every year of employment in case of his dismissal.

There was never made a contract between the Appellant (the employer) and the Respondent personally. Nevertheless I cannot agree with the view that he (the Respondent) worked without any agreement at all. It appears rather to me, that both parties, the employer who signed the collective agreement with the Association of Engineers and the employee, who was a member of this association, were aware of the conditions of work fixed and accepted them as binding on both parties. It is not necessary that a contract for services shall be made in writing; it may be concluded by oral statements or by the behaviour of the parties. Art. 437, 438 of the *Mejelle*. The criterion is that should the Respondent have been dismissed not four months after the expiration of the collective contract but four months before it, the Appellant would have regarded himself as bound to pay him two months' salary according to clause 8. The fact that after Respondent having worked two years with the Appellant, the Appellant did not renew his collective agreement does not affect the relations between the parties, unless it would be proved, that the Appellant, after the expiration of the collective contract, informed the Respondent that he intends now to change the conditions of work as fixed by the contract (Nelson *v.* Mossend Iron Co. (1886), 11 App. Cas. 298 H. L.). Nothing of this kind happened and the Respondent was fully justified to believe that the parties agreed by their behaviour to prolong the original agreement on the former terms.

For these reasons, I think that we need not worry about the custom. I don't think that what was really proved before the Magistrate was a general custom, which comes automatically in force, when the parties did not fix at all the conditions of the employee's work at the employer. What actually was proved is that a great part of the employers in Palestine, perhaps the majority of them, use to accept this custom and sign collective agreements containing such a clause as clause 8 of the contract mentioned.

In my opinion this is sufficient in the case before us as the Appellant belongs to these employers who signed the collective agreements and agreed to behave accordingly when he hired the services of the Respondent.

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

Judgment delivered in open Court this 12th day of April, 1938, in the presence of Mr. Turteldov for Appellant and Mr. Barshira for Respondent.

*Judge.*

CIVIL APPEAL No. 26/38.

## 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 APPEAL OF:

R. A. Bialer. — APPELLANT.

v.

Augusta Tauba. — RESPONDENT.

*Action on a Promissory Note — Plea of payment abroad — Admissibility of foreign documentary evidence — Section 18 of the Evidence Ordinance — Evidence of the parties Section 14 of the Evidence Ordinance — Decisive Oath Article 1632 of the Mejelle.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 16997/36, dated 9.1.38, Judgment for Plaintiff for 500 Zloty, costs and advocate's fees.

## JUDGMENT:

The Appellant pleaded payment of the promissory note and wanted to prove his contention by a document signed in Lodz (Poland) by the official receiver of the Court in Lodz. The Magistrate was right in not accepting this document as not being in conformity with Section 18 of the Evidence Ordinance. But the Magistrate had to give to the Defendant an opportunity to prove his defence by hearing of the parties (Section 14 of the Evidence Ordinance) or by administering to the Plaintiff the decisive oath according to Art. 1632 of the *Mejelle*.

The appeal is therefore allowed, the judgment set aside and the case remitted for completion on the aforementioned lines.

Costs to follow the event.

Judgment delivered in open Court this 12th day of April, 1938, in the presence of Mr. Godhard for Appellant and in absence of Respondent duly served.

*President.*

*Judge.*

CRIMINAL APPEAL No. 81/37.

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

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

IN THE APPEAL OF:

1. Moshe Volozny,
2. Mordechai Rosengarten. APPELLANTS.

v.

Attorney-General. RESPONDENT.

*Prosecution under Town Planning Ordinance — Charge addressed to Municipal Court but heard before the Magistrate — Retroactive power of the Town Planning Ordinance applied to the whole Ordinance.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 10034/37, dated 28.8.37, whereby the Appellants were ordered to pay LP. 2.800 each and to demolish a certain additional building.

JUDGMENT:

Complaint addressed to the Municipal Court, but both the Prosecutor and the accused agreed to have the case heard before the Magistrate, who has jurisdiction.

The accused did not call any other co-owners as witnesses for the Defence; there are no proofs at all, that there are co-owners.

The order of the High Court giving retroactive power to the Town Planning Ordinance does not specify any section. It simply gives power to the whole Ordinance as from 6.8.36. It does not matter that the building was completed before the proclamation 17.8.37, when it was proved that it was completed after 6.8.36.

Even if we accept the view of the Appellant it does not matter much because in every case even before the new Ordinance it was forbidden to build without permit or against it (section 38 or 40) of the Town Planning Ordinance.

Appeal dismissed for reasons given above.

Judgment delivered in open Court, this 14th day of April, 1938,

in the presence of Mr. Ben Dov for Respondent and Mr. Nehana for Accused No. 1 and in absence of Accused No. 2.

*President.*
*Judge.*

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CIVIL APPEAL No. 91/38.

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 APPEAL OF:
Jacob Gezler. APPELLANT.

v.

Litwinsky Bros. RESPONDENTS.

*Claim for rent — Clause in contract fixing amount of rent payable after expiration of term of contract is not a damage clause, and may be enforced in full — Article 484 of the Mejelle.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 3859/37, dated 2.3.38, whereby the Appellant (Defendant) was adjudged to pay LP. 25.264, with costs and advocate's fees.

JUDGMENT:

The Magistrate erred only in one point *i. e.* that he regarded the sum of 500 mls mentioned in clause 6 of the contract as damages. The contract is clear and states in clause 6 "at the expiration of the period of lease the tenant is obliged to leave the house rented and to return the keys to the landlord, otherwise he will pay 500 mls as the rent for every day that will pass after the date of expiration of the lease". The sum of 500 mls is rent, and not damages. This rent is fixed in accordance with Art. 484 of the *Mejelle,* which states that "a person may give his property on hire, for a fixed period, whether of short duration, such as a day, or whether of long duration such as a period of years". The Magistrate was therefore right in awarding the sum of LP. 15.500 in favour of the Plaintiff. We also do not see any reason to interfere with his findings as to the sum due for water.

We therefore dismiss the appeal and confirm the Judgment with costs for the Respondent.

Delivered in open Court this 14th day of April, 1938, in absence of both parties duly served.

*For Appellant:* Schulman. *For Respondents:* Dunkenblum.

*President.*
*Judge.*

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CIVIL APPEAL No. 68/38.

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 APPEAL OF:

Zeev Landau. APPELLANT.

v.

David Shapir. RESPONDENT.

*Action for the enforcement of an award — Action dismissed for insufficiency of stamps on the award — Duty of the Magistrate to accept the document in evidence after payment of the stamp fees and penalty.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 18280/37, dated 9.2.38, whereby the Plaintiff's application was dismissed.

JUDGMENT:

This is an appeal from a Judgment whereby the Magistrate dismissed Appellant's action on the ground that the award of arbitration produced by him was insufficiently stamped.

In our opinion, it was the duty of the Magistrate under section 16(1) of the Stamp Duty Ordinance to take notice of any insufficiency of the stamps and after payment of the duty and penalty to accept the document in evidence.

The appeal is allowed and the case remitted for completion.

Appellant to have the costs of this appeal and LP.2 advocate's fees.

Judgment delivered in open Court this 25th day of April, 1938, in the presence of Mr. Kadury for Appellant and in absence of Respondent duly served.

*President.*
*Judge.*

CIVIL APPEAL No. 83/38.

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 APPEAL OF:

Aharon Bogoslavsky. APPELLANT.

v.

American Porcelain Tooth Co. Ltd. RESPONDENT.

*Action on a promissory note — Magistrate may allow the amendment of the name of the defendant — Jurisdiction of Court of place where one of the defedants normally resides — Right of defendant to have the parties heard in evidence cannot be taken away by the fact that they are no longer in this country — Section 14 of the Law of Evidence (Amendment) Ordinance.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 6981/37, dated 21.2.38, whereby the Appellant (Defendant) was adjudged to pay LP. 27.160 with interest and advocate's fees.

JUDGMENT:

It seems to us that the Magistrate was right in allowing the Respondent to make a slight amendment of the name of the Appellant.

We agree also with the Magistrate that he had jurisdiction to deal with the case inasmuch as one of the Defendants in the case has his ordinary place of residence in Tel-Aviv.

But we think that the Magistrate was wrong in not giving to the Appellant an opportunity of hearing the parties at his request. The fact that the representatives of the Plaintiff whose names appear in the bills are no longer in this country is not sufficient reason for depriving the Appellant of the right given to him by section 14 of the Law of Evidence Amendment Ordinance.

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

We allow the Appellant the costs of the appeal and LP. 1 advocate's fees.

Judgment delivered in open Court this 25th day of April, 1938, in the presence of Mr. Neder for Appellant and Mr. Minkovitch for Respondent.

*President.*
*Judge.*

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CIVIL APPEAL No. 86/38.

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 APPEAL OF:
Itzhak Irov. APPELLANT.

v.

Shlomo Tagir. RESPONDENT.

*Claim for recovery of possession of immovable property. Defendant in occupation by permission of plaintiff's father — Plaintiff being the owner by virtue of Title Deeds is the proper party to sue for recovery of possession.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 16735/37, dated 14.3.38, whereby Appellant's action was dismissed.

JUDGMENT:

This is an appeal from a Judgment whereby the Magistrate dismissed Appellant's action for recovery of possession on the ground that he is not a proper party to the action.

The Magistrate found as a fact that the Respondent occupies the premises by permission of the Appellant's father and the Magistrate held that the latter is the only party who can sue for recovery of possession.

In our view, since it is not denied that the premises in question are now in the ownership of the Appellant by virtue of an official title deed the Appellant is certainly a proper party to sue for recovery of the possession of the said premises.

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

Judgment delivered in open Court this 25th day of April, 1938, in the presence of Mr. Foguel for Appellant and Respondent in person.

*President.*
*Judge.*

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CIVIL APPEAL No. 92/38.

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 APPEAL OF:

"Favoria" Société Anonyme. APPELLANT.

v.

Magen Works, I. Goldman and Co. RESPONDENT.

*Action for the recovery of the price of goods sold — Acceptance of an order for goods is an agreement to sell; subsequent dispatch of the goods renders the transaction a complete and executed sale.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 3094/36 dated 3.3.38, whereby Appellant's (Plaintiff's) claim for LP. 143 was dismissed with costs.

JUDGMENT:

The Appellant sued the Respondent for the payment of LP. 143, being the price of goods ordered by the Respondent.

The Appellant is a company domiciled in France and the Respondent, in a letter dated 27th January, 1935, required Appellant to send him at the earliest certain iron goods.

The goods were sent but were refused by the Respondent.

The Magistrate dismissed Appellant's action on the ground that the transaction concluded between the parties was an agreement for sale and not a completed sale and that the Appellant was not entitled to sue for the price of the goods but for damages for breach of contract.

In considering the document produced and the lengthy written pleadings of both parties we fail to understand how the Magistrate found that the transaction between the parties was an agreement to sell and not a completed sale.

In our view, since the Appellant accepted the order for goods given

by the Respondent and executed it by shipping the said goods, it could not be any longer a question of agreement to sell but a completed and executed sale. At the moment when the goods left the Appellant's factory, they became the property of the Respondent and they even travel at his own risk.

The appeal is therefore allowed and the Judgment appealed against set aside and the case remitted to the Magistrate for him to hear any defence or defences which the Defendant (Respondent to this appeal) may have to the payment of the price of the goods.

Judgment delivered in open Court this 26th day of April, 1938, in presence of Mr. Harari for Appellant and Mr. Karwassarsky for Respondent.

*President.*
*Judge.*

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CIVIL APPEAL No. 77/38.

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 APPEAL OF:

1. Shamai Cohen.
2. Moshe Naiman. APPELLANTS.

v.

Ephraim Shvilly. RESPONDENT.

*Contract for the sale of land, price to be paid in instalments — Purchaser entitled to claim the refund of moneys paid by him on account at any time before registration of the sale — Vendor's only remedy is in damages for breach of contract by way of cross action or counterclaim.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 9612/37, dated 20.2.38, whereby Appellants' (Plaintiffs') claim was dismissed with costs and advocate's fees.

JUDGMENT:

This is an appeal from a Judgment whereby Appellants' claim for the return of moneys paid by them in connection with a land transaction was dismissed.

The learned Magistrate held that the Appellants were bound by the terms of the contract whereby the Appellants undertook to pay the price of the land by instalments and in default the contract shall automatically come to an end and all moneys paid by them shall be deemed as agreed and liquidated damages in favour of the Respondent.

The Respondent did not bring a counterclaim before the lower Court.

Our opinion as expressed already in many previous cases is that a purchaser of an immovable property may *always* bring an action for the return of money paid by him before the registration is effected in the Land Registry.

The last case decided by the Supreme Court which is directly on this point seems to be Civil Appeal 31/37 which confirms our view on this point by applying section 11 of the Land Transfer Ordinance to all transactions regarding immovable property and giving to the vendor the right to bring an action for damages for breach of contract, or by way of counterclaim. In this case there was no counterclaim.

The appeal is therefore allowed and judgment entered for Appellant for the sum of LP. 51 with costs and LP. 2 advocate's fees.

Judgment delivered in open Court this 26th day of April, 1938, in absence of Appellant and in presence of Mr. Wilner for Respondent.

*President.*

*Judge.*

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CIVIL APPEAL No. 103/38.

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 APPEAL OF:
Attorney-General. APPELLANT.

v.

Abdul Jalil Hassan Khateeb. RESPONDENT.

*Civil claim arising out of criminal offence — Jurisdiction of Court — Magistrate's power to strike out or dismiss a case.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 847/38, dated 7.3.38, whereby Appellant's (Plaintiff's) claim for LP. 28.— was struck out.

JUDGMENT:

The Magistrate erred in taking into consideration the following points: —

(a) A case can be struck out only when the plaintiff has not appeared at the hearing [Judgment by Default (Magistrates' Courts) Rules]. In all other cases the claim may be dismissed for want of jurisdiction. This of course does not prevent a plaintiff from bringing his claim before a competent Court.

(b) According to Art. 9 of the Magistrates' Law a claim arising out of a criminal offence may be brought in any of the Civil Courts of the place where the defendant resides or where he is in custody or the place where the offence was committed. The Magistrate ought to have given an opportunity to the Plaintiff to prove that the criminal offence mentioned in the statement of claim was committed within the jurisdiction of the Magistrate's Court Tel-Aviv. Should the Plaintiff prove his allegation or should it appear that there is doubt as to whether the place where the offence was committed is within the jurisdiction of the Magistrate's Court Tel-Aviv or the Magistrate's Court at Ramle, it will be on the Magistrate of Tel-Aviv to hear the matter and decide that point.

The appeal is therefore allowed, the Judgment set aside and the case remitted for completion on the aforementioned lines.

Costs to follow the event.

Judgment delivered in open Court this 16th day of May, 1938, in presence of Mr. Salant for Appellant and Mr. Mouaké for Respondent.

*President.*

*Judge.*

CIVIL CASE No. 459/36.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:
Aharon Spivak. PLAINTIFF.

v.

Standard Bank of Palestine Ltd.
(formerly Persian Palestine Bank Ltd.). DEFENDANTS.

*Action for Account and Receivership — Contractual relationship — Third party intervention — Condition precedent, if existing, must first be executed — Arbitration Clause.*

JUDGMENT:

In his statement of claim the advocate for the Plaintiff relies on a written contract, dated July 1935, by virtue of which Plaintiff together with Nachum Paley and Yehoshua Lichter (all three together called "Hamoshav") appointed the Defendant Bank as their agents in respect of certain land transactions. Now the Plaintiff prays, for (a) an order to be given to the Defendant Bank for accounts to be furnished in respect of all or any transactions carried out by Defendants in connection with the aforementioned agreement, (b) that judgment be entered for Plaintiff in respect of any amounts that may be found due to the Plaintiff under the above agreement, (c) a receiver be appointed to take over all the property, money, cash, liabilities etc. arising out of the above agreement.

Besides the Defendant there also appeared one Yehoshua Lichter as a third party and after the Court had decided to accept him he entered upon his defence.

During the trial on 27.2.38 the Defendant Bank submitted a statement of accounts with the Plaintiff and Mrs. Paley and Lichter showing that all three are indebted to the Bank in a sum of LP. 5376.328 mls. Without admitting that the Bank is bound by the agreement to pay to the Plaintiff any sum of money even if the Bank were indebted to the Plaintiff.

The Plaintiff put to the Defendant Bank interrogatories in order to clear up the accounts. The Defendant Bank refused to answer for the reason, *inter alia*, that after the accounts were produced, it was for the

Plaintiff to prove in respect of which items these accounts were bad and they say that he cannot force the Defendants to prove Plaintiff's claim.

In our opinion it is superfluous at this stage to go into all these details of the accounts for the following reasons: —

1) All three parties, *i. e.* the Plaintiff, the Defendant and the third party rely upon the aforementioned agreement.

2) Clause 13 of this agreement reads as follows: "Hamoshav (Paley, Lichter and the Plaintiff) agrees that after the Bank (Defendant) will pay what is due for the lease of the land, loans, expenses, commission and profits due to the Bank, the Bank will pay out the net profits to all persons forming the "Hamoshav" in equal shares. In the event of a dispute between the persons forming the "Hamoshav" as to the sum due to each one of them, then these persons shall submit this dispute to arbitration and the Bank will pay the sum due to each in accordance with the award of the arbitrators. But there will not be any obligation upon the Bank to pay out any sum whatsoever before there is brought to the Bank an award of arbitrators to which all parties have agreed or which has been confirmed by a competent Court".

3) It is clear from the statement of defence brought in by the third party Yehoshua Lichter, one of the three persons of the "Hamoshav", that there is such a dispute between him and the Plaintiff, Yehoshua Lichter denying that Plaintiff is entitled to any sum at all and as this dispute has never been brought before arbitrators and as at any rate no award as aforementioned has ever been produced to the Bank.

From all the foregoing it is clear that there exists a condition precedent to the payment of any sum by the Bank to the Plaintiff — and that so long as the dispute between the Plaintiff and the third party has not been settled by way of arbitration and an award has not been produced, the Bank is not obliged to pay any sum to the Plaintiff and as the Defendant Bank has submitted a statement of accounts and as the claim for money on the ground of the agreement between the parties is premature we accordingly decide that the claim must be, and is hereby dismissed.

The Plaintiff must pay the Defendants' costs and LP. 2 advocate's fees.

Delivered in open Court this 16th day of May, 1938, in the presence of Mr. Rabinovitch for Plaintiff and Mr. Fellman for Defendants and Mr. Iszajewicz for third party.

*President.*

*Judge.*

CIVIL APPEAL No. 106/38.

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 APPEAL OF:
Alexander Grinberg. APPELLANT.

v.

1. Y. Shafir,
2. Y. Klein,
3. A. Klein. RESPONDENTS.

*Action for eviction — No contract of lease between parties — Defendant occupying premises through former owner — New owner entitled to bring action for eviction.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 1578/38, dated 20.3.38, whereby an order for eviction was given with costs against Appellant (Defendant).

JUDGMENT:

This is an appeal from an order of the Magistrate ordering the Appellant to be evicted from a building situated at the Nabulsi orange grove.

The Appellant submitted that the Respondent's action for eviction is misconceived because there was no contract of lease between the parties. From the evidence it appears clear that the Appellant was allowed to occupy the place temporarily by the previous owner. There is no doubt that the previous owner could have brought this action and there is no reason why the new owner who steps into the shoes of the previous owner could not be the same.

The Appellant having no title deed to the building in question and having failed to prove any adverse possession on his part his appeal must fail.

The appeal is therefore dismissed.

Judgment delivered in open Court this 16th day of May, 1938, in presence of Mr. Segal for Respondents and in absence of Appellant duly served.

*President.*

*Judge.*

CIVIL APPEAL No. 50/38.

## 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 APPEAL OF:
Menashe Kleinmann. APPELLANT.

v.

Abraham Sharogorodsky. RESPONDENT.

*Sale of goods by sample — Purchaser dealing with goods as owner — Loss of right to claim return of money paid on the ground of goods being different to sample — Article 335 of the Mejelle.*

Appeal from the judgment of the Magistrate's Court, Petah-Tiqva, in file No. 49/38, dated 25.1.38, whereby the Appellant (Defendant) was adjudged to pay LP. 5.500 with interest and costs.

### JUDGMENT:

From the evidence heard by the Magistrate it appears that the Respondent purchased beans from the Appellant on the basis of a sample produced by the Appellant. Some days later the Appellant delivered the beans. The Respondent after making some inquiries as is customary in this trade, accepted the beans and sold them to different customers. One of them then brought back to him the goods purported to be sold on the ground that they were not clean and the Respondent accepted them. Now he claims back from the Appellant the price of the merchandise. The Magistrate gave judgment in his favour.

In our opinion the Magistrate was wrong in so doing for the following reasons: —

(a) It was not proved that the beans accepted by the Respondent were inferior to the sample or mixed with *turmus*.

(b) The Respondent lost his right to claim back the money paid to the Appellant according to Art. 335 of the *Mejelle* having dealt with the beans as an owner *i.e.* selling them to his customers.

For these reasons the appeal is allowed, the judgment appealed against set aside and the claim of the Plaintiff (Respondent) dismissed with costs and LP. 1 advocate's fees for the Appellant.

Judgment delivered in open Court this 17th day of May, 1938, in the presence of Mr. Ben Amitai for Appellant and Respondent in person.

*President.*

*Judge.*

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CIVIL APPEAL No. 67/38.

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 APPEAL OF:
Abraham Farber. APPELLANT.

v.

Import and Export Co. Ltd. RESPONDENT.

*Appeal from the decision of the Rent Tribunal — Rent Tribunal bound by the rules of evidence as laid down in the Evidence Ordinance — Rent Tribunal may decide on the validity of the appointment of the Rent Commissioner.*

Appeal from the judgment of the Municipal Court, Tel-Aviv, in file No. 110/37, dated 27.1.38, rent for premises fixed at LP. 11.500 per month.

JUDGMENT:

The Rent Tribunal has based its judgment only on the evidence of one witness *viz.*, the manager of the Landlord Company, contradicted by the clear wording of the written contract and by the tenant without even hearing the parties. This procedure is contrary to Section 6 of the Evidence Ordinance, which is binding on the Rent Tribunal in the same way as it as on all other Courts, and for this reason the judgment is set aside and the case remitted for hearing all legal evidence to be produced by both parties. When rehearing the case the Rent Tribunal could go into the question whether the Rent Commissioner when giving his decision on 3.8.37 had been duly appointed as Rent Commissioner or whether his appointment was later confirmed in any form, and

decide in accordance with the principles expressed in the judgment of this Court in Civil Appeal No. 292/37 of the 28.2.38.

Costs to follow the event.

Judgment delivered in open Court this 17th day of May, 1938, in presence of Mr. Wiesel for Appellant and Mr. Felman for Respondent.

*President.*

*Judge.*

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CIVIL APPEAL No. 73/38.

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 APPEAL OF:

Zeev Wolpert. APPELLANT.

v.

Mordechai Ben Ami. RESPONDENT.

*Action for relief between partners of an unregistered partnership — Default of registration does not render the partnership illegal — Agreements between partners of an unregistered partnership are valid and relief in respect of them may be sought in the Courts — Partnership Ordinance articles 6(5) and 6(6).*

Appeal from the judgment of the Magistrate, Tel-Aviv, dated 18.11.37, in file No. 13926/37, whereby the Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

Section 6(6) of the Partnership Ordinance states clearly "Notwithstanding anything in this Ordinance the failure to register a partnership shall not be taken into account in considering whether or not such partnership exists". The only consequence of non registration is the procedure provided for in section 6(5) of the Partnership Ordinance. A non registered partnership is therefore not illegal by the mere default of registration and the Magistrate was wrong in his opinion, that the agreements of partners of such a firm *inter se* are illegal and the partners are not entitled to relief against each other.

We therefore allow the appeal, set aside the Judgment and remit the

case to the Magistrate in order to give to the Plaintiff a full opportunity of proving his claim and to give a fresh judgment on the merits of the case.

Costs to follow the event.

Judgment delivered in open Court, this 17th day of May, 1938, in presence of Mr. Ziev for Appellant and Mr. Rudi for Respondent.

*President.*

*Judge.*

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CIVIL APPEAL No. 74/38.

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 APPEAL OF:
Nathan Matz. APPELLANT.

v.

Nahum Zuckerman. RESPONDENT.

*Appeal against the judgment of a Rent Tribunal — Rent Tribunal's duty to ascertain the validity of the appointment of the Rent Commissioner — Agreement between the landlord and tenant does not bar the tenant from applying to the Rent Commissioner to have his rent reduced.*

Appeal from the judgment of the Municipal Court Tel-Aviv, dated 27.1.38, in file No. 28/37, whereby the rent was fixed at LP. 15 per month as from April, 1938.

JUDGMENT:

This appeal against the Judgment of the Rent Tribunal raises two points of Law: —

(1) Whether the Rent Commissioner when giving his decision on the 13.4.37 was a duly appointed Rent Commissioner. This Court has not found in the file any facts, which could be used as a basis for fixing the fact as to when he was appointed; especially whether he was appointed during a time when there was no Landlords and Tenants Ordinance in force at all and whether his appointment was later confirmed or in any form ratified.

The file will therefore be remitted to the Rent Tribunal for them to ascertain these facts and to give a fresh Judgment in accordance with the principles expressed by this Court in its Judgment in Civil Appeal No. 292/37 from 28.2.38.

(2) As to the second question, whether a tenant who had made with the landlord a lease contract on the 29.10.36 for one year and had agreed to pay LP. 18 monthly rent, is entitled on the 12.2.1937 to apply to a Rent Commissioner to have his rent reduced or modified. This question must be answered in the affirmative. The Rent Tribunal was wrong in its opinion, that such a contract made between the parties when the Landlords and Tenants Ordinance was in force amounts to a waiver of the Tenant's rights given to him by this Ordinance. This opinion contradicts the principle of the Landlords and Tenants Ordinance, which gives to the Tenant some rights "notwithstanding any agreement to the contrary". The Rent Commisioner was therefore right in his decision as to the time of reduction of the rent. That moment is the day when the tenant applied to the Rent Commissioner *i.e.* 12.2.37.

The Judgment of the Rent Tribunal is therefore set aside and the case remitted to the Rent Tribunal for completion and issuing a fresh Judgment on the aforementioned lines.

Costs to follow the event.

Judgment delivered in open Court this 17th day of May, 1938, in absence of both parties duly served.

*President.*
*Judge.*

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CIVIL APPEAL No. 99/38.

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

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

IN THE APPEAL OF:
Meir Grill.
APPELLANT.

v.

B. Zagher.
RESPONDENT.

*Claim for remuneration for work done — Contract signed by one party*

*only not binding. — Privity of parties — Quantum Meruit. Articles 563-564 of the Mejelle.*

Appeal from the judgment of the Magistrate, Tel-Aviv, in file No. 1729/37, dated 15.3.38, whereby the Appellant (Defendant) was adjudged to pay LP. 34.— with interest, costs and avocate's fees.

JUDGMENT:

The Magistrate based his judgment on the contract between the Plaintiff (Respondent) and the Defendant (Appellant) as to the sum of LP. 10 in connection with the building of 2 stores and on the oral evidence of two witnesses as to the obligation of the Defendant to pay to the Plaintiff LP. 25.— for the supervision of the erection of the third storey. In our opinion the so called contract is not on a sound basis. It appears to be a letter addressed to two persons "the husband and wife Grill" (in German *Eheleute Grill*) but signed only by one of the 2 persons. According to the opinion expressed in the judgments of the Supreme Court C.A. 29/33 and 176/34 such a contract is not a complete one and does not bind the parties. Neither is the evidence of two witnesses sufficient to establish the prolongation of this contract for the supervision of the building of the third floor because the contract itself is invalid and with all leniency in the interpretation of Art. 80 of the Civil Procedure Code such a contract between an architect and an owner of a house with regard to building work is one which has rather to be proved by written evidence or by the evidence of the parties, as being customarily always reduced to writing, rather than by witnesses.

What really was proved in this case is (a) that the Plaintiff dealt only with the Defendant and not with his wife or any other member of his family and that therefore there is privity between the parties, (b) that the Plaintiff performed some professional work at the request of the Defendant in the building of the three storied house, (c) that he is entitled to remuneration for this work in accordance with Articles 563 and 564 of the *Mejelle* on the basis of *quantum meruit*.

The Magistrate ought therefore to have appointed experts in order to assess the sum due to the Plaintiff from the Defendant.

The appeal is allowed, the judgment set aside and the case remitted to the Magistrate for completion on the aforementioned lines, and thereafter to deliver a fresh judgment.

Costs to follow the event.

Judgment delivered in open Court, this 17th day of May, 1938, in presence of Mr. Fleischer for Appellant and in absence of Respondent duly notified.

*President.*

*Judge.*

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CRIMINAL APPEAL No. 16/38.

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 APPEAL OF:

Alexander Zauber. APPELLANT.

v.

Attorney-General. RESPONDENT.

*Conviction under Section 126 of the Criminal Code Ordinance — Bona fide report of judicial proceedings — Newspaper report intended to direct attention of readers to behaviour of persons employed in public service not actionable.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 864/38 dated 4.2.38, in which the Accused was convicted to pay a fine of LP.4 or 10 days' imprisonment.

JUDGMENT:

In our view it is not possible to say that the newspaper report was not a *bona fide* report of judicial proceedings. We do not think that there was anything in the report which was calculated to influence the mind of any Judge or Magistrate within the meaning of Section 126 Criminal Code Ordinance. The report may have been meant to direct the attention of readers to certain matters connected with the behaviour or views of certain persons employed in a hospital but that was all. We think that the conviction cannot stand. We accordingly quash the conviction and order the fine, if paid, to be repaid to the Appellant.

Judgment delivered in open Court at Tel-Aviv, this 17th day of May, 1938, in presence of Appellant.

*President.*

*Judge.*

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CIVIL APPEAL No. 95/38.

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 APPEAL OF:

Abraham Mankes. — APPELLANT.

v.

1. Shmuel Begleibter.
2. Ishmain Nada. — RESPONDENTS.

*Claim for wages — Subsequent ratification of advocate's former authorisation to sign on behalf of plaintiff is valid — Article 1453 of the Mejelle — Admission of oral evidence in support of claim exceeding LP. 10.—*

Appeal from the judgment of the Magistrate's Court, Petah-Tiqva, in file No. 146/38, dated 1.3.38, whereby the Appellant (Defendant) was adjudged to pay LP. 30.770 mls with interest, costs and advosate's fees.

JUDGMENT:

This is an appeal from a judgment whereby the Magistrate ordered the Appellant to pay to the Respondents the sum of LP. 30.770 mls.

The Appellant argued that the Respondents' statement of claim before the Magistrate was signed by an advocate who had not, at that time, a power of attorney and consequently the action should have been dismissed without entering on its merits.

We agree with the Magistrate that the presence of the Respondent in person at the hearing of the case confirming what the advocate did on his behalf and signing a formal power of attorney was sufficient to enable him to go on with the case.

Then Article 1453 of the *Mejelle* is clear on this subject to the effect that subsequent ratification has the same effect as a previous authorisation.

The Appellant further submitted that the Magistrate was wrong in accepting oral evidence in support of a claim exceeding LP. 10.

We held that inasmuch as the claim was for wages, the Magistrate was right in accepting oral evidence because it is notorious that labourers

in this country do not generally enter into written contracts with their employers.

As to the other grounds of appeal, they cannot be taken into consideration because they are in contradiction to findings of fact. The Magistrate after hearing witnesses found as a fact that the Respondent, as the head of a group of labourers, entered into an oral agreement with the Appellant for the packing of a certain quantity of oranges.

We do not propose to interfere with this finding of fact.

The appeal is therefore dismissed with costs.

Judgment delivered in open Court this 18th day of May, 1938, in absence of parties duly notified.

*President.*
*Judge.*

*For Appellant:* Shaony. *For Respondents:* Ben-Amitai.

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CRIMINAL 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 Ph. Korngrun.

IN THE APPEAL OF:

1. Yechiel Erlich,
2. Feiga Erlich. APPELLANTS.

v.

Attorney-General. RESPONDENT.

*Denial of knowledge by accused does not amount to a plea of guilty — In absence of unequivocal plea of guilty the prosecution must prove their case.*

Appeal from the judgment of the Magistrate, Tel-Aviv, dated 2.2.38, in file No. 450/38, whereby the accused was sentenced to pay a fine of LP. 15.— and demolition of certain buildings.

JUDGMENT:

The record of the proceedings on 2.2.38 does not contain a clear statement of both accused amitting unequivocally that they pleaded guilty. A statement of one accused: "I don't know anything my husband is the man who built the house it is true that an order was given to pull down the building" does not amount to a plea of guilty. The public prosecutor had to prove his case. And as no witnesses were heard at all,

we allow the appeal set aside the judgment appealed against and remit the case to the Magistrate for retrial in accordance with the proper procedure.

Judgment delivered in open Court, this 21st day of June, 1938, in the presence of Mr. Ben Dov for Respondent and in presence of both Appellants in person.

*President.*
*Judge.*

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CRIMINAL APPEAL No. 18/38.

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

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

IN THE APPEAL OF:
A. Friedman. APPELLANT.

v.

Leon Hanzel. RESPONDENT.

*Charge under section 326 of the Criminal Code Ordinance — Private prosecution after refusal of Police to prosecute — Section 10 of the Magistrates' Courts Jurisdiction Ordinance, 1935 — Fresh complaint must be laid before the Magistrate after refusal of the Police — Previous complaint alone insufficient to constitute charge.*

Appeal from the judgment of the Magistrate, Tel-Aviv, dated 3.3.38, in file No. 437/38, whereby the Accused was sentenced to pay a fine of LP. 5 or 7 days' imprisonment.

JUDGMENT:

1. The Charge was brought by a letter dated 15.12.37 addressed directly to the Magistrate.

2. On the 16.12.37 the Magistrate sent this letter signed by the Complainant to the Assistant Superintendent of Police for his remarks. remarks.

3. On 17.12.37 the Police refused to take any steps in this case according to section 10 of the Magistrates' Courts Jurisdiction Ordinance, 1935.

4. No application in accordance with Sec. 10 of the Magistrates' Courts

Jurisdiction Ordinance which states "The complainant may upon such refusal lay the complaint before the Magistrate", is to be found in the file. The letter dated 15.12.37 cannot be regarded as such a charge *so that there was no charge at all before the Magistrate.*

5. The Magistrate did not hear the Accused in spite of the fact that the advocate for the Accused applied to have him put in the witness box (page 2, 3 of the statement of the appeal).

6. In our opinion there was no case at all before the Magistrate. Not one witness for the prosecution proved that the Accused had "wilfully and unlawfully" destroyed the property of the Complainant, as section 326 of the C.C.O. requires. The Accused is an architect who ordered the destruction of a fence under an honest and reasonable, although perhaps mistaken, belief that the fence belonged to the owner of the plot upon which he was just building a house.

Therefore the judgment of the Magistrate is set aside, the conviction quashed and the Accused discharged. The fine, if any paid, to be refunded.

Judgment delivered in open Court this 21st day of June, 1938, in presence of Mr. Harari for Appellant and in absence of Respondent.

*President.*

*Judge.*

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CRIMINAL APPEAL No. 34/38.

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

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

IN THE APPEAL OF:

Attorney-General. — APPELLANT.

v.

Ruth Levin,
Richard Prager,
Fritz Goldsmith. — RESPONDENTS.

*Complaint laid before the Magistrate — Section 10 of the Magistrates' Courts Jurisdiction Ordinance, 1935 — No charge unless fresh complaint laid before the Magistrate.*

Appeal from the judgment of the Magistrate, Tel-Aviv, dated 6.4.38, in file No. 2159/38, whereby the Accused was discharged.

JUDGMENT:

In our view Section 10 Magistrates' Courts Jurisdiction Ordinance, 1935, requires (in the event of a refusal by the Police to prosecute) a complaint to be laid before the Magistrate (line 6 of Section 10).

We cannot find that there was any fresh complaint laid as required by line 6 of Section 10. Such a complaint is the whole basis of the competency of the Magistrate.

We accordingly dismiss the appeal.

Judgment delivered in open Court this 21st day of June, 1938, in presence of Inspector Shamai for Appellant and Mr. Gershman for 2nd and 3rd Respondents.

*President.*
*Judge.*

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CIVIL APPEAL No. 179/38.

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 APPEAL OF:
The Palestine Import and Export Co. Ltd. APPELLANT.

v.

Abraham Farber. RESPONDENT.

*Action for eviction on the ground of non-payment of rent — Plea of tender of assessed rent by payment into Bank — To constitute real tender payments must be regular and unconditional.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 2846/38, dated 1.6.38, whereby the Appellant's (Plaintiff) claim for eviction was dismissed wih costs.

JUDGMENT:

This is an appeal from the judgment of a Magistrate whereby the Appellant's claim for eviction was dismissed.

The action for eviction was based on the ground that the Respondent had failed to pay the contracted for and legal rent commencing with 1st *Elul* 1937.

The Respondent argued that he had paid the rent at the Mizrahi Bank, not the rent agreed upon but the rent as assessed by the Commissioner for Rent.

On behalf of the Appellant it was argued: that the Rent Commissioner was not duly appointed when he gave his decision and alternatively that the Respondent did not tender payment of the rent inasmuch as he put the money in the bank for a limited period only.

In our view, we do not need to consider the 1st point of appeal, because it is not our duty now to fix the amount of rent due by the Respondent. But, in our opinion the Respondent failed to make any real tender of the rent due by him inasmuch as he did not pay to the bank unconditionally and every month the rent, if not the rent agreed upon, at least the rent fixed by the Commissioner of Rent.

The appeal is therefore allowed and judgment entered for the eviction of the Respondent from the 2 shops belonging to Appellant with costs and LP. 2 advocate's fees.

Judgment delivered in presence of Mr. Felman for Appellant and Mr. Wiezel for Respondent, this 2nd day of July, 1938.

*President.*
*Judge.*

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CIVIL APPEAL No. 100/38.

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 APPEAL OF:
Ali Mohammed Mustafa. — APPELLANT.

v.

Shmuel M. Levy. — RESPONDENT.

*Concurrent jurisdiction of Magistrate's Courts of Jaffa and Tel-Aviv — Administration of oath.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file 18264/37, dated 14.3.38, whereby the Appellant (Defendant) was adjudged to pay LP. 3.065 with interest, costs and advocate's fees.

JUDGMENT:

This appeal is based on two grounds: —

(a) The Magistrate's Court of Tel-Aviv has no Jurisdiction to deal with the case inasmuch as the Appellant is an inhabitant of Jaffa.

(b) The oath as framed by the Magistrate could not be administered to this Appellant inasmuch as the Appellant is not responsible for his brother's doings.

In our opinion the Magistrate's Court in Tel-Aviv has a concurrent Jurisdiction with the Jaffa Magistrate's Court.

As to the text of the oath, we are of opinion that the Respondent was entitled to administer the oath to the Appellant to the effect that he did not receive the goods either directly or indirectly through Appellant's brother. And as the Appellant refused to take this oath, the Magistrate was right in entering Judgment for Respondent.

The appeal is therefore dismissed.

Judgment delivered in open Court, this 18th day of July, 1938.

*President.*

*Judge.*

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LAND CASE No. 4/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

Haim Maklev. — PLAINTIFF.

v.

David Hoffman. — DEFENDANT.

*Action for Rectification of Register under section 66 of the Land Settlement Ordinance — Rights of third party (Mortgagee) must be upheld, but he cannot oppose application if his rights are not prejudiced — Rectification may be ordered in spite of lapse of time.*

JUDGMENT:

The facts of this case are as follows: Plaintiff was registered as the owner of certain land in Petah-Tiqva of a total area of 2200 square meters known at the Land Settlement as Block 6392 Parcels 24 and 32.

On 16.10.30 Plaintiff transferred to one Israel Zoar 893 square meters

of the said land; the said registration is shown in the Land Registry Extracts Exhibits "A" & "B", and on the map Exhibit "E".

On 29.7.31 Zoar transferred the same parcel to David Hoffman, the present Defendant, the area of the parcel being still 893 square meters (See Exhibit "A").

After completion of Land Settlement operation in this area it was found that the Defendant was the registered owner of 1.095 square meters instead of 893 square meters and the Plaintiff was the registered owner of 1110 square meters instead of 1307 square meters, that is to say that the Plaintiff's area is short by 192 square meters and the Defendant's area is in excess by 202 square meters.

On behalf of the Plaintiff it was contended that the Land Settlement registrations as shown in Exhibit "C" and "D" are obviously incorrect inasmuch as both parties' claim before the Land Settlement Officer were for the same areas as is shown in their Kushans Exhibit "A" and "B". There was no dispute between the parties and the respective areas of the parties as shown by the Schedule of Rights are incomprehensible. The Plaintiff, relying on Section 66 of the Land Settlement Ordinance, applies for the rectification of the Land Register in this respect and for the order to give each party the correct area.

On behalf of the Defendant it was argued that Section 66 of the Land Settlement Ordinance does not apply to this case and that Plaintiff's claim cannot be entertained so long a distance of time after the Schedule of Rights in respect of the area in question had been published.

During the hearing of the case Mr. Hirsch Weinberg intervened in these proceedings as a third party, being a Mortgagee of the Defendant's property.

On behalf of the third party it is argued that inasmuch as a mortgage is registered in his name on the land in question no rectification of the register can be ordered in accordance with the last paragraph of Section 66 of the Land Settlement of Title Ordinance.

After hearing evidence of the Plaintiff only, the Defendant having limited his defence to legal grounds, we find that the registration as shown by Exhibit "C" and "D" could not be explained except by reason of a mistake on the part of the surveyor. It is clear from the evidence of the witness, from the register and from the map. Exhibit "E", that the areas belonging to the parties shortly before the Land Settlement operation are for the Plaintiff 1307 square meters and for the Defendant 893 square meters. There is no reason and the Defendant

did not even try to find out why the areas should be so different after settlement. We are satisfied that the respective rights of the parties in this case were incorrectly set out in the register, within the meaning of Section 66 of the Land Settlement of Title Ordinance.

As to the claim of the Third Party, while we agree that this right secured by the mortgage cannot be prejudiced by the Plaintiff's action we hold however that he cannot oppose the rectification of the register so long as this is done without prejudice to his rights.

We therefore order the rectification of the Land Register in the following manner:

Parcel 24 of Block 6382 Petah-Tiqva 1307 square meters instead of 1115 square meters.

Parcel 32, 903 square meters instead of 1095 square meters.

This rectification is to be made after deposit by the Plaintiff in the Land Registry in favour of the mortgagee of a sum of LP. 200.—

Defendant to pay costs and LP. 5.— advocate's fees.

Judgment delivered in presence of Mr. Kadoury for Defendant, this 29th day of July, 1938.

*President.*

*Judge.*

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CIVIL APPEAL No. 182/38.

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

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

IN THE APPEAL OF:
Adir Co. Ltd. — APPELLANT.

v.

1. Gabriel Roos,
2. David Becker. — RESPONDENTS.

*Sale of goods — Refusal of purchaser to accept the goods sold — Vendor's right to damages — Measure of damages — Market price or actual price received.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 26.5.38, whereby the Appellant (Defendant) was adjudged to pay LP. 48.281 with costs and advocate's fees, file No. 17521/37.

## JUDGMENT:

The Magistrate was right in his decision.

(1) As to the privity between the parties,

(2) as to the want of any reason on the part of the Appellant for not accepting the goods sold, and

(3) as to the liability of the Appellant to pay damages.

The only point on which we disagree with the Magistrate is as to the sum he awarded as damages. The Magistrate accepted as the measure of damages the difference between the price fixed in the contract and the price at which the tea was sold. In our opinion the damages actually are represented by the difference between the price fixed in the contract and the *market price* of tea on the day when the tea was sold. This market price was not ascertained and it was not proved that the price paid by Mr. Rakower was really the market price. The Plaintiff has to prove this deciding fact and judgment has to be given after the Plaintiff has proved it by witnesses or experts.

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

Costs to follow the event.

Judgment delivered in open Court this 20th day of September, 1938, in presence of Mr. Kahana for the Appellant and in absence of Respondent duly served.

*Judge.*

*President.*

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CIVIL APPEAL No. 185/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV
AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Asher and Ella Itingon. APPELLANTS.

v.

Nachum Katz. RESPONDENT.

*Claim for arrears of rent — In absence of clear intention "Month" means a Gregorian month — Only party to the contract bound by it.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 2.6.38, in file No. 2119/38, whereby Appellants (Defendants) were adjudged to pay LP. 23.— with interest and costs.

JUDGMENT:

In our opinion the Magistrate has made certain mistakes. The claim contained two items; the first of which is LP. 9.— rent for one month not paid in the year 1936/37 by the lessees. As to this claim the Defendants pleaded that they paid the rent according to the Gregorian calendar, *i. e.* civil calendar in this country, whilst the Plaintiff maintains that the parties intended to have the rent paid according to Jewish (lunar) months. It was not proved what the real intention of the parties was. The fact that in a previous contract the lease was mentioned as made "from *Muharem* 1934 till *Muharem* 1935", does not of itself prove that the parties had Jewish months in mind. *Muharem* is not a Jewish holiday or the name of a Jewish month. In fact there was no contract between the parties in the year 1936/37, and there remains doubt as to the intention of the parties. In this case we must rely upon the Interpretation Ordinance (Laws of Palestine Chapter 69 page 773) which states expressly "month means a calendar month according to the Gregorian calendar". As the Defendants proved that they used to pay according to the civil calendar and as the lessor never protested against it he cannot come years afterwards and make an account that according to Jewish lunar months the Defendant still owes him one month's rent.

The second item of the claim is LP. 15.— for two months rent not paid in the year 1937/38. Here the Magistrate was right in disregarding all defences brought by the Defendant Ella Itingon and in ordering her to pay this sum. What is difficult to understand is why he also ordered the Defendant Asher Itingon to pay. The contract of lease was signed only by the lessor and Ella Itingon. All the letters used by the Magistrate to prove that Asher Itingon is also a party only prove that Asher Itingon refused to sign the contract because some condition asked for by him was not agreed to by the lessor. These letters can be regarded only as being in the nature of negotiations not completed by a contract signed also by Asher Itingon.

We therefore allow the appeal, set aside the judgment of the Magistrate and replace it by an order that the Defendant Ella Itingon shall pay to the Plaintiff the sum of LP. 15.— being the rent for two months in the year 1937/38 together with costs of the claim before this Court and LP. 2.— advocate's fees and dismiss the claim

against Ella Itingon for LP. 9.— and against Asher Itingon for the whole sum claimed.

Judgment delivered in open Court this 20th day of September, 1938, in the presence of Mr. Abrahami for Respondent and in absence of Appellant duly served.

*President.*

*Judge.*

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CIVIL APPEAL No. 193/38.

## IN THE DISTRICT COURT OF JAFFA SITTING IN TEL-AVIV AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

1. Feierstein and Serper,
2. Yoseph Rosenberg. — APPELLANTS.

v.

Lloyd Keramische Industrie A.G. — RESPONDENT.

*Action on a bill given in consideration of goods — Immediate parties — Right of defence to prove defect of long standing in the goods — Right of plaintiff to prove loss of right of option — Articles 337-340 and 344 of the Mejelle.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 12.6.38, in Civil Case file No. 305/37, whereby the Appellants (Defendants) were adjudged to pay LP. 46.482 with interest and costs.

### JUDGMENT:

The Defendants (Appellants) and the Respondents are immediate parties to a bill given by the Appellants to the Respondents in consideration of the price of goods sold. This being so we cannot understand why the Defendants are not to be allowed to assert their defence against the bill on the ground that a defect of long standing existed in the bricks sold, when they were still in the possession of the Respondent, only on the ground that they accepted the Bill of Lading without having seen the goods themselves. The Magistrate ought to have heard the evidence of the Appellant as to the existence of such a defect (Art. 337, 338, 339, 340 of the *Mejelle*) and the evidence of the Respondents as

to the fact that the Appellants had lost their right of option on the ground of defect in accordance with Art. 344 of the *Mejelle*.

We therefore allow the appeal, set aside the judgment and remit the case to the Magistrate for rehearing on the aforementioned lines and issuing of a fresh judgment.

Costs to follow the event.

Judgment delivered in open Court this 20th day of September, 1938, in absence of both parties duly served.

*For Appellants:* Hamburger. *For Respondent:* Jehuda Frenkel.

*President.*

*Judge.*

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CIVIL APPEAL No. 208/38.

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

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

IN THE APPEAL OF:
Habank Haklali Ltd. APPELLANT.

v.

M. Salomon. DEFENDANT.

*Appeal against the dismissal of an opposition — Duty of opposing party to prove his allegations — Duty of Magistrate, in absence of proof, to give the other party the decisive oath.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 28.6.38, in Civil Case file No. 688/38, whereby the Opposition was dismissed with costs.

### JUDGMENT:

It clearly appears that the opposing party had to prove his allegations or if he could not prove them by the hearing of the parties the Magistrate should have given to the Defendant (Plaintiff in the original claim), the decisive oath under Art. 1818 of the *Mejelle* as the Opponent admits that he has no other proofs.

The case is therefore remitted to the Magistrate for him to administer the decisive oath to the Defendant and to give a fresh judgment dependent on the results of Defendant's taking or refusing the oath.

Costs to follow the event.

Judgment delivered in open Court this 20th day of September, 1938, in presence of Mr. Zakheim for Respondent and in absence of Appellant duly served.

*President.*

*Judge.*

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CIVIL APPEAL No. 211/38.

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 APPEAL OF:

Abraham Lipshitz. APPELLANT.

v.

Ahuva Kriger. RESPONDENT.

*Action for the confirmation of an award — Duty of the Magistrate to ascertain the subject matter of the dispute before entering into the merits of the case — Judgment in a Criminal Case is not a chose jugée as regards civil liability for damages — Duty of the arbitrator to hear all the evidence tendered.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, file No. 1422/38, dated 26.6.38, whereby the arbitration award was confirmed with costs.

JUDGMENT:

It is not clear whether the Magistrate had jurisdiction to confirm the award or whether the application has to be brought before the District Court. According to Section 2 of the Arbitration (Amendment) Ordinance 1936 this jurisdiction depends on the claim which is the subject of a submission. In the case before us the sum that was claimed before the Arbitrator was not fixed either by documentary evidence, as for example by the record of the arbitration proceedings, or by the evidence of the arbitrator. The arbitrator himself deposed as a witness that the Plaintiff before him claimed as damages any sum which might be fixed by an expert. The expert did not fix a sum but admitted the possibility of a sum between LP. 80.— and LP. 184.—

being claimed. It was for the arbitrator to ascertain beyond any doubt what sum was claimed by the Plaintiff, but the arbitrator omitted to do so.

As regards the civil liability of the Defendant for the accident, a judgment of a criminal Court in a criminal case is not *chose jugée*, and the arbitrator was not right in refusing to hear any evidence in connection with it, and he was obliged to hear all evidence tendered to him by both parties as to liability as well as to the amount of damages and after hearing all the evidence he should award a sum, which he thought just and fit.

We therefore allow the appeal, set aside the judgment of the Magistrate and remit the case to him for completion on the aforementioned lines.

Costs to follow the event.

Judgment delivered in open Court, this 20th day of September, 1938, in presence of Mr. Zakheim for the Appellant and Mr. Khadouri for Respondent.

*President.*

*Judge.*

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CIVIL APPEAL No. 202/38.

IN THE LAND COURT AT TEL-AVIV, SITTING AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

1. Sarah Karmatz,
2. Reuben Karmatz, represented by Dr. Philip Joseph, Barrister-at-Law, and Messrs. Shimon Gratch and Shlomo Elkayam, Advocates, Tel-Aviv. APPELLANTS.

v.

Bruno Seelig, represented by Max D. Friedman, Barrister and Solicitor, Advocate, Tel-Aviv. RESPONDENT.

*Action against tenant by a purchaser from the lessor — Article 590 of the Mejelle — Defences against the lessor also available against purchaser — Privity of parties.*

Appeal from the Judgment of the Magistrate's Court at Tel-Aviv (File No. 3021/38) dated the 16th day of June, 1938.

## JUDGMENT:

The law, upon which this case should be decided is clearly expressed in Article 590 of the *Mejelle,* as follows: "If the person giving the thing on hire sells the thing hired without the permission of the person taking the thing on hire, the sale is not executory as regards the vendor and the purchaser, and on the expiration of the period of hire, the sale is irrevocable..." This means, in our case, that the Respondent Bruno Seelig, who purchased the premises from Prais, the lessor, could only recover possession of these premises let out to the Appellants, when the contract of lease made between Prais and the Appellants did not exist or did not exist any longer at the date of filing the case. The Magistrate found, on a consideration of all the evidence produced, oral and documentary, that the aforementioned contract of lease did not exist any longer at the time when the Respondent purchased the premises from the lessor Prais. This finding of the Magistrate settles the question essential for decision of this case.

It is true that the Appellants were entitled to assert against the Plaintiff all defences that they had against Prais, their lessor, not because the Plaintiff stands in the shoes of Prais but for the reasons given in Article 590 of the *Mejelle,* as aforementioned. The only point of some importance was that Prais agreed to deduct from the rent LP. 500.— for a musical instrument not delivered by him contrary to his obligation to do so. The Magistrate gave the Appellants a chance to prove this point (page 6 of the record) but the Appellants did not succeed in proving it. In our opinion the Appellants may sue for damages suffered by them by reason of the non-delivery of the said instrument or make any other counterclaim against Prais, but there is not sufficient reason to interfere with the judgment appealed against.

The Appellants are parties to the contract of lease made between them and Prais, therefore, there is privity in this case. The question of other sub-tenants may arise at a later stage, *i.e.* in execution proceedings in accordance with Article 43 of the Execution Law now in force.

We therefore dismiss the appeal and confirm the judgment appealed against with costs and LP. 5.— for the Respondent.

Delivered this 20th day of September, 1938, in presence of Mr. Friedman for Respondent and in the absence of Appellants duly served.

*President.*

*Judge.*

CIVIL APPEAL No. 134/38.

## IN THE DISTRICT COURT OF JAFFA SITTING IN TEL-AVIV AS A COURT OF APPEAL.

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

IN THE APPEAL OF:
Elchanan and Malta Berner. APPELLANTS.

v.

Herman Kenigsberg. RESPONDENT.

*Contract of lease at a fixed monthly rent — Prolongation of term of lease by consent of both parties — Fixed rent must be paid during the prolonged period — Articles 437-438 and 462 of the Mejelle.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 14.4.38, in Civil Case No. 452/38, whereby the Respondent (Defendant) was adjudged to pay LP.10.240 mls with interest, costs and Advocate's fees.

JUDGMENT:

A contract of lease between the parties fixing the monthly rent at a sum of LP. 6. terminated on the 1.11.36. The Lessor then agreed that the Lessee should remain in the house till 10.7.37. No question of rent was then discussed between the parties. The premises were vacated by the Lessee on 4.7.38. The question decided by the Magistrate and subsequently brought before this Court is"what is the monthly rent to be paid for the period between 1.11.36 and the 4.7.37? The sum fixed in the contract LP. 6 or the sum of LP. 4.800 mls being the estimated rent?" The Magistrate decided in favour of an estimated rent to be paid. In our opinion the Magistrate erred. The criterion in these cases is, whether both parties agreed to a prolongation of the period of the lease (expressly or by their conduct) or whether the Lessee remains in the premises rented in spite of opposition on the part of the Lessor. In the first case Articles 437 and 438 of the *Mejelle* have to be applied and the Lessee pays the rent as fixed in the contract. Only in the second case, when the Lessee remains in the house against the will of the Lessor, there is a voidable contract between them within the meaning of Art. 462 of the *Mejelle* and an estimated rent has to be paid.

As in the case before us the Lessor agreed to let the Lessee remain in the house, the latter had to be ordered to pay the rent fixed by the

contract. We therefore allow the appeal and alter the judgment of the Magistrate in the direction that the Defendant shall pay to the Plaintiff LP. 16.400 mls, the costs of the hearing here and in the Court below and LP. 2 advocate's fees.

Judgment delivered in open Court this 29th day of September, 1938, in presence of Mr. Lebel for Appellant and Mr. Zussman for Respondent.

*President.*
*Judge.*

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CIVIL CASE No. 234/38.

IN THE DISTRICT COURT OF JAFFA SITTING IN TEL-AVIV

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

IN THE CASE OF:

1. Aaron Rubinstein,
2. Moshe Cohen,
3. Itzhak Kourland,
4. Joseph Katzenelson. — PLAINTIFFS.

v.

The Ozar Mifalei Yam, Beeravon Mugbal,
The Marine Trust Ltd. — DEFENDANTS.

*Application to strike out a petition for the winding up of a company — Advocate's General Power of Attorney must be notarially attested — Special Power of Attorney must state the remedy sought — Jurisdiction of Court to order Stay of Proceedings where the petition was not a bona fide one — In re a Company, 2 Chancery 1894 page 349 and In re Gold Hill Mines, 23 Chancery at page 210 referred to and followed.*

JUDGMENT:

An application has been made to this Court by Dr. Dunkelblum, advocate on behalf of the Respondent Company, asking that this Petition for winding up should be struck out on various grounds. There are several grounds on which Dr. Dunkelblum relies. One of the grounds is that although the Power of Attorney given by Plaintiffs to Mr. Seligman, advocate, purports to be a General Power of Attorney, yet it is

not attested before a Notary Public as is required by Section 20 Advocates Ordinance (Laws of Palestine Revised Edition, Vol. I Page 11); alternatively, it is argued that, if Mr. Seligman relies on the Power of Attorney being one which relates to a specific suit, there is no mention in it of an application to the Court for a Winding Up Order. Another point taken by Dr. Dunkelblum is that the Petition for winding up was not brought with a *bona fide* intention *viz.* for the purpose of winding up, and is an abuse of legal process. As to the first point, it is clear from Section 20 of the Advocates Ordinance that a General Power of Attorney must be attested by a Notary Public. This was not done. As to the argument of Mr. Seligman that the power relates to a specific suit, it cannot be such because there is no mention of an application for a winding up Order, and therefore Mr. Seligman's Petition cannot be entertained by any Court for lack of power. We think that, on this ground alone, the Petition for Winding up should be dismissed; but, in our view, Dr. Dunkelblum has also succeeded in his second point, *i. e.* as to *bona fide* intention. Mr. Seligman admitted at the Bar, that his Petition for winding up had been filed because at any rate among other reasons he had been advised that he was unlikely to succeed in obtaining an order for an injunction unless he had first filed a Petition for winding up.

There is another matter which corroborates this, *viz.* the fact that the Applicants did not mention in the Power of Attorney that they empowered their advocate to ask for winding up, and also that one at least of the original applicants, Mr. Kahana, withdrew from the case (see his application of 21st June, 1938), when he got to know that his advocate had taken winding up proceedings. He says in his letter of withdrawal of 21st June, 1938 "I never intended that a Petition to wind up the Respondent Company be brought in my name or on my behalf. At the time when I signed the Power of Attorney empowering Mr. Seligman to act on my behalf, it was intimated to me that, such Power of Attorney was necessary in order to institute proceedings for restraining the Respondent Company from holding the above mentioned general meeting and from conducting the poll".

We are satisfied that the Petition for winding up is not a *bona fide* one and is an abuse of legal process. The sole question for us to decide now is whether such an application as the present one of Mr. Dunkelblum, *viz.* to strike out the Petition for winding up, can be entertained under the Law of Palestine.

One reported case which is very much in point is reported at 2 Chancery 1894 — page 349. *In re* a Company, page 351 Vaughan Williams J. in that case said:

> "In my judgment, if I am satisfied that a petition is not presented in good faith and for the legitimate purpose of obtaining a winding up order, but for other purposes, such as putting pressure on the Company, I ought to stop it if its continuance is likely to cause damage to the Company. I think those reasons apply in the present case, and that the injunction ought to be granted. I make the order asked for, restraining the advertisement of the petition, and staying all further proceedings upon it, and the Petitioner must pay the Company's costs".

There is another case in point *viz. In re* Suburban Hotel Company, Vol. II Chancery Appeal Cases 1867 page 737. The head note reads as follows, *viz.*: —

"The 5th head of section 79 of the Companies Act, 1862, is restricted to matters *ejusdem generis* with the four previous heads, and does not authorise the Court to wind up a solvent Company, against the wish of the majority of shareholders, because the business has been carried on at a loss, and appears likely to continue a losing concern.

*Semble,* nevertheless, that proof of impossibility of carrying on the contemplated business would justify a winding up order, even in the absence of insolvency."

We have also been referred to another case *viz. In re* Gold Hill Mines Vol. 23 Chancery, page 210 in which it was held that:

"...Where a petition to wind up is improperly filed the Court has jurisdiction on motion to stay all proceedings under it, or to dismiss it; that the present petition was an abuse of the process of the Court, being brought to compel payment of a small debt which was *bona fide* disputed, and being unsupported by any evidence that the company was insolvent; that the petition therefore must be dismissed with costs, and the £ 110 returned to the Company."

The above cases specifically refer, perhaps, to applications for injunctions but what, in effect, Dr. Dunkelblum asks for (although he uses the words "striking-out") is an order for stay of proceedings in the Petition for Winding Up.

We think that the present case is exactly on all fours with the Gold Hill Mines Case and the case reported at 2 Chancery 1894 page 349. In these circumstances we find it unnecessary to deal with the other points raised by Dr. Dunkelblum in his application. Being satisfied that Mr. Seligman was not empowered to bring a Petition for winding-up, and being also satisfied that he did bring the Petition in order to get an injunction preventing the holding of a meeting and not for the legitimate purpose of obtaining a winding up order, we order that the Petitioners be restrained from advertising the Petition for winding up

and we order a stay of all further proceedings upon the Petition. The Petitioners must pay the Respondent's costs and LP. 5 advocate's fees.

Delivered at Tel-Aviv in open Court this 19.10.38 in presence of Dr. Dunkelblum, advocate for Ozar Mifalei Yam and Mr. Apelbom for Petitioners for the Winding-Up.

*President.*

*Judge.*

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CIVIL APPEAL No. 207/38.

IN THE DISTRICT COURT OF JAFFA SITTING IN TEL-AVIV AS A COURT OF APPEAL.

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

IN THE APPEAL OF:
Barchat Bros. & M. Wacht. — APPELLANTS.

v.

Yaakov Nissim Mizrachi,
Nissim J. Tussiya. — RESPONDENTS.

*Principal and agent — Name of principal disclosed — Principal and agent jointly and severally liable — Mejelle Articles 1456, 1461, 1452 and 1478.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 22.6.38, in file No. 1663/38, whereby the Appellants' (Plaintiffs') claim for LP. 40.030 was dismissed with costs.

JUDGMENT:

The Magistrate was wrong in his opinion as to privity between the Plaintiffs and the first Defendant Yaacob Nissim Mizrachi. It was proved before the Magistrate beyond any doubt:

(1) That the second Defendant Nissim Tussiya was the agent of Mizrahi entitled to purchase for him merchandise.
(2) That he purchased the goods in question from the Plaintiffs stating expressly that he was purchasing for Mizrahi.
(3) That the goods purchased were sent to Mizrahi, who accepted and sold to his clients a part of them.
(4) That Mizrahi himself negotiated with the Plaintiffs as to the giving of bills for the price of the goods.

According to Articles 1456, 1461, 1452, 1478 of the *Mejelle* he is liable together with the second Defendant to the Plaintiffs for the price of the goods delivered to him. The internal relations between the principal (Mizrahi) and his agent (Tussiya) do not concern the vendor of the goods *i.e.* the Plaintiffs.

We therefore allow the appeal and alter the judgment appealed against in the direction that the first Defendant Yaacob Nissim Mizrahi is jointly and severally liable with Nissim J. Tussiya to pay to the Plaintiffs the sum of LP. 40.030 together with costs in both Courts and LP. 3 advocate's fees.

Judgment delivered in open Court this 20th day of October, 1938, in presence of Mr. Goldman for Appellant and in absence of Respondent duly served.

*President.*

*Judge.*

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CRIMINAL APPEAL No. 64/38.

IN THE DISTRICT COURT OF JAFFA SITTING IN TEL-AVIV AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Haim Schiff. — APPELLANT.

v.

Attorney-General. — RESPONDENT.

*Forfeiture of bond of surety for non-appearance of accused — No judgment in a criminal case may be given against a person other than the accused — Procedure for forfeiture of a bond is by way of endorsement and thereafter the bond is recoverable like a judgment in a civil action — Release on Bail Ordinance, sec. 8(1)-(3).*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 8.7.38, in file No. 4955/38, whereby the Appellant was adjudged to pay LP. 5.

JUDGMENT:

The procedure for the forfeiture of a bond is laid down in section 8 of the Release on Bail Ordinance. According to this section there is no such thing as a Judgment against a Guarantor on the same piece or

paper as that on which the judgment against the absent Accused is written. In general no judgment can be delivered in a Criminal Case against a person other than the Accused. For this reason alone the part of the judgment against the Guarantor Haim Ben Aharon Shiff is wrong and must be set aside. The correct procedure would have been to endorse on the Bond a certificate setting forth that the conditions mentioned in the Bond had not been fulfilled *i. e.* if the Prosecutor had wanted to apply for forfeiture, and to send a notice to the Guarantor ordering him to pay the sum of LP. 5 within the period of six days from the receipt of the order and thereafter if the amount ordered had not been paid the bond would have become recoverable like a judgment in any civil case (See section 8(1) and 8(3) of the Release on Bail Ordinance).

The Appeal is therefore allowed and the forfeiture of the Bond signed by Haim Ben Aharon Shiff cancelled. The LP. 5 to be refunded to the surety.

Judgment delivered in open Court this 27th day of October, 1938, in presence of Mr. Shereshevsky for Accused and Inspector Shamai for Prosecution.

*President.*

*Judge.*

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CIVIL APPEAL No. 225/38.

## IN THE DISTRICT COURT OF JAFFA SITTING IN TEL-AVIV AS A COURT OF APPEAL.

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

IN THE APPEAL OF:
Disa Zamir. — APPELLANT.

v.

Mordechai Flaks. — RESPONDENT.

*Advocate's Power of Attorney signed abroad — Power of advocate to draw up Power of Attorney privately — Advocate responsible for signature of his client — Advocates Ordinance, section 20.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 18.7.38, in file No. 7833/38, whereby the Appellant (Defendant) was adjudged to vacate the premises and to pay LP. 91 with costs.

## JUDGMENT:

The only question requiring decision is, whether the Power of Attorney held by Plaintiff's advocate is in order. In our opinion section 20 of the Advocates Ordinance enables the advocate in whose favour a power of attorney to act in any specific suit is given to draw up the power of attorney privately. This section does not make any difference between the case where the principal lives in Palestine or abroad. The only condition is that the advocate acting thereunder shall be personally responsible for the authenticity of the principal's signature.

The Magistrate was right in disregarding this point.

As to the merits of the case the Magistrate based his judgment on the fact that the Appellant did not pay any rent for eight months neither the rent fixed by the contract nor the reduced rent.

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

Judgment delivered in open Court this 27th day of October, 1938, in presence of Mr. Kleinzeller for Appellant, and in absence of Respondent duly served.

*President.*
*Judge.*

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CIVIL APPEAL No. 226/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV
AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Ishiyahu Danilovitz. — APPELLANT.

v.

"Nesach" factory, Nimzick Bros. — RESPONDENT.

*Expiration of lease — Provision in Contract for the return of the premises in the same condition as they were when the lease began — Witnesses and experts may be heard to prove condition and amount of damage — Intention of landlord to repair is immaterial.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 14.7.38, in file No. 8949/38, whereby the Appellant's (Plaintiff's) action was dismissed.

JUDGMENT:

This case is not the same as C.A. 286/36 and we cannot find that the claim is premature. Clause 5 of the contract states expressly that the Defendant is obliged to leave the rented premises in the same state as they were in when the lease began. Now the Plaintiff alleges that the Defendant (Lessee) left the premises in a very bad state and he estimates the damage caused by the Defendant at LP. 36.800 mls. Plaintiff is entitled to prove by witnesses and experts in what condition the house was at the beginning of the lease and what is the damage caused an the amount even if he himself does not intend to repair the house. The appeal is therefore allowed, the Judgment of the Magistrate set aside and the case remitted for rehearing on its merits.

Costs to follow the event.

Judgment delivered in open Court this 27th day of October, 1938 in absence of both parties duly served.

*For Appellant:* Hatchwell. *For Respondent:* Zwi Felman.

*President.*
*Judge.*

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CIVIL APPEAL No. 123/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV AS A COURT OF APPEAL.

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

IN THE APPEAL OF:
Eliyav Livay. APPELLANT.

v.

Yoseph Tishler. RESPONDENT.

*Claim by advocate for remuneration for legal work — In absence of an express agreement the Advocates' Fees Rules (1918) apply.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 7.4.38, in file No. 8125/37, whereby the Appellant's (Plaintiff's) claim for LP. 14.850 was dismissed and he ordered to pay to the Respondent (Defendant) LP. 8.400 mls.

JUDGMENT:

The Appellant who is an advocate, sued the Respondent for the payment of LP. 14.850 mls being the balance of his fees for legal work

done by him at the request of the Respondent. The Respondent denied the Appellant's claim and counterclaimed an amount of LP. 35.690 mls.

The Magistrate, after examining the accounts of both parties dismissed Appellant's claim and ordered him to pay to the Respondent an amount of LP. 8.400 mls.

We agree with the learned Magistrate that, in the absence of any agreement, the Advocates' Fees Rules (1918) apply to any dispute beween an advocate and his client. Yet we are of opinion that the learned Magistrate when assessing the fees due to the Appellant had not before him the documents, namely the files of the cases in respect of which the advocates' fees were to be assessed. The said cases or some of them are papers of exeptional difficulty and the Appellant may be entitled, according to the schedule of the Advocates' Fees Rules, 1918 to LP. 2 advocate's fees.

We also find the Appellant was not given an opportunity to prove the amount of LP. 10.043 mls which appears in the account or to administer the oath to the Respondent.

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

Judgment delivered in open Court this 31st day of October, 1938, in presence of Mr. Porter for Appellant and in absence of Respondent duly served.

*President.*

*Judge.*

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CIVIL APPEAL No. 152/38.

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

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

IN THE APPEAL OF:

Haim Grinwald. APPELLANT.

v.

Sh. L. Rizmond. RESPONDENT.

*Incohate bill — Right of holder to fill up all material particulars wanting — Onus of proof of want of authority on the drawer — Bills of Exchange Ordinance, section 19(1).*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 8.5.38, in file No. 3389/37, whereby the Appellant (Defendant) was adjudged to pay LP. 80 with interest, costs and advocate's fees.

JUDGMENT:

The Appellant signed the promissory note in question and delivered the promissory note to one Fellman. When the promissory note was handed in to Fellman it did not contain the name of the payee. Fellman filled up this place with the name of the Respondent for value. Now the Respondent sues the Appellant as the maker of the promissory note for the sum of LP. 80 and the Magistrate gave judgment in his favour. In our opinion, the Magistrate was right in his decision for the following reasons: — Could Fellman recover the sum of the promissory note supposing that he filled up the promissory note received from the Appellant with his own name (and not with the name of the Respondent)? We think: Yes. In the case before us the Appellant pleaded that he handed the bill in question to Fellman only as a deposit, as an additional security for his debt to Fellman and that Fellman was never entitled to use this bill in order to make money out of it. Unfortunately he did not prove his allegations as the Magistrate found after having heard the Appellant and Fellman as witness of the Appellant. It remains also to consider that Fellman was a holder of the promissory note signed by the Appellant and delivered to him by the Appellant and, so long as the Appellant did not prove the contrary, a holder for value. According to section 19(1) a person who is in possession of the bill has a *prima facie* authority to fill up all material particulars wanting on the bill. It was for the Appellant to prove that Fellman had no authority to do so, but he did not succeed in proving it. Fellman sold the bill for value to Respondent and was therefore entitled to put the name of the Respondent as payee of the bill. This principle is illustrated in the Book of Judge Shems on Law of Bills of Exchange page 97 by English cases.

For these reasons the appeal is dismissed and the judgment confirmed with costs and LP. 2 advocate's fees.

Judgment delivered in open Court this 31st day of October, 1938, in presence of Mr. Zeiger for Appellant and Mr. P. Joseph for Respondent.

*President.*

*Judge.*

CIVIL APPEAL No. 232/38.

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

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

IN THE APPEAL OF:

Hasochnut Haleyumit,
Yoseph and Tova Levinson. APPELLANTS.

v.

Yom Tov Shaltie Zakai. RESPONDENT.

*Contract for the sale of land — Failure to transfer within the time fixed — Right of purchaser to claim refund of the purchase price — Invitation to appear in Tabu must be addressed personally to purchaser and must be made within reasonable time — Clause in Advocate's Power of Attorney to refer the matter in dispute to arbitration does not render it a general Power of Attorney.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 20.7.38, in file No. 6464/38, whereby the Appellants (Defendants) were adjudged to pay LP. 44.360 with interest and costs.

JUDGMENT:

In this case it was proved that the Defendant had obliged himself to transfer in the name of the Plaintiff a plot of land by virtue of a contract made in the year 1934; it was also proved that the Plaintiff had paid the whole purchase price and that the Defendant nevertheless had not transferred the land at the date of the filing of the suit *viz.* 12.4.37. The Magistrate was therefore right in ordering the Defendant to return to the Plaintiff the money received as the purchase price.

The Defendant orally brought a counterclaim for damages for the following reasons: —

(a) That the Plaintiff had been invited to appear in the *Tabu* for the transfer and did not appear.

(b) That it was incumbent upon the Plaintiff to send a notice to the Defendant that he was ready to accept transfer.

In order to prove his defence the advocate for the Defendant produced a copy of an advertisement which had appeared in a newspaper and also copy of a letter. This advertisement was in general terms and was

addressed generally and cannot be regarded as an invitation to the Plaintiff to appear on a certain day and hour in the *Tabu*. The letter is dated 17.6.37 *i. e.* three months after the date of the filing of the suit. In our opinion it was the duty of the Defendant to prepare the file and to summon the Plaintiff for the time fixed in the contract or for some other reasonable time. In our opinion the Defendant did not prove his counterclaim.

With regard to the point taken by the Appellant's advocate as to the Plaintiff's Power of Attorney, we consider that the Magistrate was correct in accepting the Power of Attorney. We do not consider that it was a General Power of Attorney merely because power was given to the advocate to submit to arbitration the matters in dispute in this particular case. The Power still dealt with a specific suit in spite of the power to submit to arbitration.

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

Judgment delivered in open Court this 31st day of October, 1938, in presence of Mr. Apelbom and Mr. Gratch, advocates.

*President.*

*Judge.*

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CIVIL APPEAL No. 233/38.

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

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

IN THE APPEAL OF:

Hasochnut Haleumit,
Yoseph and Tova Levinson. — APPELLANTS.

v.

Emanuel Eliezer Shimshi. — RESPONDENT.

*Contract for the sale of land — Failure to transfer — Right of purchaser to claim refund of purchase price — Guarantee of a third party written on the same document is not a novation of the original contract.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 20.7.38, in file No. 6465/37, whereby the Appellants (Defendants) were adjudged to pay LP. 31.970 with interest and costs.

## JUDGMENT:

We can not find that there was any novation of the original contract by a new contract made between the Plaintiff and the Defendants No. 4 "King Solomon Bank Ltd." The clause signed by this Bank on the same document is merely an additional guarantee given to the Plaintiff by the aforementioned Bank. The Magistrate was therefore right in disregarding this defence.

No question of section 11 of the Land Transfer Ordinance arises in this case. The Defendants made with the Plaintiff a contract to transfer to him a plot of land. This contract was made in the year 1934. In pursuance of this contract the Plaintiff paid the whole purchase price, and waited four years for the transfer which has not been effected even yet. He is therefore entitled to claim his money back. The Defendants did not prove that they had prepared the transfer of the land and that they had summoned the Plaintiff to appear in the *Tabu* for acceptance and they did not give any reasons why they think that the Plaintiff who paid the whole price, committed a breach of the contract.

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

Judgment delivered in open Court, this 31st day of October, 1938, in presence of Mr. Apelbom and Mr. Gratch.

*President.*

*Judge.*

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CIVIL APPEAL No. 235/38.

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

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

IN THE APPEAL OF:

Hasochnut Haleumit,
Yosef and Tova Levinson,
King Solomon Bank Ltd. — APPELLANTS.

v.

Yaacov Shlomo Hasoch. — RESPONDENT.

*Contract for the sale of land — Failure to transfer — Refund of purchase price — Counterclaim.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 20.7.38, in file No. 6468/37, whereby the Appellants (Defendants) were adjudged to pay LP. 52.560 mls with interest and costs.

## JUDGMENT:

This appeal is one of a series of appeals against judgments of identically the same nature. The Judgment of the Magistrate was based on the fact that the parties had on 11.12.34 entered into a contract for the sale of land, that the Plaintiff had paid the purchase price and that the Defendant had not even up to now transferred the land to the Plaintiff, and that the Plaintiff is therefore entitled to claim the re-payment of his money. This Court upheld the Judgment of the Magistrate's Court in Civil Appeal No. 139/38 and Civil Appeal No. 75/38.

In this case the Defendant brought a counterclaim for damages. He made this counterclaim orally during the trial by the words: — "alternatively I have brought a counterclaim for damages on the basis of clause 3 of the contract". The Advocate for the Defendant did not produce any evidence and did not even mention concrete facts with which to show, that Plaintiff who had paid the whole price and had waited about 4 years for the transfer of the land — had committed a breach of the contract. Plaintiff has done all that was incumbent upon him to do and he is not bound to wait endlessly till the Defendant decides to fulfill his obligations.

The appeal is therefore dismissed and the judgment confirmed with costs and LP. 3.— advocate's fees for the Respondent.

Judgment delivered in open Court this 31st day of October, 1938 in presence of Mr. Apelbom and Mr. Gratch.

*President.*

*Judge.*

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CIVIL APPEAL No. 201/38.

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

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

IN THE APPEAL OF: APPELLANT.
Assuta Ltd.

v.

Phishel Merdiks, RESPONDENTS.
Michael Gutman and others.

*Claim for hospital and medical treatment fees — In absence of clear and unambiguous conditions to the contrary the patient's implied liability to pay remains.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, in file No. 18504/37, dated 16.6.38, whereby Appellant's (Plaintiff's) action for LP. 11.350 was dismissed with costs.

JUDGMENT:

The Appellant who owns and conducts a private nursing house sued the first Respondent Phishel Merdiks for payment of LP. 11.350 on account of hospital fees.

The Respondent did not deny that he was a patient in the Appellant's hospital but contended that the fees were to be paid by a third person namely "Kupat Holim" etc. This third person was joined as a party to these proceedings; another person by the name of Michael Gutman who had taken the Appellant to the hospital was also joined as a party to these proceedings. The Magistrate after hearing evidence gave a long and considered judgment dismissing Appellant's claim as well against the principal Defendant as against the third parties.

Now, we do not propose to interfere with the Magistrate's finding in respect of the third parties because it is based on findings of fact. But we do not agree with the learned Magistrate who held that the principal Defendant was not liable to pay the hospital fees claimed by the Appellant. Since the Magistrate found as a fact that the Defendant was fully conscious when he was brought to the hospital, and since there was no clear and unambiguous condition that the Defendant would not have to pay for his treatment, the Defendant is by implied contract liable to the Appellant.

The appeal is therefore allowed and judgment entered for the Appellant against the Defendant Phishel Merdiks for the amount of LP. 11.350 with costs and LP. 2.— advocate's fees.

Judgment delivered in open Court, this 1st day of November, 1938, in presence of Mr. Ben Hanoch and Mr. Dikstein.

*President.*

*Judge.*

CIVIL APPEAL No. 217/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV
AS A COURT OF APPEAL.

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

IN THE APPEAL OF:
Abraham Shligorsky. APPELLANT.

v.

Ezra Shmuel Khabusha. RESPONDENT.

*Claim for compensation for dismissal — Plea of Usage — Usage must be proved in a clear and unambiguous way — Oral evidence of the claimant alone is insufficient.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 5.7.38, in file No. 6562/38, whereby the Appellant (Defendant) was adjudged to pay LP. 23.400 with interest and costs.

JUDGMENT:

This is an appeal from a judgment whereby the Magistrate ordered the Appellant to pay to the Respondent an amount of LP. 23.400 as compensation for his being wrongfully dismissed from his employment at the Appellant's factory.

The Respondent's action was based not on law but on an alleged usage.

At the first hearing before the Magistrate the Appellant opposed Respondent's claim and the trial was adjourned. At the subsequent hearing the Appellant failed to appear at the proper time and the Magistrate entered judgment after hearing the Respondent on oath as to the existence of a usage to pay compensation in case of dismissal.

In our view, it was incumbent on the Respondent to prove in a clear and unambiguous way that a usage existed for labourers who work on a daily salary to receive compensation in case of dismissal. From the evidence of the Respondent before the Magistrate one cannot gather that such a usage exists for labourers on daily salary. Furthermore, relying on English Law, we hold that a usage is not proved by merely bringing the person interested to establish its existence by giving oral evidence of its existence unsupported by any other evidence.

The appeal is therefore allowed and the case remitted for the purpose of Respondent leading further evidence as to custom and for enabling the Appellant, if so advised, to lead rebutting evidence. Costs to follow the event.

Judgment delivered in open Court, this 1st day of November, 1938, in presence of Mr. Ben Ami for Appellant and Mr. Wilner for Respondent.

*President.*

*Judge.*

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CIVIL CASE No. 23/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

"Habassar" Ltd. PLAINTIFF.

v.

Moshe Ladman. DEFENDANT.

*Claim by a Cooperative Society against one of its members — Action for an injunction in restraint of trade — Right of Cooperative Society to impose fines on members — Objects of Cooperative Societies must be for the benefit of its members and of the public.*

JUDGMENT:

The facts in this case as proved by the evidence produced by both parties are as follows:

(a) The Plaintiffs are a cooperative society of butchers in Petah-Tiqva trading under the name "Habassar, Agudat Hakazawim Shetufith be Petah-Tikva Ltd.". Their object being to purchase cattle, slaughter of same and sale of the meat to the inhabitants of the colony of Petah-Tiqva and surroundings.

(b) Defendant Moshe Ladman a butcher was a member of the Plaintiff's society from the time of its foundation till 26.10.37. Like other members he deposited a promissory note for LP. 50.— in order to secure the payment of his share in the society's losses, and he took

an active part in the society's business. He used to receive meat from the society to sell it in his butcher's shop, and deliver the money received to the society and to receive LP. 5.— weekly for himself and LP. 2.500 for the wages of a servant, he himself being an old man 78 years of age.

(c) Clause 1 of Part 4 of the rules of the Plaintiff society provides that each member undertakes not to engage during his membership of the society in the sale of meat or products of meat outside the society and not to engage on his own account nor in the service of someone also within the period of one year from the date on which his membership in the society ceases, in any trade in competition with the trade of the society in the area of its operation.

(d) By a letter dated 26.8.37 the Defendant notified the Plaintiff society that he ceases to be a member of it as from 26.10.37. After the 26th October, 1937, Defendant opened a butcher's shop in Petah-Tiqva on his own account and worked it for about six months and then closed this shop so that he has not dealt in meat for the last six months and does not do so now.

(e) The Plaintiff society took no objection to Defendant's notice that he ceased to be one of its members and completed with him all accounts for meat. But more recently, *viz.* in December, 1937, the Committee of the society imposed upon the Defendant a fine of LP. 50.— on the pretext that he had committed a breach of the rules. In addition to this, the committee transferred the promissory note deposited by the Defendant to a third person, who sued the Defendant for LP. 35.— and obtained judgment against him.

(f) Now the Cooperative Society asks this Court for an order that the Defendant, being a member of the society, should be restrained during the time of his membership or alternatively for one year from the date on which he has ceased to be a member from carrying on in any form the business of purchasing and selling meat in Petah-Tiqva.

The main question in issue in this case is whether the Defendant was a member of the Plaintiff society when the action was brought against him. In our opinion the Defendant had ceased to be a member of the Plaintiff society as on the 26.10.37, because he gave two months' notice according to clause 6 of the rules and he was not indebted to the company in any sum of money at that date. The society was not entitled to impose upon him any fines three months later according

to clause 5 (b) of its rules. The Defendant could only be sued before the Court for damages according to Rule 5 (c). This was not done. As to his liability for the debts of the society, his bill was transferred and his debt covered so that before this Court only the matter of restraint of his trade for the year after his ceasing to be a member was in issue and not the question of permanent restraint. Unfortunately, the year as from 26.10.37 the date when he ceased to be a member has already passed and there is no longer any possibility of ordering him to be restrained from trading. We should like to be spared the necessity of returning an answer to all other issues but we must enquire into them because the Plaintiffs claim costs as having been entitled at the date of filing the action to the remedy they claimed. In our opinion the Cooperative Society "Habassar" was not entitled to claim for an injunction to restrain Defendant from trading because it did not comply with the conditions necessary in order to be entitled to such a remedy. The Plaintiff society did not work either for the benefit of its members or for the benefit of the public. It was proved that even at the time when the Defendant was a member the Plaintiff society was badly managed, that it twice lost its capital by paying excessive salaries to members and that, as the last balance sheet shows, it is actually in a state of bankruptcy. Further we can not agree with the contention of the advocate for Plaintiffs, that a society, whose aim it is to purchase cattle at low prices in order to sell the meat at high prices and to make profits from the difference, can be regarded as working for the benefit of the public. On the contrary it is prejudicial to the sellers of cattle and also to the whole population of Petah-Tiqva as well.

For all these reasons we dismiss the action and order the Plaintiff to pay to the Defendant costs and LP. 5.— advocate's fees.

Delivered this 3rd day of November, 1938, at Tel-Aviv, in presence of Mr. Gratch for Plaintiffs and Dr. Grinwald for Defendant.

*President.*

*Judge.*

CIVIL APPEAL No. 246/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV
AS A COURT OF APPEAL.

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

IN THE APPEAL OF:

Sasson Shaoul Shohat. APPELLANT.

v.

The Mizrachi Bank Ltd., Tel-Aviv. DEFENDANT.

*Appeal from the Magistrate's Court to the District Court — Failure to give security — Rules 325 and 327 of the Civil Procedure Rules apply to District Courts sitting as a Civil Court of Appeal as well as to the Supreme Court — (Jerusalem C. A. No. 147/38 considered).*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated the 29th July, 1938, in Civil Case No. 18675/37.

JUDGMENT:

The first objection taken by the Respondent to this appeal is that no security has been given as is required by Rules 325 and 327 Civil Procedure Rules 1938. To this objection the Appellant's advocate replies that those Rules apply only to appeals to the Supreme Court sitting as a Court of Appeal, and, in support of this contention, he refers to Form No. 31 which is in the following terms, *viz.*: "has preferred the above mentioned appeal from the order of the District/Land Court of, etc."; and he contends that, had the Rule Making Authority intended that Rule 325 should apply to appeals from Magistrate's Courts then the word "Magistrates'" would also have appeared in Form 31. We think, however, that we must look at the Rules themselves. We think that there is force in the contention of the advocate for the Respondent when he says that those Rules apply to *all* proceedings in a District Court, *i. e.* they apply to the District Court sitting as an Appellate Court as well as when it exercises its original jurisdiction. In Rule 3 Civil Procedure Rules there is no distinction between the District Court as an Appellate Court, and as a Court of original jurisdiction. Now, if it had been intended to restrict the requirement of furnishing security to appeals to the Supreme Court sitting as a Court of Appeal, then in Rule 313 instead of finding the words "in the Registry of the Court to which the appeal lies", one would

have expected to find merely the words "in the Registry of the Supreme Court". There is only one Registry of the Supreme Court, *viz.* in Jerusalem. There is no District Registry of the Supreme Court.

For these reasons, we hold that Rules 325 and 327 do apply to appeals from Magistrates' Courts to District Courts.

We have seen a report of a judgment of the District Court of Jerusalem in its appellate capacity in Civil Appeal 147/38 reported in the "Palestine Post" of the 3rd July, 1938, in which that Court held that the Rules which apply to appeals from Magistrates' Courts to District Courts are only Rules 334 *et seq* and not Rules 313 *et seq*. With all respect to the District Court, Jerusalem, we are unable to agree with the ruling of that Court on this point. There is, moreover, very good reason why security should be required, *e. g.* to discourage frivolous appeals. Rule 327 enables the Registrar to be satisfied with a small deposit in lieu of a bond, so that no undue hardship need be caused to an Appellant.

As no bond has been filed or security given or deposited by the Appellant in this case, the appeal must be dismissed. There is another reason why it should be dismissed, *viz.* all the parties to the original action have not been made Respondents to this appeal as is required by Rule 313.

For the foregoing two reasons. the appeal is dismissed with costs and LP. 2 advocate's fees to the Respondent.

Delivered this 3rd day of November, 1938, in the presence of Mr. Siev for the Appellant and Mr. Z. Fellman for the Respondent.

*President.*

*Judge.*

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CIVIL CASE No. 149/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

Aharon Sankovsky. PLAINTIFF.

v.

"Hagilboa" Ltd. DEFENDANT.

*Application to appoint an arbitrator — Submission referring to arbitration under the Arbitration Ordinance — Notice should be to*

*concur in the appointment of a sole arbitrator — Notice to appoint an arbitrator for the party is bad.*

JUDGMENT:

It seems clear that the notice which Plaintiff should have sent to the Defendant was a notice requesting him to concur in the appointment of a sole arbitrator. Had the notice been in such terms, it would have been a good notice. What did happen, however, was that the notice sent on behalf of the Plaintiff requested the Defendant to appoint an arbitrator on his behalf, *i. e.* after the Plaintiff had appointed an arbitrator for himself, *i. e.* there would have been two arbitrators. Under the contract (Clause 16 of the contract) parties undertook to settle their disputes by arbitration under the Arbitration Ordinance; with para (a) of the Schedule to the Arbitration Ordinance the reference should have been to a single arbitrator. Without dealing with the other defence (*i. e.* as to Plaintiff's advocate's power of attorney) we consider that the defence as to the notice being a bad notice is a good defence to the present application. The application is dismissed with costs and LP. 2.— advocate's fees.

*For Plaintiff:* Dr. Lustig. *For Defendant:* Dr. Grünwald & Zundelewitz.

Dated this 21st day of November, 1938. *President.*

*Judge.*

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CIVIL APPEAL No. 221/38.

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

BEFORE: His Honour the Relieving President (C. Curry, J.),
His Honour Judge Ph. Korngrun.

IN THE APPEAL OF:
Israel Levin. APPELLANT.

v.

Jacob Gribovsky. RESPONDENT.

*Third Party Opposition to provisional attachment — Presumption of ownership of goods belonging to owner of the premises where they are found — Article 57 of the Execution Law.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 7.7.38, in file No. 2094/38, whereby 3rd party's (Appellant's) opposition to the provisional attachment was dismissed with costs.

## JUDGMENT:

In this case an attachment was made in favour of the Respondent against Eliezer Ramba in his store in Haifa on many goods found in the store.

Now, Appellant, the trustee in the bankruptcy of one Ephraim Ramba, claims that the movables attached belong to the said Ephraim Ramba.

It was proved that the store belongs to Eliezer Ramba and according to Art. 57 of the Execution Law, there is in such a case a presumption that the ownership of movables attached belong to the owner of the shop, Eliezer Ramba. It was therefore incumbent upon the Appellant to prove the contrary *viz:* that the goods attached belong to Ephraim Ramba. The Magistrate gave to the Appellant full opportunity to prove it and had heard all witnesses produced by the Appellant, but the Appellant did not succeed in his proof.

The appeal is directed only against the findings of the Magistrate which are not in favour of the Appellant.

We do not see any reason to interfere with these findings.

The appeal is therefore dismissed and judgment confirmed with costs and LP. 3 advocate's fees.

Judgment delivered in open Court, this 23rd day of November, 1938, in presence of Mr. Michalovsky for Appellant and in absence of Respondent duly served.

*R/President.*

*Judge.*

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CIVIL APPEAL No. 227/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

IN ITS APPELLATE CAPACITY.

BEFORE: His Honour the Relieving President (C. Curry, J.),
His Honour Judge Ph. Korngrun.

IN THE APPEAL OF:

Assuta Ltd.

APPELLANT.

v.

Hevra Belgit Lemishmar Ltd.

RESPONDENT.

*Judgment in absence as if in presence — Plaintiff's claim must be proved — Counter claim must be struck out and not dismissed — Judgment by Default Rules, Rule 3(4).*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 6.4.38, in file No. 570/38, whereby the Appellant (Defendant) was adjudged to pay LP. 3.345 with interest and costs. Counterclaim dismissed.

JUDGMENT:

In this case two mistakes were made by the Magistrate:

(a) In the main claim the Magistrate has issued the judgment in absence of the Defendant as if in his presence (Rule 3(4) of the Judgment by Default — Magistrates' Courts Rules) without Plaintiff having proved his claim.

(b) Instead of striking out the counterclaim when the Defendant did not appear on the second sitting, the Magistrate dismissed the counterclaim.

We therefore allow the appeal, set aside the judgment and remit the case to the Magistrate in order to hear the claim and counterclaim on their merits and give a fresh judgment.

Costs to follow the event.

Judgment delivered in open Court, this 23rd day of November, 1938, in absence of both parties.

*For Appellant:* Dikstein. *For Respondent:* Pardo.

*R/President.*

*Judge.*

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CRIMINAL APPEAL No. 75/38.

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

BEFORE: His Honour the Relieving President (C. Curry, J.),
His Honour Judge I. Many.

IN THE APPEAL OF:
Ibrahim Mansour Ibrahim. APPELLANT.

v.

Attorney-General. RESPONDENT.

*Appeal against order of deportation of an illegal immigrant — Admission of illegal entry — Date of commencement of period of prescription — Section 12(2) of the Immigration Ordinance, 1927. CR.A. 51/38 referred to and followed.*

Appeal from the judgment of the Magistrate's Court, Rehovoth, dated 31.8.38, in file No. 510/38, whereby the accused was sentened to 3 weeks' imprisonment and recommended for deportation.

JUDGMENT:

The Appellant was one of 3 accused charged with entering the country illegally contrary to section 12(2) of the Immigration Ordinance, 1927.

The Appellant raises various points in his appeal but there is no substance in them.

The accused himself admitted that he came illegally to the country in 1925. So there can be no argument as to the sufficiency of the evidence against him. The period of prescription does not commence to run from the date of the illegal entry but from the date he is found in Palestine as that of the commission of the offence — see Criminal Appeal 51/38.

As regards the accused being charged together with 2 other persons although he did not enter at the same time, the accused suffered no disadvantage thereby in the trial.

For the foregoing reasons the appeal is dismissed.

Judgment delivered in open Court, this 24th day of November, 1938, in presence of Mr. Aziz Eff. Sheadeh for Appellant.

*R/President.*
*Judge.*

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CIVIL APPEAL No. 237/38.

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

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

IN THE APPEAL OF:

Reuben Sheinzwit. APPELLANT.

v.

Eliezer Meierovitz. RESPONDENT.

*Defence disallowed by Magistrate — Appeal allowed to give defendant full opportunity to prove defence.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 24.7.38, in file No. 8594/38, whereby the Appellant (Defendant) was adjudged to pay LP. 90.719 with interest and costs.

JUDGMENT:

We do not think that the Defendant had a proper chance of making his defence before the Magistrate.

The appeal is allowed, the judgment appealed against set aside and the case remitted to the Magistrate to enable the Defendant to place his full defence before the Magistrate.

After having heard the defence, the Magistrate will be at liberty to decide according to the view he takes of the effect of any defence or evidence submitted and according to any interpretation the Magistrate may itself care to put on any of the Judgments of the Supreme Court cited to him.

Costs to abide the event.

Judgment delivered in open Court this 29th day of November, 1938, in presence of Mr. Levitzky for Appellant and Mr. Frenkel for Respondent.

*President.*

*Judge.*

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CIVIL APPEAL No. 239/38.

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

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

IN THE APPEAL OF:
A. Doar. — APPELLANT.

v.

Yaacov Pevsner. — RESPONDENT.

*Action for damages caused by wrongful attachment laid on goods — No provision in Palestinian Law — Applicability of English Law of Damages — Damages, to be recoverable, must be caused by and arise immediately from the act complained of.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 21.7.38, in file No. 6300/38, whereby the Appellant's (Plaintiff's) action for LP. 50 was dismissed with costs.

## JUDGMENT:

The Appellant sued the Respondent for the payment of LP.50 as compensation for damages sustained by him by a wrongful attachment laid on his goods at the request of the Respondent.

It is agreed that such an action does not lie under any law in Palestine, but it is argued that under English Law there is such a cause of action.

We have doubts as to the applicability of English Law in this matter when the Palestinian Law is so clear (see Articles 912 and 922 of the Mejelle). In our view, even if English Law does apply the Appellant has not shown a cause of action.

According to English Law, damages in order that they may be recoverable, must be such as arise not only naturally, but also immediately from the act complained of.

It is not alleged that the fact complained of, namely the attachment made on the goods, is the direct cause of the slump in the prices of such goods. It merely happened that the price of these goods fell in the market during the time when the goods were attached. The contrary might well have happened, *i. e.* prices might have gone up.

We consider the Appellant's claim most frivolous.

We accordingly dismiss the appeal with costs and LP. 2 advocate's fees.

Judgment delivered in open Court in presence of Mr. Pardo for Appellant and of Respondent in person at Tel-Aviv, this 30th day of November, 1938.

*President.*

*Judge.*

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CIVIL APPEAL 240/38.

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

BEFORE: His Honour the Relieving President (C. Curry, J.),
His Honour Judge Ph. Korngrun.

IN THE APPEAL OF:

Hanna Ansara. APPELLANT.

v.

"Haargaz" Cooperative Society Ltd. RESPONDENT.

*Appeal against the rejection of an opposition — Reasons for non-appearance at the trial and at the hearing of the opposition must be considered in the light of circumstances of each case separately — Judgment by Default (Magistrates' Courts) Rules, Rule 8 and Rule 3(2).*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 29.7.38, in file No. 13138/37, whereby the Appellant (Defendant) was ordered to pay LP. 58.100 with interest and costs. Opposition dismissed.

JUDGMENT:

The facts in this case are as follows. The Appellant who was one of the Defendants in the action was summoned for a Sunday. He is a Christian Arab residing in Jaffa, he notified the Court that he could not appear on a Sunday, nevertheless the Magistrate decided to proceed against this Defendant by default. This action on the part of the Magistrate was wrong and was the more extraordinary in that he came to this decision although he had to adjourn the case against the other Defendants as they had not been summoned.

The present Appellant subsequently filed an Opposition to the Default judgment. On the day fixed for the hearing the state of affairs in the country were such that the Appellant felt it was dangerous for him, an Arab, to come into Tel-Aviv and he telephoned the Court to enquire if his case could be adjourned, he also sent a telegram to that effect. He received apparently no reply to his enquiries and so decided to come, arriving at 11.30 a.m. to find that judgment had already been given against him. He now appeals against that judgment.

It is submitted that by virtue of Rule 8, Judgment by Default Magistrates' Courts Rules the judgment is not subject to Appeal. Although that Rule is clear I think it must be considered reasonably and it would certainly be unreasonable, taking into consideration the present state of in security in the country and also the particular circumstances in this case to deprive a party of the right to appeal against an *ex parte* judgment because he did not attend the Court until 11.30 a.m. on the day of hearing.

By Rule 3(2) the Magistrate has power during the 1st day's hearing of an action which has been decided in absence to grant the Defendant leave to defend if he subsequently appears on that day and shows good cause for his non appearance. Moreover I should like to add that in my opinion if a party does not appear when his case is called, the Magistrate should not immediately proceed with the hearing but should put the case at the bottom of that day's list.

For the foregoing reasons the Appeal is allowed and the case remitted to the Magistrate for rehearing. Costs to follow the event.

Delivered in open Court, this 30th day of November, 1938.

*For Respondent:* Spindel.

*R/President.*
*Judge.*

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CIVIL APPEAL No. 244/38.

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

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

IN THE APPEAL OF:

Alexander Ukrainitz,
Shimon Ukrainitz. APPELLANTS.

v.

Ottoman Bank. RESPONDENT.

*Appeal by guarantors — Interpretation of Guarantee or Pledge — Actual loss irrelevant as long as debt is overdue — Interpretation of "Joint" and of "Joint and Several" liability.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 28.7.38, in file No. 6779/38, whereby the Appellants (Defendants) were adjudged to pay LP. 60 with interest and costs.

JUDGMENT:

This is an appeal against the judgment whereby a Magistrate ordered the Appellants to pay to the Respondents, jointly and severally, the sum of LP. 60. The Respondents' claim is based on four promissory notes, each in the sum of LP. 15. It is admitted that these bills were given by the Appellant at the request of a certain Joseph Ukrainitz who was indebted to the Respondents in a certain sum of money (see letter of August 6th, 1937, signed by the said Joseph Ukrainitz).

The document on which the Appellants rely the most in their appeal is a letter dated August 22nd, 1937, addressed to the Respondent wherewith the Appellants remitted to the Respondents a certain number of bills and gave their instructions to the effect that the proceeds of these bills should be entered in a special account in the Respondents' books, which account was to constitute a supplementary guarantee in respect of Mr. Joseph Ukrainitz's debit account.

It is argued on behalf of the Appellants that this document is not a guarantee but an undertaking to supply a pledge, which is revocable under Art. 706 of the Mejelle. It is further argued that the claim is premature as no losses have yet been incurred.

There were other grounds of appeal, but they are without substance.

In our view, the document dated 22 August, 1937, is a guarantee and not an undertaking to pledge. This is quite clear from the wording of that document. It is also quite clear that the Defendant undertook to pay the bills at maturity.

The mere fact that no losses have yet been incurred is irrelevant so long as the debt which was guaranteed by the Appellant is still overdue.

We agree with the advocate for the Appellants that the Magistrate erred in holding that the Appellants are jointly and severally liable inasmuch as the letter produced in support of the claim contains the words "we promise to pay" and not "I promise to pay".

The judgment of the Magistrate is therefore amended to the effect that the Appellants are ordered to pay jointly to Respondents LP. 60 with costs and interest 7% from 1.3.38 and LP. 4 advocate's fees.

Judgment delivered in open Court this 30th day of November, 1938, at Tel-Aviv, in presence of Mr. Goldberg for Appellants and in absence of Respondent.

*President.*

*Judge.*

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CIVIL CASE No. 345/37.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:
Leon Nissim Amzalak. — PLAINTIFF.

v.

Simon Mark Amzalak,
Joseph B. Amzalak. — DEFENDANTS.

*Ruling on a preliminary point — Doctrine of "Goodwill", it's introduction into the law of Palestine — Effect of Privy Council decision and obiter-dicta — Mention of "Goodwill" in the Bankruptcy Ordinance — Supreme Court C.A. 91/31 referred to and distinguished.*

## JUDGMENT:

In this case Mr. Gratch, advocate for Defendants, has asked the Court to decide, as a preliminary point of law, the point whether the doctrine of goodwill forms part of the law of Palestine to-day. We do not think that it is satisfactory to decide preliminary points of this nature at so early a stage of the proceedings. It is not part of the duty of the Courts to answer academic questions; moreover, until we have heard evidence as to the nature of the item in the Balance Sheet of the partnership in dispute, it is not possible for us to say whether the particular item formed part of good-will or not. But Mr. Gratch quite rightly pointed out that Mr. Ben Yamini (Advocate for the Plaintiff) had frankly admitted that unless the doctrine of good will did prevail in the law of Palestine to-day he cannot succeed. That being so, Mr. Gratch argues, if he (Mr. Gratch) can convince us that the doctrine of good-will is not part of the law of Palestine to-day, the action can at once be dismissed. This being so, he persuaded us to hear arguments and asked us to give a ruling. This ruling we are now prepared to give.

Mr. Gratch relied entirely on a judgment of the Supreme Court of Palestine in Civil Appeal 91/31 reported at page 2 Palestine Law Reports, Vol. II. In reply to that Mr. Ben Yamini argued that all that that case decided was that good-will had not been introduced into Palestine by the Companies Ordinance 1929 or by the Partnership Ordinance 1930. He further argued that since the date of that judgment the position in Palestine had been altered by the following: —

(a) The fact that the Judicial Committee of the Privy Council have recently drawn the attention of the Courts in Palestine to the fact that the law here has been enriched by the introduction of principles of English Law.

(b) By reason of the mention of the word "good-will" in the Trade Marks Ordinance, 1930, Section 19(1) and 19(2) — "in connection with the good-will of the business", and in the Bankruptcy Ordinance, Section 52, subsection (1) — "including the good-will of the business".

To this Mr. Gratch replies that the word "goodwill" was already in the Trade Marks Ordinance in force at the time of the judgment in C.A. 91/31. This may be, but there can be no doubt that the recent judgment of the Privy Council and the very definite words about goodwill in the Bankruptcy Ordinance lead us to the conclusion that not only has the position been altered since the decision in 1933 by the recent decision of the Privy Council, but that the Legislature have at any rate by the Bankruptcy Ordinance definitely recognized the existence

in Palestine of the doctrine of goodwill. The Bankruptcy Ordinance is an Ordinance of universal application to all types of persons and we do not think that it can now be said that it is a mere side-wind (to use the words in the judgment in C.A. 91/31) that brings us with respect to goodwill into the law of Palestine to-day. We accordingly rule against Mr. Gratch's preliminary objection.

The case must proceed, but this of course will be without prejudice to Mr. Gratch proving at the proper stage that any particular item in any Balance Sheet is either out of the nature of goodwill or at any rate is not of the kind of goodwill which should entitle the Plaintiff to succeed.

The case must be accordingly adjourned for a further hearing.

Judgment delivered in open Court, this end of November, 1938.

*President.*

*Judge.*

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CIVIL APPEAL No. 267/38.

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

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

IN THE APPEAL OF:
Hassan Gubrik. — APPELLANT.

v.

Gilio Ako. — RESPONDENT.

*Claim based on a document — Inadmissibility of oral evidence to contradict a written document — Supreme Court C.A. 168/38 referred to and followed.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 31.7.38, in file No. 18900/37, whereby the Appellant (Defendant) was adjudged to pay LP. 81.290 with interest and costs.

JUDGMENT:

The Respondent proved his claim by documents signed by the Appellant. The Appellant wanted to prove by witnesses that the relations between the parties were a definite sale and not based on a commission

agency. The Magistrate was right in refusing to hear oral evidence against the documents produced.

In an identical case of the same Respondent No. 357/37 this Court decided not to hear witnesses against a document and this judgment was upheld by the Supreme Court sitting as a Court of Appeal in C.A. No. 168/38.

We, therefore, dismiss the appeal and confirm the judgment with costs and LP. 2 advocate's fees.

Delivered this 12th day of December, 1938, in absence of Appellant and in presence of Mr. Hamburger for Respondent.

*President.*
*Judge.*

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CIVIL APPEAL No. 223/38.

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

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

IN THE APPEAL OF:
Zeev Landau. APPELLANT.

v.

David Gedaliya Shapir. RESPONDENT.

*Application for the confirmation of an award — Award insufficiently stamped — Duty of the Magistrate to take notice of the insufficiency and accept the document in evidence after payment of the duty and fine — Magistrate may decide himself on the amount of duty and fine or remit to Commissioner of Stamps for his decision.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 10.7.38, whereby the Appellant's (Plaintiff's) application for confirmation of an award was dismissed with costs.

JUDGMENT:

This case is before this Court the second time without any necessity. This Court as a Court of Appeal (D. Edwards and I. Many) decided in this case as follows: —

> "This is an appeal from a judgment whereby the Magistrate dismissed Appellant's action on the ground that the award of arbitration produced by him was insufficiently stamped. In our opinion it was the duty of the Magistrate under section 16 (1) of the Stamp Duty Ordinance to take notice of any insufficiency of the stamps and after payment of the duty and penalty to accept the document in evidence".

It was upon the Magistrate to decide himself how much the Appellant had to pay as duty and fine, or to send the document to the Commissioner of Stamps in order to have the question of insufficient stamps definitely settled; but the Magistrate was wrong in not following the instructions given to him by the Court of Appeal and dismissing the claim for the same formal reasons.

The appeal is therefore allowed, the judgment set aside and the case remitted to the Magistrate for complying with the decision of this Court and hearing it on its merits.

Costs to follow the event.

Judgment delivered this 13th day of December, 1938, in the presence of Mr. Kadouri for Appellant and in the absence of Respondent duly served.

*President.*
*Judge.*

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CIVIL APPEAL No. 242/38.

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

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

IN THE APPEAL OF:
Feivel Rivkes. — APPELLANT.

v.

Zalman Alperovitz. — RESPONDENT.

*Foreign bill — Action on the consideration — Rules of prescription governed by the Lex Fori. C.A. 242/37 confirmed by Supreme Court C.A. 22/38 referred to and followed.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 21.7.38, in file No. 9131/37 whereby the Appellant (Defendant) was adjudged to pay 463 Lits (LP. 15) with costs and advocate's fees.

JUDGMENT:

It was already decided by this Court that according to Sec. 52 of the Bills of Exchange Ordinance when consideration was given for a bill — the holder of it may sue the party to whom he had given consideration — on this consideration. The judgment is Civil Appeal 242/37, confirmed by the Supreme Court sitting as a Court of Appeal in Civil Appeal No. 22/38. According to both these judgments — when both parties live in Palestine no regard has to be taken of Lithuanian Law and prescription is 15 years. As in this case it was proved that the promissory note was given for consideration by the Defendant directly to the Plaintiff we dismiss the appeal and confirm the judgment with costs and LP. 2 advocate's fees.

Delivered this 13th day of December, 1938, in presence of Mr. Frenkel for Appellant and Mr. Rosing for Respondent.

*President.*
*Judge.*

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CIVIL APPEAL No. 254/38.

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

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

IN THE APPEAL OF:
Karl Baer.
APPELLANT.

v.

Yosef Berlin.
RESPONDENT.

*Action on a document — "Exclusive Jurisdiction" clause — Plea of lack of jurisdiction must be raised before the commencement of the case. The Civil Procedure Rules, 1938, do not apply to Magistrates' Courts. Ottoman Code of Civil Procedure still applicable to Magistrates' Courts.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 31.7.38, in file No. 12894/37 whereby the Appellant's (Plaintiff's) action was dismissed with costs.

JUDGMENT:

The Civil Procedure Rules, 1938, do not apply to cases before the Magistrate's Court (See Rule 2). The issue in this case is whether the

plea of lack of Jurisdiction was taken in time and can be heard by the Court or whether it was raised too late and must be rejected. This has to be decided in accordance with the Magistrates' Law and the Ottoman Law of Civil Procedure, the last named having been abolished only as far as the Courts mentioned in Rule 2 of the Civil Procedure Rules are concerned.

The relevant article is Art. 49 of the Ottoman Code of Civil Procedure which states "No case can be transferred from one Court to another for legal reasons except when one party demands it before the beginning of the case". There is no doubt that a plea of lack of local jurisdiction is one of these legal reasons mentioned in Art. 49 of the Ottoman Civil Procedure Code. In the case before us the Defendant knew at the first hearing the contents of the document which was the basis of the claim and especially the fact that it contained a clause "that all disputes arising out of the document have to be heard by the Competent Court in Vienna" but he pleaded it only at the ninth sitting, after the Court had gone into the merits of the case and after the Defendant refused to take the decisive oath that he did not sign the document in question. It was too late and the Magistrate should have disregarded such a plea.

We therefore allow the appeal, set aside the judgment of the Magistrate and remit the case to the Magistrate for rehearing on its merits and issuing of a fresh judgment.

Costs to follow the event.

Judgment delivered in open Court this 13th day of December, 1938, in presence of Miss Witenberg for Appellant and in absence of Respondent duly served.

*President.*

*Judge.*

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CIVIL APPEAL No. 255/38.

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

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

IN THE APPEAL OF:

Dov Rosenberg. — APPELLANT.

v.

Zvi Byali. — RESPONDENT.

*Claim for wages for work done — Denial of liability in general includes denial of sum claimed, which must be proved — Oral evidence admissible.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 1.8.38, in file No. 2494/38, whereby the Appellant (Defendant) was adjudged to pay LP. 34.818 with interest and costs.

JUDGMENT:

The Magistrate was right in holding that the nature of the claim was not changed. The Plaintiff (Respondent) claimed for work done by him in favour of two Defendants, co-owners of a house. On the first sitting the advocate for the Plaintiff gave details and cleared up the facts, that one of the Defendants ordered the work and the other (the Appellant) undertook to pay for it. It is not an alteration of the basis of the claim especially when the advocate for the Appellant did not object to this.

The Magistrate was also right in hearing oral evidence especially the evidence of the parties themselves in spite of the fact that the sum claimed surmounts LP.10. This case does not come within the meaning of Art. 80 of the law of Civil Procedure.

The only question which arises here is whether the sum claimed was denied and had to be proved. The Appellant denied his lability to pay at all and consequently did not deal with the sum claimed by the Plaintiff or the individual items. It cannot be inferred from his behaviour that he denied his liability to pay but did not contradict the sum to be paid. This sum was therefore denied, and the evidence of one witness (the Plaintiff) without any corroboration is not sufficient.

We, therefore, set aside the judgment only as to this detail and remit the case to the Magistrate for completion with the direction that the Plaintiff (Respondent) shall prove by additional evidence the sum claimed by him.

Costs to follow the event.

Judgment delivered in open Court this 13th day of December, 1938, in presence of Mr. Hamburger for Appellant and Mr. Herman for Respondent.

*President.*

*Judge.*

CIVIL APPEAL No. 288/38.

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

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

IN THE APPEAL OF:
Raphael Shlomo Neiman. APPELLANT.

v.

Moshe Klein. RESPONDENT.

*Contract of lease for the period of two years — Rights of renewal provided for in the contract — Conditions attached to such "rights" — Option must be unconditional — Effect of "Renewal Clause" on sections 2 and 11 of the Land Transfer Ordinance.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 9.10.38, in file No. 11180/38, whereby the Appellant's (Plaintiff's) claim for LP. 51 was dismissed with costs.

JUDGMENT:

We are of the opinion that the appeal must be allowed and the case sent back to the Magistrate to be heard on its merits.

*President.*

The facts in this case are : —

The Appellant (Lessor) claims for eviction of the Respondent (Lessee) on the ground of a lease contract between them for the reason that the Defendant did not pay rent for the premises let for four months. The clauses of the contract relevant to this case are in the preamble "The shop he (the Lessee) hired for the period of two years as from 1.12.38 with rights to renewal of the contract". The word "rights" is used in the plural. They are defined in the clause (b) of the contract itself as follows : —

"When the Lessee wants to renew the contract it is upon him to inform the Lessor in writing two months before the expiration of the period of the contract and *to sign a new contract* at least one month before the expiration of the period of the contract".

The Magistrate understood these clauses so that the parties had made a contract of lease of immovable property for four years and as such a contract is void under section 2 and 11 of the Land Transfer Ordinance — dismissed the claim for this reason only without going into the

question, whether the Plaintiff (Appellant) is entitled to have the Defendant (Respondent) removed from the shop for other reasons.

We cannot agree with the opinion that this contract contains an option by virtue of which the term of the lease may exceed three years; an option must be unconditional. In my opinion only some preference for the Lessee has been reserved to renew the contract for a longer time than two years under certain conditions by the way of a new contract.

We think that this does not fall within the meaning of Section 11 of the Land Transfer Ordinance.

Therefore we allow the appeal and remit the case to the Magistrate to hear it on its merits and give a fresh judgment.

Costs to follow the event.

Delivered this 13th day of December, 1938, in presence of Mr. Aizen for Appellant and Mr. Goldberg for Respondent.

*Judge.*

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CIVIL APPEAL No. 260/38.

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

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

IN THE APPEAL OF:

Menashe Leipzig. — APPELLANT.

v.

Nahum Honig. — RESPONDENT.

*Claim for the return of money paid in respect of a contract for the sale of land — Contract invalid on the ground of uncertainty — Thing sold must be clearly defined and ascertainable — Right to recover purchase money — Articles 201, 205, 209 and 214 of the Mejelle. Section 11 of the Land Transfer Ordinance.*

Appeal from the judgment of the Magistrate's Court, Tel-Aviv, dated 7.8.38, in file No. 5464/38, whereby the Appellants' (Plaintiff's) action for LP. 51 was dismissed with costs.

JUDGMENT:

The relations between the parties are governed by the contract attached to the file. The first clause of it runs : —

"The vendor obliges himself to sell and the purchaser to purchase

one (1) plot *musha'a* out of the "Zofia" land situated on the way Jerusalem—Schem—Haifa at the 5-6 Kilometer from Jerusalem."

Such a sale is invalid in itself. *Musha'a* means immovable property undivided in contradiction to *mafrouz* divided. One can sell one plot *mafrouz* according to a parcellation plan or on the ground of a map or clear definition of boundaries or such and such number of parts in an individual property. For instance 1 plot of 10000 square pic *mafrouz* or $^{7}/_{1000}$ parts *musha'a* of land exactly described as to boundaries and as to the surface, for instance $^{7}/_{1000}$ of 2000 dunams but it is impossible to sell one plot of 1000 pics "*musha'a*", because it is legally impossible to supply a map with one plot being an undivided part of a great land, because every co-owner may claim for partition being lawfully in some proportion an owner of the plot sold *musha'a*.

This is clear from Art. 201, 205, 209 and especially 214 of the *Mejelle* stating "The sale of an ascertained undivided share in a piece of real property owned in absolute ownership prior to division such as a half, a third or a tenth, is valid". It is, however, clear that a sale of one undivided plot out of the land of a whole village is not valid especially when it is not stated in the contract what the land of "Zofia" means.

For this reason alone the Magistrate was wrong in his decision. He erred also in his opinion that there is any change of the basis of the claim when the Plaintiff asked his money also on the ground of section 11 of the Land Transfer Ordinance. This reason is mentioned impliedly in the statement of claim.

We, therefore, allow the appeal, set aside the judgment and order that the Defendant (Respondent) shall pay to Plaintiff (Appellant) the sum of LP. 51 together with legal interest from 27.4.38. Costs of the proceedings before the Magistrate and before this Court and LP. 3 advocate's fees.

Delivered this 14th day of December, 1938, in presence of Mr. Goldman for Appellant.

*President.*

*Judge.*

CIVIL CASE No. 158/37.

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. David Pochas,
2. Hilel Saphir,
3. Yoseph Getzler,
4. Ya'acov Pinhasi. PLAINTIFFS.

v.

Nissan Aharonovitz. DEFENDANT.

*Action for damages for breach of contract — Failure to transfer land — Lump sum of money as agreed and liquidated damages — Interpretation of damages and penalty — Actual damages must be proved — Supreme Court C.A. 191/37 and 126/38 referred to and followed.*

JUDGMENT:

The facts in this case are as follows:

1. By a contract dated 17.3.35 Defendant undertook to sell to the Plaintiffs an area of 6059 metric dunams in the vicinity of Gaza at the price of LP. 4.800 per dunam. Upon signing the contract Defendant received LP. 500.— as a first payment on account of the purchase price.

2. Under clause 8 (b) of the said contract Defendant had to receive a further payment of LP. 1000.— within 60 days of the date of signature under a condition that the Defendant should secure this sum and the LP. 500.— already received by a mortgage in favour of Plaintiff on an area of 1100 dunams. In the contract these 1100 dunams are not exactly described, the relevant clause reading as follows *viz.*: "Within 60 days of the day of signing this contract the purchaser is obliged to pay to the vendor the sum of LP. 1000.— against a first mortgage on an area of about 1100 metric dunams known as block No.....plot No.....". From the evidence of witnesses it appears that these 1100 dunams are part of the whole area sold and that the Defendant is already registered as a mortgage over this area. The clause of the purchase price was payable on the day of transfer in the Tabu of the immovable property sold.

3. Under clauses 8, 9 and 14 of the contract the Defendant undertook to procure an irrevocable power of attorney signed by the owner of the land sold, Fahri El Hussein, to the name of Mr. B. Goldman, advocate for the Plaintiff in order to enable him to arrange the aforementioned mortgage and another mortgage for LP. 4500.— as an additional security for the LP. 1500.— and a part of possible damages in the sum of LP. 3000.—.

4. Clause 13 of the contract states: "In the case of a breach of this contract in whole or of any of its conditions the party committing the breach will be obliged to pay to the other party as damages fixed in advance the sum of LP. 13000.—". The parties dispensed with the necessity of sending notarial notices to each other.

5. Under clause 2 of the contract the land had to be transferred not later than the 17.3.36. The Defendant has not transferred the land up to now and has not complied with the aforementioned clauses, so that the Plaintiffs now claim the return of LP. 500.— paid by them and LP. 13000.— damages. For the first sum judgment *ex parte* was given on the 6.7.37. This Court as now constituted has to deal only with the claim for damages.

6. The Defendant raised all kinds of defences in order to prove that the Plaintiffs were not ready and willing to receive transfer of the immovable property sold, that it was their fault that he did not transfer, because they ordered him to negotiate with some other firm as to the sale of the same land, but this Court finds after having heard all evidence produced by both parties, that the Defendant has not succeeded in proving these contentions, at least not in such a manner as to entitle us to hold that there has been a breach of the contract on the part of the Plaintiffs as well. Only one serious plea, therefore, remains *viz.:* that the sum of LP. 13000.— stipulated by the parties in the contract as damages actually represents a penalty. The leading judgments in this regard are the judgments of the Supreme Court sitting as a Court of Appeal in Civil Appeal No. 191/37 in the case of Farouqui *v.* Ayoubi and Civil Appeal No. 126/38 in the case of Saadia Paz *v.* Zeidan. Following the principles laid down in the aforementioned judgments a sum fixed in the contract is a penalty, when a single lump sum is made payable by way of compensation on the occurence of one or more of several events, some of which may occasion serious and other but trifling damages. This is exactly what happened in the case before us. In the statement of claim the Plaintiffs themselves expressly enumerate the events as "Defendant did commit breaches of the contract

(a) In failing to execute a mortgage within 60 days (clause 9. 8).

(b) In failing to give an irrevocable notarial power of attorney from the owner of the land to the representative of the Plaintiffs" and so on.

It is clear that they themselves regard the LP. 13000.— as a penalty to enforce each and every clause of the contract. This Court accordingly gave the Plaintiffs an opportunity of proving the actual damages sustained by them, but the evidence brought by the Plaintiffs is not sufficient to enable us to arrive at an exact estimate of any sum of money which should be awarded to the Plaintiffs. The Plaintiffs tried to prove that between the date of the signature of the contract and the date fixed for the transfer *i. e.* beween the 17.3.35 and 17.4.36 prices of land in the vicinity of Gaza went up, but in this respect the opinions of the experts heard by the Court differ. It was proved that from August 1935, the date of the breach of the Abyssinian War, there were no purchasers of land available at all and that prices went rapidly down from the beginning of the disturbances in Palestine *i. e.* 19 April 1936. The Plaintiffs themselves gave evidence that they did not purchase the land for the purpose of selling it to others but for settlement by themselves and that this has been rendered impossible and is even to-day still impossible.

In the very recent judgment of the Supreme Court sitting as a Court of Appeal, Civil Appeal 126/38, it was held that the principle of English Law *viz.* that where damages are stipulated for in a contract the measure of damages is the difference between the contract price and the price obtainable at the time of the breach — is not applicable in Palestine and it was held that the actual loss suffered is recoverable. The actual damage suffered has not been sufficiently proved by the Plaintiffs before us.

For these reasons we dismiss the action with costs and LP. 5.— advocate's fees to the Defendant.

Delivered this 20th day of December, 1938, at Tel-Aviv in presence of Mr. Goldman for Plaintiff and Mr. Hamburger for Defendant.

*President.*

*Judge.*

CIVIL CASE No. 92/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

N. V. Philips Gloeilampenfabrieken. PLAINTIFF.

v.

1. (a) M. Gafny & Co.,
   (b) Matatiahu Gafny,
   (c) Ethel Gafny,
2. Alexander Kremener. DEFENDANTS.

*Action on a contract — Exclusive jurisdiction of a German Court stipulated in the contract — Effect of the Civil Procedure Rules 1938 on "Exclusive Jurisdiction" provided for in Article 1 of the Addendum to the Civil Procedure Code of 9/4/1911. Supreme Court C. A. 194/37 referred to and discussed — Oppenheim vs. Louis Rosenthal & Co., All England Law Reports, 1937, Vol. 1 Page 23 referred to by dissenting Judge.*

*Note:* This case was confirmed on appeal in C.A. 8/39 (1939, 1 S.C.J. 86). C.A. 194/37 is reported in 3 Ct. L.R. 26 and *Ha'arez* 23.iv.38.

JUDGMENT:

The Plaintiff is suing the first Defendants in respect of a contract dated 10.9.33, Exhibit P. 1. Defendants 1 have become bankrupt and Plaintiff has filed a claim in the bankruptcy and apparently obtained a certain payment. He now claims the balance from the Defendant 2 as guarantor. Defendant 2 objects to the jurisdiction of this Court in view of the clause 10 of the contract which provides that the Berlin Mitte Court shall have exclusive jurisdiction.

When the contract was made Plaintiff and Defendant 2 were both in Germany. Now Defendant 2 has come to Palestine.

Mr. Krongold argued that CA 194/37 did not apply in this case as the Civil Procedure Rules were not then in force. But I do not think the Civil Procedure Rules prohibit the exclusive jurisdiction. Moreover, the Plaintiff appeared to argue that the present Rules were based on English Law and that whilst the English Law recognised the legality of a clause such as clause 10 — that English Courts would only assume

jurisdiction if it were not possible to bring the action in the Court designated by the parties.

Plaintiff does not say, however, that he cannot bring the action in Berlin. I understand that the Plaintiff firm is not Jewish — he merely says that it will make it more difficult for him to get a judgment in Berlin and then bring an action here on the Judgment.

This does not seem to me to be a good reason for varying the condition of the contract.

Presumably the parties had a good reason for inserting Clause 10 and whilst agreeing that there may be circumstances where this Court should assume jurisdiction, *e. g.* if it were impossible for Plaintiff to institute proceedings in Germany, I do not consider that a plea of greater convenience is sufficient to entitle the Court to ignore the agreement of the parties.

For the foregoing reason I consider the action should be dismissed with costs and advocate's fees of LP. 2.

Delivered in Open Court this 21st day of December, 1938.

*R/President.*

## DISSENTING JUDGMENT OF KORNGRUN J.

The Defendant Kremener pleaded want of jurisdiction because in the contract between the parties signed in Berlin on 20/9/33 there is a Clause 10 stating: "Any disputes resulting from this contract shall be within the exclusive jurisdiction of Berlin-Mitte". Defendant relied upon a judgment issued 1 November, 1937, by the Supreme Court sitting as a Court of Appeal in Civil Appeal No. 194/37 in which the principle was laid down that "the parties having agreed that all disputes arising out of the policies are within the jurisdiction of the Court of Zurich — the Courts in Palestine are not the competent Courts to deal with it".

In my opinion this plea of the Defendant must fail for the following reasons:

1) The aforementioned judgment of the Supreme Court cannot be taken as an authority because it was issued before the Rules of Civil Procedure, 1938, came into force. These Rules introduced a very important change in the Law governing the question of jurisdiction. The former Law was expressed in Article 1 of the Addendum to the Civil Procedure Code from 9/4/1911 as follows:

> "If a place of residence is specified in any agreement and the intention of the parties was to bind one of the

parties only — the other party has the choice to bring his claims arising out of the agreement or the contract in the Court of the place of residence of the party so bound or before the Court in the place specified in the agreement. If, however, the intention of the parties was to bind both parties, then either party may bring all his claims arising out of this agreement in the Court of the place specified in the agreement".

The former Law constituted an exclusive jurisdiction of a Court by the intention of the parties in the latter case. The Civil Procedure Rules, 1938, cancelled this possibility and gave only the Plaintiff the right to bring his claim before one of the Courts mentioned in Rule 4 — "Actions in respect of debt or movable property *shall be instituted* before the appropriate Court of the place (a) where the Defendant resides *or* carries on business, or (b) where the undertaking was made or" and so forth. It means clearly that even when the parties agreed to sue and be sued before the Court of the place where the contract was signed — this clause does not prevent the Plaintiff from instituting his action before the Court where the Defendant resides. Rule 4 of the Civil Procedure Rules, 1938, has abolished the right of the contracting parties to create an exclusive jurisdiction of one Court and to eliminate all other appropriate Courts.

2) This plea was not made by the Defendant in good faith. Defendant who is a Jew knows exactly that he is not able to defend himself before a German Court, simply because he cannot appear before such a Court without exposing himself to the danger of being arrested or put in a concentration camp even when he would be able to receive a visa to Germany. He knows exactly — what is notorious — that even if this impossibility would happen and he would be in a position to defend himself before a German Court, the Plaintiff could not make a judgment obtained before such a Court executable in Palestine neither by the way of *exequator* nor by an action on the judgment — in accordance with Rules 3, 7 (1) (c) of the Foreign Judgment Rules and especially under Rule 7 (2) — as there is no reciprocity between Germany and Palestine. It means that after the Plaintiff will obtain a judgment in Berlin he will be in the position in which he is to-day *i.e.* to go to the root of the transaction and institute the same action before the same Court in Palestine. — The advocate of the Plaintiff, who is a Dutch firm, declared that he is ready to accept and to answer to all defences which the Defendant would be able to bring under German Law before a German Court. By refusing to agree to it and sticking to the clause of the jurisdiction of a Court in Berlin, before which he never can appear — the Defendant only proves his bad faith and his intention

to avoid the fulfilment of his obligations towards the Plaintiff. It is a great difference between a Court in Zurich in Switzerland, mentioned in the cited judgment of the Supreme Court, and a Court in Berlin — in Germany. It is notorious that a Jew who left Germany for Palestine cannot even go there.

3) This my opinion is based on a judgment of the London Court of Appeal in the case Oppenheimer *v.* Louis Rosenthal and Co. reported in the All England Law Reports Annotated, Vol. 1, 1937, Page 23. — In this judgment the respective English authorities are quoted.

4) Finally I am in doubt whether — after the Judges of this Court disagreed as to the preliminary point of Jurisdiction — the claim should be dismissed or rather the plea of lack of jurisdiction overruled.

For these reasons I suggest that the plea of lack of jurisdiction be overruled and the case heard on the other issues.

Delivered in open Court this 21st day of December, 1938.

*For Plaintiff:* Barshira. *For Defendants:* Nusbaum.

*Judge.*

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CIVIL CASE No. 122/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

1. Joseph Zinman,
2. Eliahu Lager,
3. Joseph Zimberknopf. PLAINTIFFS.

v.

Moshe Shwarz. DEFENDANT.

*Application to set aside an award — Time within which such application should be made — Estoppel of party to raise a point agreed to by their own arbitrator — Manner of notification of adjournments — Discretionary power of Court to enlarge time.*

JUDGMENT:

This is an application under Section 13 of the Arbitration Ordinance to set aside an award.

When the matter came before the Court for hearing the Respondent suddenly took a preliminary objection that the application was out

of time. Respondent had not raised this objection in his written defence nor when issues were agreed and I think it is very doubtful whether he should be allowed to raise the matter now. Unfortunately there are no Arbitration Rules to say within what period an application to set aside an award must be made. Presumably there must be some time limit within which such an application must be made. I cannot trace any decision of a Court in this country on the point. It is true that in Jerusalem Civil Case 38/37 the Court there by way of *obiter dicta* expressed the opinion that Order 64, rule 14 of the Rules of the Supreme Court should be applied. Those rules require the application to be made within 6 weeks after the making of the award and its publication to the parties. This was not done in the present case. Whilst we are inclined to the view expressed in Jerusalem Civil Case 38/37 we feel that the matter is not free from considerable doubt. In any event we are of the opinion that taking into consideration all the circumstances in this case it is one where the Court should use its discretionary power of extension of time and hear the motion even though it was out of time.

According to the submission dated 2.10.37 the Arbitrators had to make their award within 1 month. They did not do so. Moreover as there is no provision for the enlargement of time in the submission they had no power to enlarge in view of the definite limitation in the submission.

It is rather strange, however, that the Petitioner's Arbitrator agreed to an enlargement and Petitioner is now seeking to have the award set aside because of this enlargement. I think it is doubtful whether Petitioner is not estopped from raising this objection to the award. However in view of these circumstances the Court considers this is a proper occasion for exercising its discretionary power and enlarging the time.

From the evidence we are not satisfied with the manner in which notification was given of the adjourned meeting. In our opinion notice should have been given in writing and in view of the non-appearance of the Petitioner's Arbitrator on the 7th December, 1937, it would have been advisable to have adjourned that meeting.

In the circumstances we remit the case to the Arbitrators to proceed from the stage at which they had arrived before the meeting of the 7th December, 1937, and to make a fresh award within 1 month from to-day — no order as to costs.

Dated this 21st day of December, 1938.

*For Plaintiffs:* Gafni. *For Defendant:* Hatchwell.

*R/President.*

*Judge.*

CIVIL CASE No. 182/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

1. Shlomo Har-Paz,
2. Zehava Anvi,
3. Rahel Goldberg,
4. Zipora Goldberg-Shulman. PLAINTIFFS.

v.

Dov Feigin. DEFENDANT.

*Claim for an Injunction — Agreement in restraint of trade arrived at by way of a compromise — Legality of compromise — Restraint not unreasonable.*

JUDGMENT:

The facts in this case are as follows:

Plaintiffs, leased a shop to Defendant at 26, Nachmany Street. In December, 1936, Plaintiffs filed an action against Defendant in the Magistrate's Court for possession as they required the shops themselves and apparently intended themselves to open a shop of a similar nature *viz.* a dairy and café. Before the hearing of the action a compromise was made by the parties whereby Plaintiffs agreed to allow to Defendant to occupy the premises until 31.3.38 in consideration of the Defendant paying ½ the Court Costs and giving an undertaking not to open a dairy or café within a radius of 175 metres of 26, Nachmany Street so long as Plaintiffs ran it as a dairy or café.

From the evidence it is clear that Defendant's wife immediately opened a café at 47, Ahad Haam Str. — a distance of only some 50 metres away. The wife has taken a permit out in her name. I am satisfied however that the wife is merely being used as a cloak in an endeavour to get round the compromise. The café is being run in all material points as before.

The Defendant alleges that Plaintiff has not opened a dairy or café at No. 26, Nachmany Str. as he has not yet obtained a permit from the Municipality. I do not consider the defence sound. I find as a fact that the Plaintiff is carrying on the business of dairy and café at No. 26.

The question whether or not he should obtain a permit from the Municipality is immaterial to the action.

That disposes of the issues of fact. As regards the issues of law 1 & 2. The compromise is legal — there is a good consideration for it and the restriction is not unreasonable.

3. In my opinion the Plaintiff is entitled to an injunction as it would be almost impossible for him to prove damage suffered in respect of loss of trade in a business which he was not carrying on there previously to the breach.

Issue 4 was not proved and does not appear to me to affect the case.

For the foregoing reasons we grant an injunction against Defendant restraining him from carrying on either directly or indirectly the said business of dairy and café within a radius of 175 metres of 26, Nachmany Street and to pay Plaintiffs' costs and Advocate's fee LP. 3.

Given this 21st day of December, 1938.

*For Plaintiffs:* Dr. Felman and Zwi Fellman. *For Defendant:* Herouti.

*R/President.*

*Judge.*

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CIVIL CASE No. 90/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF:

1. Joseph Rahamim Azar,
2. Itzhak Shaul Huri. PLAINTIFFS.

v.

Israel Beit Eli. DEFENDANT.

*Contract for the sale of land — Undertaking to transfer adjoining plots not yet in possession of vendor — Right to adjoining plots existing by virtue of contract with third party, reference to which was made in the undertaking — Failure to transfer adjoining plots — Right of purchaser to recover proportionate part of purchase price.*

*Note:* This judgment was confirmed on appeal in C. A. 9/39 (1939, 1 S.C.J. 104).

C.D.C.T.A. 176/37, referred to in the judgment, is reported in the 1937 volume,

## JUDGMENT:

The facts in this case are briefly as follows. By a Contract dated 23.10.34 the Defendant undertook to sell a certain plot together with a right on the completion parts for the said plot to the Plaintiffs. Defendant has transferred the plot but not the completion parts to Plaintiffs. Plaintiffs ask for the return of the proportionate part of the purchase money and certain costs.

Actually the wording of the contracts is but slightly different. It is similar contract, to a person called Palatnik. The present Plaintiffs like the present Defendant were only able to transfer the plot without the "completion parts". Palatnik sued the present Plaintiffs (Civil 176/37) and his action was dismissed as the Court held that the Defendants in that action (the present Plaintiffs) had merely undertaken to assign their rights to the "completion parts" and that they had done. The judgment was appealed (C.A. 246/37) and the judgment reversed. The Appellate Court held that in Cl. 1 of the contract between the present Plaintiffs and Palatnik there was a declaration by them that certain land belonged to them under an assignment and was held by the Municipality on their behalf. The Appellate Court held that that declaration was a misrepresentation. The Appellate Court appears to me to have held also that as the Municipality held no land on behalf of the Respondents (the present Plaintiffs) no rights could be transferred.

Now if the wording of the contracts between the parties in this action were the same as that in Civil 176/37 this Court would be bound to place the same interpretation on the contract as that made by the Appellate Court in C. A. 246/37.

Actually the wording of the contracts is but slightly different. It is clear from the contract, — I do not think the Defendant can deny it, that by Cl. 1 & 3 Defendant undertook to transfer his rights in respect of the completion parts. Now it is clear from the evidence that the Municipality is not as yet the owner of the "completion parts". Further, from an examination of the contract with the Municipality to which reference is made in this contract we find in Cl. 3 thereof that the Municipality undertakes to negotiate with the registered owners to acquire the plots provided it gets them to transfer them. In Cl. 4 it undertakes that if it fails so to acquire hem by negotiating it will submit a Town Planning Scheme to the Town Planning Commission and that if that plan is approved it will expropriate. Finally Cl. 5 provides what the Municipality will do if it fails in these endeavours. Therefore the alleged rights are merely promises by the Municipality to do its best to acquire these completion plots. When the Municipality had acquired

them, then group 22 or its assignees would acquire rights to transfer but not until then. Thus in this case the Municipality not having acquired the plots, Group 22 has not acquired any rights to transfer.

I feel a doubt in my mind as to whether the representation by Defendant amounts to a misrepresentation in view of the fact that reference is made to the contract with the Municipality in this contract and therefore the Plaintiffs could quite easily by looking at the contract with the Municipality have ascertained whether or not Defendant had any rights to transfer. I feel it is open to doubt whether Plaintiff was not negligent in not looking at that contract when it was specifically referred to in this Contract. However in view of the fact that the Contract with the Municipality was referred to in the contract with Palatnik and the Court of Appeal in that case did not hold that the purchaser should have studied the Municipal contract to ascertain the alleged rights I do not consider we can hold that Plaintiffs' negligence deprived them of their right to recovery.

For the foregoing reasons we give judgment for the Plaintiffs for the return of the purchase money paid in respect of these completion plots, we dismiss the claim for costs as Plaintiffs need not have incurred them — costs in this action and advocate's fee of LP. 5. Interest from date of action.

Given this 22nd day of December, 1938.

*For Plaintiffs:* Dr. Felman and Zwi Fellman. *For Defendant:* Aizen.

*R/President.*

*Judge.*

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CIVIL CASE No. 241/38.

IN THE DISTRICT COURT SITTING IN TEL-AVIV.

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

IN THE CASE OF: PLAINTIFF.
Haim Buchman.

V.

DEFENDANT.
Abraham Avieh.

*Opposition to the enforcement of an award — Pleas not raised at the proper time cannot be raised in final speech — Arbitrators not bound to decide on discretionary matters — Right of arbitrators to extend time exists unless expressly forbidden or excluded.*

## JUDGMENT:

This is an opposition to the enforcement of an award for three reasons: —

(a) That witnesses produced by the opposing party were not heard and that documents were disregarded by the Arbitrators.

(b) That the Arbitrators did not decide all questions referred to them.

(c) That the Arbitrators exceeded their Jurisdiction and decided matters not referred to them.

During the trial the opposing party waived the first ground and confined the examination of the third Arbitrator only to the two remaining points (b) and (c).

As to (b) it was proved that the award does not contain a formal decision as to the dissolution of the partnership. This was argued by the advocate for the opposer, why we should not confirm the award. We cannot agree with this contention. In the submission these following words appear *viz.:* "The Arbitrators are *entitled* to dissolve the partnership" but this does not mean that they were obliged to do so. It was within their rights to do so but they were not bound to do so.

As to (c) the opposing party did not prove that the Arbitrators had dealt with or decided questions not referred to them. Instead of specifying any such question the advocate for the opposing party in his final speech pleaded two new points namely, that the Arbitrators had extended the time for the issuing of the award in spite of the fact that, according to the submission, they had to issue the award within ten days from the date of the signing of the submission and that the award is not executable on the face of it. We do not think that these new reasons come within the meaning of excess of Jurisdiction by the Arbitrators. They are rather new or separate points, which should have been raised and pleaded at the proper time and should not have been mentioned in the final speech. But even if that were not so, we can find no substance in them. Section 4 of the Arbitration Ordinance states: "A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the Schedule to this Ordinance". It appears clear that provision (c) of the Schedule giving to the Arbitrators the right to enlarge the time for giving their award must be deemed to be incorporated in every submission, if it is not expressly forbidden or excluded by the submission itself. A clause in the submission "The time of the Arbitration is in the following terms *viz.*: fixed for ten days from the date of this submission" is not in itself sufficient to preclude the Arbitrators from

enlarging this time according to the Schedule. Especially when both parties accompanied by the same advocates appeared before the Arbitrators after the expiry of the period of ten days mentioned in the submission, pleaded before them, tendered evidence, heard experts etc. The parties proved by their behaviour that they never had the intention to exclude the provisions of the Schedule. Even if it had so happened, this Court under the circumstances of the case and in accordance with section 10 of the Arbitration Ordinance is always entitled to enlarge the time for giving an award. So this plea must fail.

From the award itself it does not appear that it is not executable. The award fixed all kinds of principles for the settlement of the relations between the parties and is executable like any judgment dissolving a partnership. It may be that the award is not ideal but it is a matter for the party who asks us to confirm it to say whether he is satisfied with it or not. It will be for him, if necessary, to overcome any difficulties he may meet with in the Execution Office.

Awards in which conditions have been imposed have been supported (See Russell on Arbitration 12 (1931 Edition Pages 229 & 230). For all the foregoing reasons we confirm the award with costs and LP. 5.— advocate's fees against the Respondent.

Delivered in Open Court at Tel-Aviv, this 22nd day of December, 1938, in the presence of Mr. Schwartzman for Applicant and Mr. Fellman for Respondent.

*President.*

*Judge.*

# פ ס ק - ד י ן

תביעת התובעת בסך של 300 לא"י מבוססת על שטר חוב שזמן פרעונו היה ביום 15.4.36.

השטר הנדון נתן בקשר עם חוזה שעל פיו התחייב הנתבע להעביר לתובע קרקע בתנאים מסוימים. השטר הזה יחד עם שטרות אחרים נתנו לבטחון דמי הקדימה ששלמה התובעת לנתבע ועל פי ההערה לסעיף 6 מהחוזה שבין הצדדים התובעת היתה צריכה להשתמש בשטרות הנ"ל כאמצעי לגבות מהנתבע ומהערבים את דמי הקדימה שהוא שלם במקרה והנתבע לא יעביר את הקרקע בשם התובעת בתוך המועד הקבוע בחוזה.

המועד הקבוע בחוזה היה בראשונה עד ליום 15.3.36, אבל על פי הסכמת הצדדים הוארך זמן ההעברה ליום 15.2.37.

הנתבע לא העביר את הקרקע והתובעת מבקשת לחייבו לשלם את השטר של 300 לא"י שהוא חלק מדמי הקדימה.

בשם הנתבע טען העו"ד מר הררי כדלקמן:

1) שטח הקרקע לא הועבר במועד הקבוע בחוזה לפי בקשתה המפורשת של התובעת.

2) דחוי העברת הקרקע הנ"ל נגרם גם ע"י המאורעות.

3) התובעת מצדה הפרה את החוזה ומשום כך אין לה זכות לדרוש את סכום התביעה.

4) הזמן לא היה תנאי עיקרי בחוזה.

אחרי שמיעת העדים בית המשפט מוצא שהנתבע לא הצליח להוכיח שהתובעת הפרה את החוזה או שהיא בקשה מהנתבע לדחות את העברת הקרקע לאחרי 15.2.37. ובנוגע לטענת ב"כ הנתבע שהזמן לא היה תנאי עיקרי הרי הסעיף 6 מהחוזה אומר בפירוש שהתובעת רשאית לגבות את השטרות במקרה והנתבע לא יעביר את הקרקע בתוך הזמן הקבוע בחוזה. אין איפוא שום ספק שהזמן במקרה שלפנינו היה תנאי עיקרי.

ואשר לטענת ב"כ הנתבע שהעברת הקרקע לא נעשתה מסבת המאורעות אין להתחשב בה היות והתובעת איננה דורשת פצויים כי אם את החזרת דמי הקדימה.

על סמך האמור אנו מחליטים לחייב את הנתבע לשלם לתובע סך 300 לא"י יחד עם הוצאות המשפט, רבית חוקית מיום 15.2.37 ושכר עו"ד 5 לא"י.

פס"ד זה הוצא והודע בפומבי ביום 18.12.38.

(חתום) י. מני
שופט

(חתום) פ. קורנגרין
שופט

ב ש ם ה ת ו ב ע ת: אפרתי. ב ש ם ה נ ת ב ע י ם: הררי.

בית המשפט סבור שמסירת תעודות המניות בידי מקבל המשכון או בידי שליש בהסכמת הצדדים מהווה משכון בהתאם לסעיפים 701, 705, 706 מהמג'לה.

במקרה שלפנינו, תעודות המניות השלשו בהסכמת הממשכן ד"ר חבויניק ומקבל המשכון התובע בידי השליש חברת „אסותא" בע"מ. אין חשיבות לעובדה שמקבל המשכון לא הכיר את השליש ולא התקשר אתו באפן ישר. הממשכן במקרה זה תווך בין מקבל המשכון ובין השליש והקשר בין שלשת הצדדים הוא גמור ומחייב.

לכן אנו מחליטים שלתובע יש זכות קדימה על שלש המניות הנידונות והיות והן עכשיו מעוקלות ועומדות למכירה פומבית על ידי משרד ההוצאה לפעל, אנו מחליטים שעל משרד ההוצאה לפעל למכור את המניות ולשלם מכספי המכירה לתובע את הסך 500 לא"י ולחלק את השאר בין הקרדיטורים האחרים באפן יחסי לחובותם.

אין אנו חושבים שיש להטיל על הנתבעים הוצאות המשפט הזה היות והתובע לא הצליח להסיר את העקול או לקבל את המניות.

פסק־דין הוצא והודע בפומבי ביום 13.11.38.

(חתום) ד"ר פ. קורנגרין
שופט

(חתום) ד"ר מני
שופט

בשם התובע: קרוסרסקי.
בשם הנתבעים: הררי, גרשמן, פרבשטיין, המבורגר, דיקשטיין.

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תיק אזרחי מס. 174/38.

## בבית המשפט המחוזי במושבו בתל-אביב.

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

בענין:

„תנובה", אגודה חקלאית שתופית לשווק תוצרת משקי העובדים העברים במחוז תל־אביב, בע"מ
תובעת

נגד

1. ישראל הלוי,
2. יעקב ברמן

נתבעים

תביעה על שטר שנתן כערבות להחזרת דמי קדימה — הפרת חוזה מכר ע"י אי־העברת אדמה תוך הזמן הקבוע — טענת חוסר אפשרות להעביר מסבת מאורעות נופלת במקרה שהתביעה היא להחזרת דמי הקדימה בלבד ולא פצויים.

א) העקול שהוטל על המניות הנ"ל נתאשר על ידי בית המשפט ויש איפא לפנינו מקרה של Chose Jugée. לתובע היה האפשרות להגיש התנגדות צד ג' לפני אותו בית המשפט שאישר את העקול וזה בהתאם לסעיף 37 מחק שופטי השלום.

ב) המסמכים שעליהם מסתמך התובע דהיינו מוצגים מס. 1 ו־2 הם מחוסרי בולים מספיקים ואי אפשר להגישם בתור הוכחה במשפט זה.

ג) התובע איננו רשאי לסמוך על החק האנגלי כשיש חוק מקומי על הענין הנדון. הסעיף 706 מהמג'לה מתנה מסירה של המשכון למקבל המשכון ובמקרה זה לא היתה מסירה. ואי אפשר להגיד שחברת „אסותא" החזיקה המניות בתור שליש היות ולא היה שום משא ומתן בין הממשכן והחברה.

ה) הזכויות של התובע לא נרשמו בספרי החברה בניגוד לסעיף 17 מההוספה השלישית של חק החברות משנת 1929.

ו) התובע לא הגיש תביעה לתקון ספרי החברה בענין זה בניגוד לסעיף 35 מחק החברות.

בנוגע לשתי הטענות האחרונות, אין צרך לבררן באריכות היות והתובע איננו דורש זכות בעלות על המניות הנ"ל. מטעם זה גם כן יש לדחות את הטענה הראשונה של הנתבעים שעל התובע היה להגיש התנגדות צד ג' לפני אותו בית המשפט שאישר את העקול. הסעיף 87 מחק שופטי השלום שעליו מסתמכים הנתבעים חל רק במקרה שדורשים זכות בעלות על הדבר המעוקל. ואשר לטענת חוסר בולים במסמכים המוגשים ע"י התובע, בית המשפט סבור ששני המוצגים מס. 1 ו־2 מהווים מסמך אחד היות ואחד מהם הוא הצעה והשני קבלה ומכיון שהממונה על מס הבולים הטביע בולים על המסמך מס. 1 וקבל את הקנס בהתאם לסעיף C 17(2) מחק הבולים אין שום מניעה לקבל את המסמכים הנ"ל בתור הוכחה במשפט זה.

נשאר לנו לברר את השאלה אם המסמכים הנ"ל מהווים משכון חקי לטובת התובע. שני הצדדים דברו באריכות על החק האנגלי והחק המקומי בקשר למשכון.

אין אנו חושבים שיש מקום במקרה שלפנינו להסתמך על החק האנגלי מאחר שהמג'לה כוללת ספר שלם על המשכון והוא הספר החמישי.

טען ב"כ אחד הנתבעים שבארצנו אי אפשר למשכן מניות ובפרט מניות על שם (Nominal) מכיון שקשה לתאר מסירתן ועל פי המג'לה המסירה של המשכון בידי מקבל המשכון היא עיקרית בכדי שהקשר יהיה גמור ומחייב. אין אנו רואים מדוע לא תהיה אפשרות למשכן מניות כמו שממשכנים נכסים אחרים. הלא המניות מכל הסוגים מהווים בימינו חלק גדול של הרכוש הפרטי ואפשר לבסס עליהן אשראי גדול לטובת הפרט והכלל. בודאי שהיה רצוי שהמחוקק יקבע פרוצדורה מיוחדת למשכון מניות בכדי להגן את הקהל נגד קנוניות והברחת רכוש. אבל אין להגיד שכל זמן שאין פרוצדורה כזו אי אפשר למשכן מניות על שם.

שלשת המניות של ד"ר א. חבויניק לפקודת כב' נגד מסירת השטר או השטרות שיהיו בידי כבודו אז לנו.

„רשמנו לפנינו את הודעתו של ד"ר א. חבויניק הבלתי חוזרת ובמקרה ואחד השטרות הנ"ל לא ישולם בזמן פרעונו, אנו מתחייבים למסור לו את שלשת המניות שלו עם כל הזכויות הקשורות בהן בלי שום תמורה נוספת מלבד השטר או השטרות של ד"ר א. חבויניק שיהיו בידו אז. אשור זה נתן בהתאם לתקנותינו ומחייב אותנו".

באותו התאריך, חברת „אסותא" כתבה לתובע מכתב בנוסח הנ"ל בדיוק (מוצג 2).

הנתבע ד"ר אריה חבויניק לא שלם את השטר של 250 לא"י שז"פ חל ביום 30.3.38 והתובע שלח התראה לחברת „אסותא" שבה הוא דורש למסור ולהעביר לו את שלשת המניות נגד השטרות, כפי התחייבותה במכתב מוצג 2.

חברת „אסותא" בע"מ ענתה להתראת התובע שאין באפשרותה למסור את המניות היות ועל המניות הנ"ל נעשו עקולים אחדים מטעם בית משפט השלום.

העקולים נעשו על פי בקשת הנתבעים האחרים במשפט זה.

לפי תביעתו המתוקנת מיום 13.6.1938 התובע מבקש: א) לתת פקודה ל„אסותא" בע"מ בנוכחות הנתבעים האחרים ובפניהם להעביר ולמסור לתובע את שלשת המניות הנ"ל או את תמורתן בסך 500 לא"י. ב) באפן אלטרנטיבי להחליט שהמניות הנ"ל הן ממושכנות לתובע על סך 500 לא"י בתור משכון ראשון ולחייב את „אסותא" בע"מ בתור נאמן למסור את המשכון לתובע כדי שהתובע יוכל לגבות את כספו ע"י מכירת המשכון. ג) באפן אלטרנטיבי, להכיר בהתחייבות של „אסותא" בע"מ בתור ערבות בעד הסך 500 לא"י ולחייב אותה לשלם לתובע את הסך הזה. ד) באפן אלטרנטיבי לחייב את „אסותא" בפצויים בסך 500 לא"י בעד אי מלוי התחייבותה. ה) באפן אלטרנטיבי, לחייב את „אסותא" בע"מ וד"ר חבויניק באפן סולידרי בסך 500 לא"י ולתת פקודה למכור את שלשת המניות ולשלם מתוכן את הסכום הנ"ל בזכות יתרון לתובע. ו) באופן אלטרנטיבי, לתת לתובע את העזרה לפי החק ולפי היושר.

ביחס לנתבעים האחרים שהטילו עקולים על המניות הנ"ל, התובע מבקש להסיר את העקולים האלה במדה שהם פוגעים בזכות היתרון של התובע כבעל משכון על המניות הנ"ל.

אשר לתביעת התובע נגד הנתבע הראשון חברת „אסותא" בע"מ אין בה ממש מאחר שהחברה הנ"ל לא הכחישה מעולם את התחייבותה היחידה בתור „שליש" למסור למקבל המשכון את המשכון במקרה של פגור מצד הממשכן לשלם את חובו אלא שלרגל העקולים שנעשו על המניות מטעם בית המשפט לא היה באפשרותה למסור את המניות. אנו מחליטים איפא לדחות את תביעת התובע מחברת „אסותא" בע"מ ולחייבו בהוצאות ושכר עו"ד 5 לא"י.

ואשר לתביעת התובע נגד הנתבעים האחרים שהטילו עקולים על המניות, טענו ב"כ הנתבעים האלה כדלקמן:

תיק אזרחי מס. 120/38.

## בבית המשפט המחוזי במושבו בתל-אביב.

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

במשפט שבין:

ד"ר קורט ליפובסקי — תובע

נגד

1) אסותא בע"מ
2) ד"ר אריה חבויניק
3) ליפמן לוינסון
4) אליעזר זאב ריבנר
5) אברהם פתאל
7) בנק אשראי. — נתבעים.

משכון מניות להבטחת חוב — השארת המניות בידי החברה בתור שליש — הטלת עקולים ע"י צד שלישי לאחר המשכון — זכות קדימה של בעל המשכון — התנגדות צד ג' רק במקרה של תביעת בעלות ולא במקרה של תביעת זכות בלבד — הטבעת בולים על מסמך אחד מספקת לקבלת מסמך שני הקשור עם הראשון — הסתמכות על החק האנגלי במקום שישנו חק מקומי — אפשרות של משכון מניות על שם.

## פ ס ק - ד י ן

העובדות במשפט זה הן כדלקמן:

התובע, ד"ר קורט ליפובסקי, הלוה לנתבע השני ד"ר אריה חבויניק סך 700 לא"י ובתור בטחון להלואה הנ"ל, הנתבע משכן לתובע שלש מניות בחברת „אסותא" בע"מ, שהיא הנתבעת הראשונה במשפט זה.

המשכון נעשה בצורה הבאה: ד"ר אריה חבויניק כתב מכתב (מוצג 1) להנהלת „אסותא" שבו הוא בקש מהחברה הנ"ל לכתוב לד"ר קורט ליפובסקי את המכתב דלקמן:

„הננו מאשרים לכב' שד"ר אריה חבויניק הנהו בעל שלש מניות בחברתנו ושלם את תמורתן המלאה בסך של 1500 לא"י ואינו חייב לנו כלום בקשר עם המניות הנ"ל.

„קבלנו היום מד"ר חבויניק מכתב בלתי חוזר ובו הוא מודיע לנו שהוא ממשכן את שלש המניות שלו לכב' בתור בטחון על סך 700 לא"י שהוא, ד"ר א. חבויניק, חייב לכב' לפי שטרות אלה: 200 לא"י — ז"פ 15.9.37; 250 לא"י — ז"פ 30.3.38; 250 לא"י — ז"פ 30.6.38.

„והוא, הד"ר חבויניק, מבקש אותנו באופן מחלט ובלתי חוזר לרשום לפנינו שאם השטרות הנ"ל או אחד מהם לא ישולם בזמן פרעונו, עלינו להעביר את

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