MODERN APPLICATIONS OF JEWISH LAW

NAHUM RAKOVER

MODERN APPLICATIONS OF JEWISH LAW

Resolution of
Contemporary Problems According to Jewish Sources
in Israeli Courts

VOLUME TWO

THE LIBRARY OF JEWISH LAW

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TORTS

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Chapter One

GENERAL

1. Consenting to Injury to Person or Property

C.A. 335/59
REHANI v. TZIDKI *et al.*
(1961) 15 *P.D.* 159, 164, 165

In the course of throwing stones at one another, the appellant struck the respondent in the eye and severely injured him. The lower court ordered the appellant to pay a sum equal to forty percent of the estimated injury.

Cohn J.: It is noteworthy that Jewish law distinguishes between physical injury, in regard to which the consent of the injured party is of no avail, and injury to property where such consent is effective. In any event, the consent here was not clear and explicit. Maimonides (*M.T. Hovel uMazik* 5:10) writes:

> There is another difference between physical injury and injury to property. Where one says to another, "Blind me or cut off my hand and you will be free of liability" the other is still liable, since it is common knowledge that no person would wish this to be done to him. Where, however, one says to another, "Tear my clothes or break my utensils and you will be exempt," the other is exempt.

Rosh disagrees and holds that where the injured person expressly waives the damages, the tortfeasor is not liable. Rosh reads Maimonides' rule as if the injured person said "Cut off my hand or put out my eye", to which the tortfeasor replied, "Do you say this so I should be exempt?" and the injured party answers "Yes"; that must be considered as having been said in astonishment, i.e., "Would I say that to you?" In such circumstances the tortfeasor is liable (cited in *Tur, Hoshen Mishpat* 421:18).

In the circumstances proved before the learned judge, as aforesaid, it seems to me that he reached the right decision in attributing sixty percent to the respondent and forty percent to the appellant with respect to responsibility for the injury suffered by the respondent. At all events, nothing was produced to convince us that he was in any way mistaken.

Here also, it is of interest to note that under Jewish law "where two injure one another, if one caused more injury to the other than the other caused him, he has to pay the excess of the damages, but that is only when both began together or where after one has already injured another, the latter immediately commenced to do injury to the former; where, however, one of them began, the second is exempt since he is permitted to fight back and defend himself. But this is relative; where he could defend himself by inflicting some slight injury, but went to an excess, he is liable" (*Hoshen Mishpat* 421:13).

See: ZIM ISRAEL NAVIGATION CO. LTD. v. MAZIAR, Part 1, Jewish Law in the State of Israel, p. 28.

See: LAGIL TRAMPOLINES AND SPORTING EQUIPMENT ISRAEL v. NAHMIAS *et al.*, Part 8, Obligations, p. 644.

C.A. 548/78

SHARON *et al.* v. LEVI

(1981) 35(1) *P.D.* 736, 754, 755, 757

The District Court refused an application by the appellant for a declaration that the respondent was the father of her daughter. Equally, it dismissed her claim for maintenance. The appeal also involved the question of whether the respondent could be required to take a blood test for determining paternity.

Elon J.: The court's power to direct various medical tests also arises in the judgments of the Rabbinical courts. It is difficult to trace any special treatment of the problem in the halakhic sources, apart from a number of quasi-halakhic discussions (see, for example, the fairly unsophisticated blood test ordered by R. Sa'adiah ben Yosef...for determining paternity and rights of inheritance, cited in *Sefer haHassidim* by R. Yehudah haHassid, twelfth century Germany).

The question sometimes arises when the rabbinical court addresses the

problem of capacity to have children, and medical opinion is that the husband should undergo examination. The various grounds given for or against ordering medical tests do not rest generally on the invasion of privacy but on whether certain halakhic prohibitions can be observed when carrying out the tests. The accepted approach in the rabbinical courts is to order an investigation when no obvious risk to health is thereby entailed. Thus R. Eliezer Waldenberg, the President of the Jerusalem Rabbinical Court, has held, after a detailed study (*Resp. Tzitz Eliezer*, Part 7, 48), that "there is, it appears, no occasion for the husband to evade examination ordered by the court, particularly when his refusal is to the detriment of the woman." (See also R. Shlomo Yosef Zevin, *Le'or haHalakhah* (1964) 195; D. Frimer, "Determination of Paternity by Blood Tests in Israeli and Jewish Law" 5 *Jewish Law Annual* (1978) 219-39.)

In Jewish law, the power of the court to direct tests is based on the inherent power of the court to order whatever it deems necessary for a fair and just determination of the problem before it. This is the ancillary jurisdiction of which Lord MacDermott speaks...

Very obviously a blood test will not be conducted against the wishes of the person to be tested and the court cannot compel it in the absence of clear and express statutory provision. The right not to be physically affected is one of the basic human rights in Israel and forms one of the rights of personal freedom (*H.C.* 355/79 *Katlan et al.* v. *Prison Service et al.* (1980) 34(3) *P.D.*, 294. That case involved the forced administration of an enema to prisoners in order to recover the drugs they had swallowed. Such physical invasion is indeed more grievous than that of a blood test, since it is accompanied by an act which debases human respect, but a blood test too, though it does not entail any shameful act, is still an invasion of a person's body and of his freedom. It is a fundamental human right that this not be done by compulsion and without consent. Thus it has been held that a person suspected of an offence is not to be given a blood test except of his own free will (*Cr.A.* 184/62 *Peretz* v. *Attorney-General* (1963) 17 *P.D.* 2014). So also my learned friend decided on the application on motion, that the appellant is not to be compelled to undergo examination. As expressed in Jewish law, this basic right is instructive. "If one smites his neighbour inflicting less than the value of a *perutah* in damage", (i.e. causing him no damage—a "*perutah*" was the smallest denomination of currency) he is liable to flogging (*Sanhedrin* 85a; *M.T. Hovel uMazik* 5:3). Even when the person so struck has consented, no legal force attaches to his consent (*Baba Kamma* 92a; *Hoshen Mishpat* 420:1 *et seq.*) Why may one then let the blood of another even if that is medically necessary? According to the *Amora* R. Matna (*Sanhedrin* 84b), it is not because the sick person has consented, implicitly or expressly—such consent has

no effect — but because of the verse, "Thou shalt love thy neighbour as thyself" (*Lev.* 19:18). "A Jew was only warned against doing something to others that he would not desire to be done to himself" (Rashi *Sanhedrin* 84b). Nahmanides also wrote in his *Torat haAdam* (ed. Chavel (1964), vol. 2, 42) in the same vein. See also M. Elon, "*Halakhah* and Modern Medicine" 4 *Molad* (1971) 228, 232...

It is in fact a basic right of one against whom paternity is claimed that no tissue test be made—although it is a standard blood test like all other blood tests of this type and presents no danger to his health — without his consent....There is, however, the fundamental right of every person to know who his father is, so as not to be one who knows his mother but not his father (*M. Kiddushin* 4:2), and whose mother silences him whenever he asks about his father (*Kiddushin* 70a). When these two basic rights confront each other, we think—as long as the Knesset has not said otherwise —that the right of the presumptive father takes precedence over the right of the minor and he will not be compelled or ordered to undergo examination. But that does not mean that we will not draw the logical conclusion from his "suppressing" the decisive evidence at his disposal — and his disposal alone — to demonstrate whether or not he is the father. The conclusion to be drawn from his refusal to be examined is necessitated by reason and reality and is common to most legal systems. As a court, which is the "parent" of minors, we are required to do so in order to preserve that minor's basic right to know who is the father that bore him and who is the parent—in addition to his mother—who will support him.

2. Silence of the Victim

H.C. 182/75

TADIR LTD. v. MAYOR OF PETAH TIKVAH

(1976) 30(1) *P.D.* 311, 312, 314

Kister J.: On 6 May 1975, this Court issued an *order nisi* against the respondent requiring him to give reason why he should not grant the petitioner a licence under the Licensing of Businesses Law, 1968, for carrying on the business of preparing concrete in the industrial zone of Kiryat Aryeh in Petah Tikvah, or alternatively, why he should not

within fifteen days inform the petitioner in writing what he requires it to do in order to grant it the licence...

We are well aware that the renewal of a licence is involved and that a local authority may be required to extend a licence which it was originally not prepared to grant. But that is only when no damage or at least no appreciable damage will ensue from operating the plant, but not so in cases such as ours where the factory constitutes a nuisance or is injurious to the health of people in the vicinity by reason of the dust created. I have no need to dwell on other nuisances and mischief created by the petitioner's undertaking. In the instance of such damage no right will be available to the petitioner because of earlier licences. Already in Talmudic times it was emphasised that in the case of a nuisance created by dust it will be useless for the owner of a plant to argue that those living nearby saw and kept silent and thereby waived the damage. This rule derives from what is set out in *Baba Batra* 23a and is also so decided by Maimonides, *M.T. Shekhenim* 11:4:

> Where all the preventive measures mentioned above are not effected and a neighbour stands by silently, the latter is deemed to have foregone his rights....This only applies to injuries other than the four types of injury mentioned in this chapter, which are smoke, the smell of sewage, dust and the like, and movement of earth, as regards which there is no prescription....Even if the injured party remained silent many years he may compel their removal....These injuries are differentiated from others, because no one will tolerate them and is presumed not to have waived the injury permanently.

It should be said that these four types of nuisance are not a closed list and there are further examples in Maimonides. *Hoshen Mishpat* 156:36 ff. lays down the same rule.

3. Causal Connection

Cr.A. 47/56

MALKA v. ATTORNEY-GENERAL

(1956) 10 *P.D.* 1543, 1545, 1546, 1547, 1549-1550, 1554, 1555, 1558- 1559

Silberg J.: This was an appeal by leave against a judgment of the Haifa District Court, under which the appellant was convicted of an offence under sec. 218 of the Criminal Code Ordinance, 1936 (unintentionally causing death) and was fined IL. 75.

(a) On 1 September 1953, at 9.30 a.m., the appellant was driving a tender laden with watermelons through Haifa and while turning from one street into another...his vehicle ran into a two-year old child who was knocked down and had his arm fractured above the elbow. The appellant's arguments—that he was driving very slowly, that he did not and could not have seen the child because of a cartload of prickly pears that obstructed his view and the like—did not avail him. The learned judge did not believe him and, relying on proper and sufficient evidence, held as a fact, with which we see no reason to disagree, that the injury was definitely caused by the appellant's negligent driving...

(c) After a few days, necrosis developed in the area of the fracture. The skin tissue died, the skin blackened and shrivelled and as a result the wound reopened. To avoid infection and sepsis, the child's doctors treated him with antibiotics, penicillin and streptomycin, but did not administer an anti-tetanus injection.

(d) The treatment was given on the advice of experienced doctors, but the facts, to their surprise, proved them wrong. On 9 September...eight full days after the accident, symptoms of trismus and opisthotonus suddenly appeared, i.e. convulsion of the mouth and twisting of the spinal cord, characteristic indications of tetanus. The doctor's efforts to save him were not successful and that night the child died. The cause, according to the doctor's evidence and the court's finding, was penetration of tetanus germs when (or after) necrosis had set in.

(e) The appellant was then charged with unintentionally causing death...and was brought to trial....The learned judge held that, notwithstanding the unexpected turn of events, there was a direct causal connection between the negligence of the appellant and the death of the child, and she convicted him of the offence....The learned judge drew an analogy between the present case and *In re Polemis* [1921] 3 *K.B.* 560, and

concluded that the foreseeability of the actual consequence is not a prior condition of conviction under the section. The learned judge dealt with the difference between the civil action in tort in *Polemis* and the criminal prosecution in the present case by reference to the judgment of this Court in *Rotenstreich* v. *Attorney-General* (1953) 7 *P.D.* 58, where the Court likened the degree of criminal liability under sec. 218 to the degree of civil liability in an action in tort. It is against this judgment that the appellant directed his appeal...

The problem, however, arises once more in the intermediate case where foreseeability is lacking not in relation to the injury nor to its extent but "in relation to the kind of injury" or more precisely the remarkable manner in which, in this particular case, the injurious process developed. It may be added that there is no relationship between the two, the actual and the potential; for example instead of "expected" theft there comes a flood. This group of cases in fact parallels what the Sages of the *Talmud* describe in a remarkably apposite definition: "The beginning is in negligence and the end in accident", with the additional feature that both occur within one "causal chain"; that is to say, were it not for the negligence, the accident would not have happened, as for example, in the well-known instance of the "cot of bulrushes" which is the Talmudic counterpart of *Polemis*, except that it preceded it by 1600 years. It is worthwhile to examine that instance, for it embraces succinctly all the elements of the concept:

> A certain person deposited money with his neighbour who placed it in a cot of bulrushes and then it was stolen. R. Yosef said: Although it was properly guarded against thieves, there was negligence with regard to fire; hence the beginning was with negligence and the end with accident. He is therefore liable (*Baba Metzia* 42a). [There follows the almost identical rule from *M.T. She'elah uPikadon* 4:6.]

Here there was a causal connection between negligence and accident, "the accident came by reason of the negligence", as the commentators say, since had the money not been left where it was, it would not have been stolen, for the thieves apparently did not look elsewhere. By contrast the law is different in the following case:

> If he was negligent, [i.e. the bailee in whose care the animal was entrusted was negligent because he did not properly lock the stable for example — Rashi *ad loc.*] and it strayed [to graze] in a meadow and died naturally...Rava said in the name of Raba: he is not liable. It is obviously so according to the view that if it began in negligence and ended in accident, one is not liable, but even on the view that one

> is liable, it is otherwise here, because what difference does one place or another make to the Angel of Death? (*Baba Metzia* 36b)

Here no causal connection exists between the negligence and the accident since the "Angel of Death" does not distinguish between "here" and "there" and would have taken his toll in the cowshed as well. Hence the bailee is not liable, even though he was negligent in his bailment of the animal.

Thus in a nutshell, we have both aspects of the *Polemis* rule, as will be explained later, with one important difference which should be emphasized from the outset: the *Polemis* rule involved, also or only, a duty resting in the law of torts; the "cot of bulrushes" rule involved a contractual duty, a special contractual duty resting in the law of bailment. I shall further examine this difference below...

That therefore is the *Polemis* rule, propounded thirty-five years ago in England by the Court of Appeal. Attempts have been made to express it concisely and scholars have coined for it the well-known *dictum* of Justice Holmes: "The tort once established, the tortfeasor assumes the risk of the consequences" (*Holmes-Pollock Letters*, Vol. 2, 88, cited by Lord Wright in *"Re Polemis"* (1951) 4 *Modern L.R.* 293).

If I am not mistaken, however, the correctness of this *dictum* has been attacked; it involves, with the greatest respect, somewhat of a *circulus vitiosus*, for so long as liability for the consequences has not been determined, the tortfeasor has not yet been identified. It seems to me that, if we really must seek and find a concise formula as a specific against forgetfulness, then the Talmudic formula is the most apt: "The beginning was with negligence and the end was with accident—he is liable provided the accident occurs by reason of the negligence." As a consequence, however, of transferring "negligence" from the law of bailment to the law of torts, a slight change will occur in its meaning and instead of "a breach of the duty of guarding" will come "a breach of the duty of care". Subject to the differences flowing from this change, the *Polemis* rule will be identical with the "cot of bulrushes" rule, with the addition of the rounding-off notion expressed in the picturesque observation of "what difference does one place or another make to the Angel of Death."

In trying therefore to translate the actual facts of the present case into the categories of the *Polemis* rule...we must determine whether all the conditions of the rule are indeed satisfied: (a) "The beginning was with negligence"—the negligent driving and injury by the appellant was, on any view, likely to lead to the running down and killing of the child; (b) "and the end through accident"—the child's death from tetanus, which even the expert doctors could not foresee; and (c) the accident ensued

from the negligence — but for the arm injury there would have been no necrosis and no onset of tetanus and the child would not have died.

The present case, therefore, accords most precisely with all the conditions of the *Polemis* rule...

Perhaps it would be proper to refer here *mutatis mutandis* to an English judgment of 1881 applying, as it were, the yet-to-come *Polemis* rule to the special duty of a bailee towards the owner. That case concerned goods which a bailee had transferred to another place of safe-keeping where they were burnt without any fault on his part. The judge observed:

> I think the plaintiff is entitled to judgment....The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another and he must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods is equally inevitable in one place as in the other. (Per Grove J. in *Lilley* v. *Doubleday* (1881) 7 *Q.B.D.* 510, 511)...

The rule prescribed here is strikingly similar to the above-mentioned Talmudic rule. Before us is a rule of bailment in the spirit of the "cot of bulrushes" rule conjoined with the "proviso" of "what difference does one place or another make to the Angel of Death" (assuming that the transfer itself from place to place was "negligent"). As we saw above, this is precisely the Talmudic rule corresponding to the *Polemis* rule. That is the link or bridge between the two cases.

In truth, and to be precise, in order to avoid any inaccuracy or misunderstanding with regard to the comparison, I wish to add that if [the Talmudic rule] applies principally to bailment (cf. *Baba Metzia* 36b, 42a, 93b; *M.T. She'elah uPikadon* 4:6; *M.T. Sekhirut* 3:9, 10; *Hoshen Mishpat* 291:9); at its periphery it merges with the area of property torts, i.e., property that causes damage (*Baba Kamma* 21b; 56a; *M.T. Nizkei Mammon* 2:15; *Hoshen Mishpat* 390:12; 396:1). The reason is that in that area, too, the law of bailment is involved, since according to Jewish law liability for property torts arises because "the 'safekeeping' is your obligation" (*Baba Kamma* 9b). The rule may therefore be based on a single concept, that the Talmudic *Polemis* rule — i.e., where the beginning was with negligence and its end with accident, the person involved is liable — is confined neither to contract nor to tort: it has become linked to matters which involve a duty of safekeeping, whether it is another's property and the duty is to keep it from being damaged, or whether it is one's own property and the duty is to keep it from causing damage.

4. Indirect Causation

C.A. 302/67

MEFI CO. LTD. v. ASHKENAZI AND PARTNERS

(1968) 22(1) *P.D.* 211, 218-220

The appellant was held liable for damage caused by the flow of water from its land to that of the respondents.

Cohn J.: The Sages of Jewish law saw fit to impose a duty of avoiding damage to another either on the principle that "thou shalt not put a stumbling block before the blind" (*Lev.* 19:14) or the principle "thou shalt love thy neighbour as thyself" (*ibid.* 19:18) or because of "ways of pleasantness" (*Prov.* 3:17). I have found no express rule regarding the inundation of land, but one may draw an analogy from the law relating to neighbours, where one person dwells in an upper storey and another on a lower storey and water from the upper storey seeps down and causes damage, or the law relating to adjoining land owners, where one grows plants on his own land that damage the orchards of his neighbour. Maimonides (*M.T. Shekhenim* 10:5, 6) summarizes the rule as follows:

> Where a person places a steeping pool for flax alongside the vegetables of his neighbour and water from the pool penetrates the earth and damages the vegetables, or where a person plants leeks close by to his neighbour's onions which are thereby affected, or where a person plants mustard near beehives and the bees eat the leaves and lose their honey —in each such and like case he need not distance his plants to avoid damage, but the neighbour must remove his plants, if he so desires, so that they are not damaged, since the first person does what he does on his own land, and the damage to the neighbour comes of its own. This only applies where the damage comes of its own after the tortfeasor has stopped planting. If, however, what he does on his own land causes damage to the neighbour at the time while he is doing it, he is treated as a tortfeasor. The situation is similar to where a person standing on his own property fires arrows into his neighbour's courtyard and claims that he did so on his own domain (in which event) he is prevented....Where the owner of an upper storey pours water that seeps down, if the upper storey had a concrete floor that contained the water and after the upper owner stopped pouring water it was absorbed

> and then seeped down and made the lower storey damp, the owner of the lower storey must do the repairs and prevent the damage. If there is no concrete floor but the water pours down at once, the person responsible is like the one who has fired arrows and he must do the repairs or stop pouring water. So in all the cases.

Behind this rule rests the distinction between indirect causation of subsequent damage and direct causation by the tortfeasor himself by his own hands and activity, when the damage is immediate. The rule in Jewish law is that a person causing damage indirectly is generally exempt, whereas he is always liable for damage caused directly. This special rule, however, developed beyond this distinction.

We have seen that the one who causes damage with his own hands is he who pours water onto his neighbour's land whether intentionally or with the knowledge that the water will penetrate his neighbour's dwelling (because there is no concrete flooring), but an upper owner who uses his property in the normal and accepted fashion as a residence and pours water in the normal and accepted manner and in a place designed for that and the water nevertheless penetrates his neighbour's dwelling, he is not liable for the damage and the lower owner is himself "liable" and must "remove" himself from the damage or take all necessary steps to prevent it. The same will apply to a person who uses his land in the normal and accepted manner even if the plants he sets cause damage to his neighbour's land. He too is not liable since he planted on his own land, and land was created to be planted as R. Jose said, "for the one digs in his own and the other plants in his own"—*Baba Metzia* 117a; *Baba Batra* 22b and 25b).

The foregoing applies when the use is normal and common but not when it is "exceptional". When A digs a well on his own land which catches the rain and then overflows and penetrates the walls of B's cellar and becomes malodorous, Rosh held that A must remove the cause of the damage (*Resp. Rosh* 108:10). A's digging of the well on his own land, like the building of the pool in *Rylands* v. *Fletcher* (1868) *L.R.* 3 *H.L.* 330, is an "exceptional" use and therefore those who caused the water to collect in a man-made installation are bound to prevent damage to their neighbours, especially when the installation was negligently built.

Finally, I would also mention the distinction made by Jewish law between "prescriptive" and "non-prescriptive" damage for the purposes of the burden of proof. In the case of two adjacent owners, if the "lower" owner suffers damage from the flow of water from the "upper" land—this is a topographical feature which has not been created overnight, and the damage has long existed, either potentially or actually—such damage is or may become prescriptive since the "lower" owner knows his own land and

its topography well and presumably rain or other water has overflowed in the past from the "upper" land. The law is that the burden of proof is on the injured party — the plaintiff — to show that the other had no prescriptive right, by virtue of either implied permission or implied consent on the part of the plaintiff, that prevents him from suing. Only in the case of a non-prescriptive right, such as when the damage is a sudden or single occurrence or something to which the ordinary person is not readily reconciled (smoke, sewage, dust and the like and movement of the earth), is the burden of proof on the tortfeasor who urges that the injured party consented to or permitted what he did (*M.T. Shekhenim* 11:4-7).

5. Divine Punishment for Indirect Damages

See: NESS *et al.* v. GOLDAH *et al.*, p. 583.

6. Interspousal Actions

C.A. 479/60

APPLESTEIN *et al.* v. AHARONI

(1961) 15 *P.D.* 682, 688, 699-700

Sussman J.: Originally under the Common law no act committed by one spouse against the other gave rise to a cause of action in tort by the latter: *Phillips* v. *Barnet* (1876).

My friend, Landau J., has already said of this rule that "it used to be customary...to explain away the wrong done to a woman...by misusing the Biblical notion that husband and wife are 'one flesh', as if because of their unity it was impossible for a husband ever to affect his wife adversely." He adds that this trend of thought smacks of hypocrisy (*C.A.* 257/57 *Brandt* v. *Brandt* (1958) 12 *P.D.* 565, 577)...

Cohn J.: I agree.

Not only is it true that "the notion of the unity of husband and wife, notwithstanding its Biblical origin, has never been part of local law", as

Sussman J. puts it, but it has never been part of Jewish law either. This is but one example out of many of the interpretation of the Bible by Christian judges in England which is inconsistent with the interpretation of the Bible in Jewish tradition. For ourselves, it would be senseless to adopt in practice the Christian interpretation and forsake the interpretation of Jewish tradition.

If the truth be told, the *dictum* "and they shall be one flesh" (*Gen.* 2:24) has received many varying interpretations. Rashi explains (in accordance with *Sanhedrin* 58a) that "the child is created by both of them and in it they become one flesh." In Ibn Ezra's view this explanation is "far from correct" and he would understand the *dictum* as meaning "as if" they were one flesh or "deemed" to be so, but even Ibn Ezra is far from arriving at a legal "unity" of the spouses. Nahmanides, too, does not accept Rashi's interpretation, and in his own manner construes the passage literally as meaning that "it is the nature of man...for males to be attached to their wives". Just as we say of our fellow men that "they are of our flesh", so a man speaks of his wife, and indeed a man's wife is nearer to him than all his kin. R. Obadiah Sforno regards the *dictum* as a moral imperative, that man in all he does should aim at the perfection intended in the creation of man. The Midrash gives an explanation not necessarily expressing a moral imperative but a kind of physiological fact: "How may he rightly come unto her? By cleaving to his wife that they become one flesh, in a place where both are made one flesh" (*Gen. Rabbah*, 18:5). In law it was decided that the *dictum* was in the nature of a prohibition, even for the Noahides, of lying with an animal (see *M.T. Melakhim* 9:5).

Special importance attaches in Jewish law to the imposition of liability on spouses for injury they do one another. Whilst the rule is that the wife's property is held by the husband and he enjoys the income from it, the reparation which a husband has to make for any damage he causes her was excluded "so that the wrongdoer is not rewarded by taking part of injury he did her" (*Helkat Mehokek* to *Even haEzer* 83:1).

The law as decided by Maimonides (*M.T. Hovel uMazik* 4:16-18) is as follows:

> A husband who injured his wife must pay her immediately for the injury, the shame and the pain, and it all belongs to her and the husband does not enjoy the usufruct. If she wishes to give the money away to others, she may do so....The husband must see to her medical treatment as with any illness of hers. A man who injures his wife during intercourse is liable for the damage.
>
> A woman who injured her husband is required to sell her supplementary *ketubah* [marriage settlement], if she has such, to her husband without

> consideration, and the husband, if he wishes, may collect from it; if he wishes to divorce her and collect from the entirety, he may do so; if, however, she has no supplementary *ketubah*, she is unable to sell him her principal *ketubah*, since it is forbidden for a wife to remain even for one moment without a *ketubah* so that she is not treated lightly by the husband and divorced. If the husband wishes, he may draw a bill for the damages or divorce her and take his due part of her *ketubah*.

Even when it is not the husband but someone else who injures the wife, the husband will only take that part of the damages attributable to loss of earnings and medical treatment; the part attributable to shame is taken by the wife and that for pain and injury is shared between them (*ibid.*, 16). Where the wife is injured by the husband in conjunction with another person, the damage is shared (*ibid.*, 1:13) and the portion payable by the husband is given entirely to the wife as her own, whilst the portion payable by the co-tortfeasor is divided between the husband and wife as explained above.

7. Agency to Commit a Wrong

C.C. (Misc.) 182/73

BALAGEH *et al.* v. ESTATE OF N. TAFT dcd. *et al.*

(1976) 2 *P.M* 25, 30-31

Two people were killed when the vehicle in which they were travelling hit a mine. The widow and children of one of them, who had been sitting beside the driver who was also killed, claimed damages from the driver's estate.

Tirkel J.: The work of [the two deceased] and their movement in the area where the accident occurred were for their common purposes and each was well aware of the risk involved in travelling along a road that had not been inspected and in an untracked vehicle. The fact that Taft was driving the vehicle in which both were travelling is no more than a physical fact—only one of them could drive the vehicle at one time—and he must therefore in reality be regarded as the "extended arm" of Balgah who could just

as well have been driving his own vehicle and carrying Taft. In other words, the physical fact that one of them was driving does not of itself necessarily lead to any conclusion in point of law regarding his liability to the other. Even if we have regard to the duty of care, it is very questionable whether in these circumstances of a joint undertaking, the driver owed any duty of care to his passenger, just as it is very questionable whether the passenger owed any duty of care to the driver. It may be said that in contrast to a passenger in a public vehicle who, as it were, "entrusts" his well-being and safety to the driver, the passenger here took his safety into his own hands (just as the driver did), irrespective of whether he did so himself or through his agent for this purpose, i.e., the driver. But even if we say, following the age-old principle that no one can be an agent for an illegal act and the agent therefore is personally liable (see *Kiddushin* 42b, Rashi *ad loc.* and the instructive analysis of Prof. A. Kirschenbaum in 4 *Dinei Yisrael* 55 and in 1 *Jewish Law Annual* 219), that the driver owed a duty of care to his passenger, the negligence in the driving here must be divided between the two of them and "offset" between them. It is absolutely impossible to say that the driver was more negligent regarding the passenger than the latter was to himself (and to the driver). It was not proved that the driver had any special knowledge or ability which the passenger did not possess that imposed on him any extra duty of care.

8. Contributory Negligence

C.A. 3/51

DAN LTD. *et al.* v. MANDELBAUM

(1952) 6 *P.D.* 817, 819, 825-827

The respondent claimed damages for serious injuries caused by a bus belonging to the first appellant. The latter pleaded that the respondent had himself caused the accident or, alternatively, had been negligent and that the lower court had improperly refused to adjourn the trial to enable further evidence to be brought.

Assaf J.: Here I wish to note briefly that in strict Jewish law the appellants would be liable in the present circumstances. First of all we may cite the

leading principle laid down by the early authorities that "a person should guard himself more against causing an injury than against being injured" (Tosafot to *Baba Kamma* 27b: R. Yeshayahu miTrani in *Shitah Mekubetzet, ad loc.*). Indeed, there is another Talmudic rule that appears to prescribe the principle of contributory negligence: "If one acts unusually and another then does an unusual act to the detriment of the first, he is exempt", and if one's ox is crouching in a public place and the ox of another passes by and injures it, the owner of the second ox is free from liability (*Baba Kamma* 24b), but the authorities (*Tosafot ad loc.* and Rosh etc.) state that this rule does not apply to humans, for they are intelligent beings, and if one person does something out of the ordinary and negligently, the other must not act in like fashion but must take the utmost care not to injure the first person, particularly where that first person has himself caused no injury (Maharshal, *Yam shel Shlomo* to *Baba Kamma*, 3:20). One Tosafist particularises from the discussion in the *Talmud* to rule that where one is deemed negligent in respect of an act of his and must pay damages to another who has been injured, he is not deemed negligent when others injure him [as a result of that act], and they are liable (*Or Zarua* to *Baba Kamma* 159). For instance, where a person has not securely locked his door and a dog gets in and seizes a loaf of bread from the oven with a glowing coal attached and in so doing sets a haystack alight, the owner of the coal is liable for the damage to the haystack in that he did not lock the door (*Baba Kamma* 21b), but the owner of the dog is liable for the loaf of bread, and we do not say that the owner of the loaf was negligent in not locking the door. We come back to the same rule that it is better for a person not to injure others than to avoid being injured himself. Contributory negligence by the injured party does not exempt a tortfeasor from his obligation, but where the injured party is responsible at least equally with the tortfeasor for the injury, the latter is free from liability since both of them caused the injury (*Baba Kamma* 32a and Tosafot *ad loc.*)...

The following case was once put to Rosh. Soon after the wedding ceremony a bridegroom went riding in the countryside, accompanied by friends and relatives, some on horses and some on mules. One of the retinue raced his horse and collided with the mule ridden by the bridegroom, causing serious injury. The tortfeasor argued that since the accident had occurred on a public highway he was not liable, for the bridegroom should have taken proper precautions. Rosh replied: "This is no argument, because even a pedestrian should not rush along a public thoroughfare unless he is able to stop himself....Even more so, a person riding a horse may not race along where others are riding in case he cannot stop himself when necessary. If he does race along, he is negligent" (*Resp. Rosh* 101:5, cited in *Tur* and *Shulhan Arukh, Hoshen Mishpat*, 378).

Jewish law is consistent. It does not recognise allocation of damages as between tortfeasor and victim. (The payment of half in respect of the damage done by an animal whose owner was unaware of its propensity to cause injury is another matter.) Either the tortfeasor is fully liable and must pay for all the damage he has caused, if his act is the decisive one, or else he is fully exempt, even if not entirely blameless, where the victim has contributed to the damage no less than he.

9. Joint and Several Liability

C.A. 411/70

PINESS v. BEN AMIRA *et al.*

(1971) 25(2) *P.D.* 284, 298

The issue in this appeal arose over the fact that one of the two drivers involved in a road accident in which a person was killed had no compulsory insurance.

Cohn J.: Since the doing of justice and equity is involved, it is perhaps proper to recall that the question of two people together injuring another occupied the Sages of the *Talmud* long ago. R. Natan, a leading judge of his time, who delved into the depths of the law, held that where both were negligent, each must pay for half of the damage, and "if it is not possible to enforce payment against one, the other must make it up", on the assumption that each was responsible for the entire damage and is therefore liable, and the reason they nevertheless share equally is because one can say to the other that he should derive some benefit from the other having joined him in the damage (*Baba Kamma* 53a).

10. Absolute Liability

See: MAOR-MIZRAHI v. ATTORNEY-GENERAL, Part 6, Penal Law, p. 436.

11. Self-Help

C.A. 2/73

SELA v. STATE OF ISRAEL

(1974) 28(2) *P.D.* 371, 378-379

The defendant seized two lambs that had strayed onto his land so that he might compensate himself for the damage caused to him. He was convicted of an offence under the Penal Law Amendment (Deceit, Blackmail and Extortion) Law, 1963, it having been established that he was not permitted to seize the lambs and hold them as guarantee against payment of the damage they had caused.

Kister J.: The learned President referred to the approach of different systems of law regarding self-help in torts, in cases similar to the present one. He also mentioned the conjectures of one scholar about the position of Jewish law on this subject. In view of that, I find it proper to set out briefly the approach of Jewish law as reflected in the halakhic literature.

The liability for damage caused by a person's animals that stray into the fields or gardens of others is to be found in *Ex.* 22:4: "If a man causeth a field or vineyard to be eaten and shall let his beast loose and it feeds in another man's field, of the best of his own field and of the best of his own vineyard shall he make restitution." The question is much discussed in the *Talmud* and later authorities, but it will be enough to say here that the liability of the owner (or the person who has custody of the animal) is based either on his wilful act or his negligence in guarding the animals. The chief means of obtaining reparation is, obviously, through court action, but Jewish law recognises that in certain instances the law may be taken into one's own hands.

The nature of these instances also serves as a matter for distinctions and for differences of opinion among the authorities. One clear distinction is between seizure in order to repair damage and that for repayment of a debt. The latter is forbidden because of the prohibition of withholding a pledge. Some differentiate between rescue and the avoidance of damage, where self-help is permitted, and seizure in respect of damage already suffered, which is forbidden. At all events, the law treats seizure for the purpose of compelling the other side to go to court (and thus render reparation of the damage easier) more leniently than it does self-help for the purpose of obtaining what is due once and for all. There are authorities who do not define seizure as "self-help" and consider it legitimate mainly where it is difficult to get the other side to come to court or to obtain judgment against him.

Furthermore, with regard to animals that are wont to enter and cause damage to the land of others, it has been held that the owner of the land may warn the owner of such animals to guard them, otherwise he will be at liberty to kill them. It should be emphasized that killing is only permissible when the animal is intended for slaughter in any event, since the owner of the land may not cause damage to the owner of the animal by killing an animal intended for another purpose (*Hoshen Mishpat* 4:1; 5; and 397 and the glossators *ad loc.*, in particular *Netivot haMishpat* to 4:3 and *Resp. Mahari Kolon* 159).

C.A. 756/80

ROSENSTEIN *et al.* v. SOLOMON

(1984) 38(2) *P.D.* 113

The parties were owners of adjoining farms. The appellants claimed that the boundary of their land ran over land which the respondent had farmed for many years. The appellants entered the disputed area by force and damaged the crops which the respondent was growing there. They also put up a stone wall to prevent entry to the disputed area by the respondent. The latter claimed an injunction against the appellants and damages.

Elon J.: The question of taking the law into one's own hands has undergone many changes and developments in Jewish law...and it is right that we should look at its main aspects, if only in brief, especially as it forms the basis for sec. 19 [of the Land Law, 1969].

The main discussion appears in *Baba Kamma* 27b. (The subject is also treated in *Y. Baba Kamma* 3:1).

> R. Yehudah said: No man may take the law into his own hands for the protection of his own interests (according to Rashi *ad loc.* even when he is in the right — he should go to a judge). R. Nahman said: A man may take the law into his own hands for the protection of his interests. Where loss is involved, no one disputes that a man may take the law into his own hands. (Where for example A draws water from B's well without permission in order to irrigate his field, B may forcibly prevent A from doing so, for until he can take proceedings in court against A his well may be drained dry and it will not be possible to show how much water was taken by A: Rashi *ad loc.*) Where no loss is involved, opinions differ. R. Yehudah says that a man may not take the law into his own hands...for since no loss is involved

> let him go to court. R. Nahman says that a man may take the law into his own hands...for since he acts in accordance with law, there is no need for him to trouble himself to go to court.

As is usual in Talmudic discussion, a broad examination follows of a number of rules that support one or the other of these two opinions, most from the law relating to movable property, but one concerning trespass on land (where a public road passes through privately owned land: *Baba Kamma* 28a). The decisive majority of authorities decide the law in accordance with R. Nahman. (See Rabbenu Hananel *Baba Kamma* 27b; Rif *ibid.*; *M.T. Sanhedrin* 2:12; *Piskei haRosh, Baba Kamma* 3:3; *Tur* and *Shulhan Arukh, Hoshen Mishpat* 4; and others.) It is noteworthy that some of the authorities in the Geonic period (seventh to eleventh century) and the period immediately following decide in accordance with R. Yehudah. Thus in the first post-Talmudic code, the *She'iltot* of R. Ahai miShavha, we find:

> Where a person has a dispute with his neighbour, he may not use force but must go to court to decide the matter in accordance with the law...for the world rests on the truth, as we have learnt [*M. Avot* 1:18]: "By three things the world is preserved, by truth, by judgment and by peace" (*She'iltah* 2, Introduction).

...It is clear that the statement in the *She'iltot* does not refer to the ousting of a robber or trespasser when he is committing the unlawful act — as is apparent from the words, "where a person has a dispute with his neighbour", a point with which some commentators have dealt at length...

The view of Me'iri, which appears to be a solitary view in his time (thirteenth century), is instructive: one may only take the law into one's own hands when an act of violence is being perpetrated, but once the illegal seizure has taken place, one may not do so but must take legal proceedings (see *Bet haBehira, Baba Kamma* 27b, and the like view of Me'iri to *Baba Metzia* 101b).

As I have indicated, however, most authorities permit the taking of the law into one's own hands even after the illegal act has been committed and is complete. (See *Bet haBehira, Baba Kamma* 27b, and also as regards trespass on land *Baba Metzia* 101b and Raban *ad loc.*; *M.T. Sekhirut* 7:7; *Hoshen Mishpat* 319:1.) A number of conditions were attached to the rule as to when a person may do so and the means that may be adopted. It was repeatedly stressed that self-help is permitted only where one's property is seen to be in the possession of the person who stole it; to take the property of another in order to collect a debt is forbidden (*Tur* and *Shulhan Arukh, Hoshen Mishpat* 4; *Piskei haRosh, Baba Kamma* 3:3).

Regarding the payment of a debt and other obligations, the very strict prohibition of *Deut.* 24:10-13 applies: "...thou shalt not go into his house to fetch his pledge. Thou shalt stand without, and the man to whom thou dost lend shall bring forth the pledge without unto thee..." This prohibition is discussed in detail in the *Talmud* and by the authorities, both with respect to a debt emanating from a loan and a debt arising from other obligations. (See *Baba Metzia* 113a and the different glossators *ad loc.* and other authorities cited in M. Elon, *The Freedom of the Individual in the Collection of Debts in Jewish Law* (1964) 1-2, 31-37, 52- 67.) A line of authorities decided that self-help is only available when the property patently belongs to the person taking the law into his own hands and that it was the person from whom he is retrieving it who stole it:

> But where he does not know whether or not that person stole it — no one may do so, even if he says he lost the article, for if everyone should say to his friend, this is mine...then no one would be left in peace! Certainly, no one may take the law into his own hands unless he knows that the other stole [the article] from him [*Or Zaruah, Piskei Baba Kamma* 3:145, and see Mordekhai to *Baba Kamma* 3:30).

Substantial restrictions were imposed on the means that might be employed when the purpose was to prevent commission of the illegal act. The passage in *Baba Kamma* (27b) cited above, and in its wake Maimonides, (*M.T. Sanhedrin* 2:12), Rosh, (*Piskei haRosh, Baba Kamma* 3:3), *Tur* and *Shulhan Arukh*, (*Hoshen Mishpat* 4) lay down that taking the law into one's own hands is permissible even when no loss is involved....but this was construed in the course of time restrictively to the case where its purpose is to avoid a possible loss (*Resp. Maharit* 1:110, and see *Resp. Maharshakh* 3:22). One of the important later authorities draws a basic distinction in self-help between movable and immovable property: "For movable property, where there is a risk of loss...one may strike him, but with immovable property, where there is no fear of it getting lost, it is forbidden from the outset" (*Netivot haMishpat, Hoshen Mishpat* 4:1). Another reservation in this area is the obligation to minimize the damage caused by self-help. This obligation was already stipulated in the *Talmud* (*Baba Kamma* 28a), and it was reiterated and stressed in the rulings of the authorities and in the *Responsa* literature (see e.g. Meiri to *Baba Kamma* 28a; *Resp. haRosh*, 101:3; Mordekhai to *Baba Kamma* 3:37; *Tur* and *Shulhan Arukh, Hoshen Mishpat* 4, Rema *ad loc.*). Moreover, damage that is caused in the process of self-help which is beyond what is permissible gives rise to liability for compensation (*Resp. haRosh*, 101:3).

In summary, according to most authorities, self-help is permissible, even after the theft or the trespass has been perpetrated, if the person is retrieving

his own property, but only if it is absolutely clear that the property is his and has been stolen from him; when he has incurred no loss, self-help may not be effected by force, and must be done with as little damage as possible caused to the thief or the trespasser.

The obvious question is this: does Jewish law ignore the risk involved in self-help — even with the said reservations and limitations — of disturbance of the peace and public order? In order to answer this question correctly for the purposes of the present matter of self-help, one must consider the existence of a principled legal policy in Jewish law, according to which a long line of laws and rulings have been laid down in all areas of the legal system, the basis and aim of which is the concept of preservation of public order and prevention of all types of violence. Thus, there is a whole string of regulations enacted by the Sages in pursuit of peace (*M. Gittin* 5:4) and in order to prevent acts of dispute and enmity (*Hagigah* 22a; *Ketubot* 47a and 58b; *Kiddushin* 63a; *Baba Metzia* 10a and 12b; *Y. Ketubot* 9:4 (33a); *M.T. Ishut* 21:9, and see M. Elon, *Jewish Law* (2nd ed., 1978) 516 ff.); and this principle of making rulings in order to prevent disturbances of the peace is one of the important foundations of the decisions of the Sages (see e.g. *Resp. Tzemah Tzedek* 2; and see *M.T. Megillah veHannukah* 4:14). We have even found that the violence of one of the litigants can bring about a substantive change in the legal procedure and evidence, even to the extent of imposing the burden of proof on a party known to be violent — in contradiction to the rule that the burden of proof is on the claimant — when the witnesses are afraid to testify against him because of his violence (*Ketubot* 27b; *Baba Metzia* 29b)... and Maimonides sums up the situation thus:

> Whosoever wishes to bring witnesses to give evidence [to extract money from the defendant] deals with the witnesses and brings them to court; and if the court knows that the other party is violent and the plaintiff claimed that the witnesses are afraid of the other party to come and testify for him — the court forces the [violent] party to bring his witnesses... [*M.T. Edut* 3:12].

Jewish law is guided by the basic object of preserving public order and preventing violence, as we saw above. To take the law into one's own hands is only permitted in order to retrieve property that has obviously been stolen. Otherwise, "life would be impossible and everyone would seize the property of another, claiming that it is his...and the powerful would prevail" (*Or Zarua, Baba Kamma* 3:145; *Yam Shel Shlomo, Baba Kamma* 3:5).

Where it is clear that stolen property is involved, Jewish law recognizes the right to take it back, and the implementation of this right takes

precedence in Jewish law over the fear that self-help will entail a breach of the peace.

This does not end the matter in Jewish law. It seems to me that if the moral-social conditions exist in a given situation, we are bound to give preference to concern for public peace over the right of the "injured" party to retrieve his property by his own efforts...even when the right is recognized in general. If the Jewish law sources do not deal with the special case before us, there is some hint of it in a matter that is very similar to it. A case came before R. Ya'akov Reischer, in which partners were at odds over the partition of a cellar that belonged to them jointly, one claiming that his part of it should be close to his house (*Resp. Shevut Ya'akov* 2:167). R. Reischer came to the conclusion that in the given circumstances and in view of the differences among the authorities as to whether a person could be compelled not to act in the manner of Sodom [i.e. rigorously insisting upon one's legal rights], the rule is that whoever knows he has right on his side may do everything to assert his right, but he did not actually so decide; instead he advised that lots should be drawn. He says:

> My mind tells me...that the reason (for that rule)...no longer obtains at the present time since the number of those who are unrestrained and steal and use violence in respect of things that do not belong to them has increased....Therefore they should partition the property by lot...even if that step is novel, since it is not to be found in the early or later authorities. In any event, it should be so decided for the sake of truth and peace according to the needs of the time.

This is illuminating: the basic conception of Jewish law is to decide "for the sake of truth and peace" in the prevailing circumstances.

12. Loss of Earning Capacity

C.A. 237/80

BARSHESHET v. HASHASH *et al.*

(1982) 36(1) *P.D.* 281, 293-294

The appellant was injured in a road accident and was declared permanently disabled. Before the accident she lived on welfare alone. The District Court refused to award her any damages for loss of earnings.

Shilo J.: When the law is clear, no recourse need be had to the provisions of the Foundation of Law Act of 1980. It is, however, difficult not to dwell —even if only for the purpose of comparison—on the approach of Jewish law.

At the beginning of Chap. 8 of *Baba Kamma* (83b), the *Mishnah* deals with the various heads of damage for which a tortfeasor is liable—injury, pain, medical treatment, loss of time and shame — which correspond strikingly with the heads of damages considered today in our courts. We shall refer only to the first, which is pertinent to the present case. "Injury" is but the "loss of earning power" of modern law, as may be gathered from its definition in the *Mishnah*:

> How is it with injury? If he put out his eye, cut off his arm or broke his leg, the injured party is treated as if he were a slave being sold in the market and a valuation is made as to how much he was worth previously and how much he is worth now.

Maimonides, *M.T. Hovel uMazik* 1:2, completes the definition and concludes that the tortfeasor must pay the difference in value. The resemblance of the formulation of the principle of loss of earning power by Cheshin J., in Englard, Barak, Cheshin (eds.) *Law of Torts* (2nd ed. 1977) 602, to that in the *Mishnah* and Maimonides is not only a resemblance in language but a resemblance — and one may perhaps say an identity — in content. For what is the difference in value of which Maimonides speaks if not the difference of earning power of a person expressed by his worth in the labour market (the slave market of ancient times)?

All agree that the tortfeasor must make compensation for the decrease of working capacity resulting from the injury sustained, for which the appellant is not responsible. It is immaterial that this decline of working capacity may or may not entail a decrease of income.

13. Trespassers

C.A. 360/59

ATTORNEY-GENERAL v. BERKOVITZ

(1960) 14 *P.D.* 206, 208, 213

Witkon J.: The deceased...worked as a civilian employee in a military camp. As such he was forbidden to obtain food from any kitchen in the camp without prior approval from the adjutant-general. With such approval he might obtain vouchers by payment or by deduction from his wages. The deceased knew about the prohibition from past experience. In fact, however, the cooks and the mess sergeants and sometimes also low-ranking officers in command were not meticulous in observing the prohibition and would occasionally allow food to be obtained, at least by those civilian employees they knew or were friendly with. At times, the deceased too had obtained food in this manner. He knew one Sergeant Blum who was in charge of a kitchen, though not of the unit in which he was employed. One morning he waited for Sergeant Blum and asked him for food and the sergeant let him have it. Unfortunately the food was bad and whilst about a hundred soldiers of the unit came down with food poisoning, some seriously and some less so, the deceased died after three days. The question is whether his widow, the respondent, is entitled to claim damages for his death.

The traditional English approach to the sanctity of "the private domain", it appears to me, reflects a general principle which is not necessarily a product of the peculiar English character. There has also been submitted to us on behalf of the appellant the opinion of Mr. Elon, the adviser on Jewish law in the Ministry of Justice, from which it emerges that Jewish law as well discriminates against trespassers as opposed to other injured parties.

14. Liability for Injury Inflicted by One's Property

C.A. 564/66

KHURI *v.* KASSASH *et al.*

(1967) 21(1) *P.D.* 629, 635

The respondent suffered burns on his body caused by a tin of turpentine which caught fire and ignited his clothes in the course of his employment in the appellant's workshop. The District Court established that the accident was caused by contact between a hot electrode and the tin of turpentine. The two came into contact as a result of the proximity between the appellant's welding operation — of which the electrode was part — and the painting work, which required the use of the turpentine. The District Court held that the appellant was responsible for the accident under sec. 52 of the Civil Wrongs Ordinance, 1944, which deals with damage caused by fire and which provides that in certain circumstances, it is the defendant's responsibility to prove that he was not negligent with respect to either the starting of the fire or its spreading. Both sides appealed.

Kister J.: At this stage, the approach adopted by Jewish law to this issue is worthy of brief mention.

It is well-known that Jewish law divides damage done by a person's property into four classes. The owner's liability, however, is determined by the measures he took to prevent his property from causing damage. Any negligence with regard to these measures constitutes grounds for liability. This principle also applies to fire damage, even if "the fire spreads by itself" from his property. This issue is widely discussed in halakhic literature, but the essential point is incisively formulated in the following extract from *Tosefot Yom Tov* on the first *mishnah* in *Baba Kamma*:

> The common factor [in all four major heads of damage] is that damage is likely and that the owner is liable to take precautions against its occurrence: the owner is not liable for damage caused by his property unless he was negligent with respect to the safety measures he was required to take in order to prevent such damage.

In his commentary on the same *mishnah*, Meiri emphasises another aspect of the *halakhah* in this area:

> ...The owner is obliged to guard his property and becomes liable when he is negligent with regard to this obligation...and must pay full damages.

The owner's liability for fire damage is defined by R. Sa'adyah Gaon as follows:

> Scripture did not impose liability upon the owner for starting the fire, but only for not taking precautions to keep it safe (cited in *Torah Shelemah*, R. Kasher, vol. 18, p. 206).

Chapter Two

TORTS

A. Negligence

1. "Thou Shalt Love Thy Neighbour as Thyself"

Cr.A. 478/72
PINKAS v. STATE OF ISRAEL
(1973) 27(2) *P.D.* 617, 627-629

A person employed by the appellant as a tractor driver volunteered to descend a deep hole to retrieve certain tools that had fallen in. No proper precautions were taken and he fell and was killed. The appellant was charged with causing death by want of precaution under sec. 218 of the Criminal Code Ordinance, 1936.

Kister J.: First, I will mention one of the basic principles guiding us in determining a person's obligation to his fellowman and his liability for bodily harm... as stated in the case of *Donaghue* v. *Stevenson* (1932)... [by] Lord Atkin (at p. 579):

> The liability for negligence, whether you style it such or treat it as in other systems as a species of culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay...
>
> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour, and the lawyers question, who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in comtemplation as being affected when I am directing my mind to the acts or omissions which are called in question.

Incidentally it may be mentioned that "love of one's neighbour" mentioned above is a (not totally literal) translation of the principle, "Thou shalt love they neighbour as thyself" (*Lev.* 19:18) which is a cardinal principle of the Torah. The legal formula that is derived therefrom, as noted by Lord Atkin, i.e. "You must not injure your neighbour", corresponds, however, to the Aramaic translation by Yonatan ben Uziel: "Do not to your neighbour

what is hateful to yourself", and is similar to what Hillel told the convert: "What is hateful to you do not do to your neighbour" (*Shabbat* 31a).

Were we to go on and consider the moral approach, particularly that of the Jewish people, we would recall first the sanctity which attaches to the life of another as to our own and, secondly, the duty owed to care for the welfare of others engaged in our own affairs, including employees. I shall not enter into any theoretical explanations but content myself with mentioning some examples that concretize this manner of looking at things.

Subsequent to the abolition of the cities of refuge, it became impossible to sentence a person convicted of manslaughter to exile in one of these cities. Nevertheless, it was common, even when the killing was indirect and devoid of all criminal guilt, for the person involved to ask of the rabbis whether any guilt attached to him and what he might do to repent and atone for what he had done. Among the published *responsa* are to be found some that deal with people whose workers or agents had been killed whilst performing their respective tasks. Although the principals were free of criminal guilt, death had occurred as a consequence of the tasks the victims had carried out, and the rabbinical authorities directed the principals to do proper repentance, relying, *inter alia*, on a passage in *Sanhedrin* 95a: "The Holy one, blessed be He, said to David, 'How long will this crime of yours go unpunished? Through you, Nob, the city of priests, was massacred, and through you, Saul and his three sons were slain.' " Examination of the Bible shows that although some causal connection existed between what David had done and the death of these people, the connection was rather remote and one could not speak in terms of legal fault or guilt; nevertheless, the matter was considered a transgression.

It is no wonder that people generally were fearful of having committed a wrong and being subject to Divine sanction, if any of their agents were killed in the course of their work. As I have said, many *responsa* deal with the matter, some of them collected by Dr. Shilem Warhaftig in his *Jewish Labour Law* (1969) 944-49 (in Hebrew), of which I shall cite two.

(i) R. Ya'akov Weil some five centuries ago wrote in his *Responsa*, No.125: "You have written that R. Ezra was killed whilst acting as your agent....Although King David was not really guilty, and it was only indirectly through him that the mishap occurred, he was nevertheless punished. How much more so here, where the evil happened during (the deceased's) agency, is there occasion for some corrective penalty, and it would be well for you to accept a penalty such as fasting for forty days and, if the victim has children, providing for them as generously as you can to save them from grievous distress."

(ii) In No. 3 of his *Responsa* (Mehadurah Tinyana), R. Akiva Eiger considered the case of a person who forced a laden cart to speed at night. His son and an attendant were killed whilst sitting on the load. R. Eiger considered this a very serious matter, for the person was "a major cause" (*gorem gadol*) "...and possibly like one who acts with malice aforethought" and he therefore needed to make onerous repentance. He directed him to distribute charity in the manner detailed in the *responsum* (the son and attendant not leaving next of kin), to undergo mortification (although because he was an old man, the mortification was limited to fasting on certain specified days, and, if that turned out to be too difficult, the fasting was to be commuted by fixed sums) and for the rest of his life he was not to participate in wedding meals (other than those of his issue), and he should, in addition, offer penitentiary prayer. R. Akiva Eiger points out that the person should have taken care and realized that an accident could occur if the cart were sent off at night.

It may be noted that this rule of making repentance appears in *Magen Avraham* to *Orah Hayim* 603 and in *Mishnah Berurah, ad loc.*

2. Foreseeability

See: MALKA v. ATTORNEY-GENERAL, p. 520.

3. Negligent Misrepresentation

C.A. 86/76

AMIDAR Ltd. v. AHARON

(1978) 32(2) *P.D.* 337, 345, 348-358

The respondent, a new immigrant, sought to get a workshop from Amidar, a housing company, for his trade as a locksmith. A shop was made available to him, but on the evidence it was not suitable for the purpose and neighbours and the municipality were unhappy with the situation. Amidar knew about this but were negligent and falsely represented the situation. As a result, the respondent suffered loss and was forced to close down the shop and, after losing work, to take another place. The issue is whether a cause of action accrued to the respondent because of the negligent misrepresentation.

Elon J.: The subject of causing damage by giving information negligently is discussed extensively in Jewish law, in the *Talmud* and in the *responsa* written throughout the Diaspora....Let us look at the main headings of the subject and a number of the precedents.

The main discussion is found in *Baba Kamma* 99b:

> If a *dinar* was shown to a money-changer [and he said that it was good] but was subsequently found to be bad, one *beraita* held that if he was an expert he is exempt [from the liability for the damage done], if he was not an expert he is liable. Another *beraita* held that he is liable whether an expert or not. R. Papa said, the ruling that an expert is exempt refers to those like Dankho and Issur [two renowned expert money-changers of the time] who need no instruction whatever, but erred about a coin newly minted.

One should remember that in those days the value of a coin was intrinsic, depending upon its weight, its form and the manner in which it was minted, and a defective coin was worth much less. Not everyone was familiar with coins, and able to discern whether they were good or bad. R. Papa concludes that a person who asks advice from another, be he an expert or a layman, and is given a negligently incorrect answer that causes loss, is entitled to receive compensation for such loss. Only when a change occurs in the mintage and an entirely new coin is issued of which no expert would know, is he exempt, since he acted inadvertently and without negligence (see Rashi *ad loc.*).

The discussion in the *Gemara* continues to develop this idea:

> A certain woman showed a *dinar* to R. Hiyya and he told her that it was good. She returned the next day and told him that she had shown it to others who had said it was bad and she could not pass it on. He said to Rav [his treasurer: Rashi *ad loc.*] 'Go and change it for a good one and make a record that this was a losing transaction'.

The *Gemara* concludes that though R. Hiyya was a great expert and was not negligent in giving his opinion, he assumed liability for the damage, acting beyond the strict law.

Another incident is related in the *Gemara* (*ibid.*, 100a):

> Resh Lakish showed a *dinar* to R. Elazar who told him it was good. (Resh Lakish) said, 'You see, I rely upon you.'

The discussion concludes by stating that if R. Elazar was not right in his opinion, he would be liable for the loss suffered by Resh Lakish since the matter comes under indirect causation (*garmi*) which renders the tortfeasor liable.

The additional remark made by Resh Lakish that he relied upon R. Elazar has led to considerable debate among the commentators of the *Talmud* and other authorities as to whether reliance of the person seeking information upon the person asked is a condition of liability. Elsewhere in the *Talmud*, it may be inferred that a person tendering commercial advice did not intend that his advice should be relied and acted upon (see e.g. *Baba Batra* 30b—"a person may easily let a word slip from his mouth"). Some hold that in every case the inquirer must say that he relies upon the other. Where in the circumstances the other ought to know that the inquirer so intends, he is liable....Another question that was much debated was whether there is room for distinguishing between the case where the informant is paid for his opinion — which increases his liability and duty of care — or gives it *gratis*, a distinction that exists with regard to other tortious acts. I need not enlarge on these latter points (see, e.g., Rif and his glossators, *ibid.*; *M.T. Sekhirut* 10:5; *Tur* and *Shulhan Arukh, Hoshen Mishpat* 306:6). It is enough for the present purpose to give a summation of the principal views cited by R. Yehiel Epstein in his *Arukh haShulhan, Hoshen Mishpat* 306:13:

> Liability arises not only when some actual act is done but also, at times, when a mere statement is made, such as when a coin is shown to a money-changer to ascertain whether it is good and acceptable, and the latter says it is good but it is found to be bad or counterfeit. If payment was made for the opinion, the money-changer is liable to make restitution; if not, he is free from liability, provided he is an expert and requires no teaching. If, however, he is not an expert, he is liable [even when he receives no payment]. Where a money-changer is relied upon expressly or by implication he is liable. Otherwise he may say that he did not know that reliance was placed on him alone without consulting others and therefore he was not meticulous in examining the coin....Some say that generally to show a money-changer a coin involves liability....When payment is made, even though there was no express reliance, such reliance is implied. The obligation arises because of indirect causation (*garmi*).

The conclusions that emerge are clear:

(a) A cause of action in damages exists not only when some act is actually done but also when an opinion is expressed, when incorrect information that causes damage is given negligently.

(b) The condition essential for liability is that it must be clear to the informant that reliance is placed upon the information he gives and that it will be acted upon.

(c) Evidence of such reliance depends on the circumstances: some require

it to be explicit; some would look to the context in which the information was given.

(d) Where the informant receives payment, that alone shows that the information was to be relied and acted upon.

(e) The liability of a layman is in some circumstances greater than that of an expert.

Before proceeding to see how Jewish law developed the Talmudic rule regarding the negligent money-changer, let us pause to consider the distinction made in Jewish law between the liability of the layman and that of the expert. An illuminating explanation is given by R. Shimon ben Tzemakh Duran (Tashbetz). The following case was put to him (*Resp. Tashbetz*, Part 2, 172):

> A man bought a parcel of gold dust from an Arab. He showed it to an expert, asking him whether it was pure gold or not....The expert looked at it and said that it appeared to him to be pure gold and not counterfeit, by reason of its weight. A purchaser relied upon the expert and bought it as pure gold but on melting it down found that it was copper.

Tashbetz was asked whether the expert was liable for the damage...by reason of his wrong information. Tashbetz held that since the expert did not receive any remuneration, he is free from liability. He adds that a layman would be liable. He explains:

> An expert is exempt since no liability attaches to an expert unless he takes remuneration....He takes remuneration only because reliance is placed upon him and he assumes responsibility. In the case of a layman, even when he takes no remuneration he is liable for *garmi* (indirect causation), provided he knew that he was being relied upon, because he should not have involved himself in something he knows nothing about. In the case of a real expert who says what appears to him to be the case without payment, if he is found to have erred, how has he been negligent and what wrong has he done? Here the expert apparently had given his reason for thinking as he did, that the weight indicated that it was gold, and thereby said all that he knew, and if it turns out to be copper, he need not pay. That appears to me to be the strict law. If any usage exists, it should be followed...

The last observation of Tashbetz about the strict law is interesting. Where a usage exists that makes an expert responsible for the loss occurred, even when he is not remunerated, that usage is to be followed since in Jewish law a usage will supersede the law, primarily in civil matters (see M. Elon, *Jewish Law*, Part 2, 732 ff.).

In the course of its history, Jewish law developed the principle of liability for negligent misrepresentation beyond the concrete case of the money changer or of the bag of metal, and applied it to various forms of incorrect information imparted with negligence. In the exigencies of space, I will only look at two precedents, the facts of which are similar to those of the English precedents...

The first was dealt with by R. Ya'akov Weil (*Resp. Mahari Weil*, 80)...:

> A argued that B had owed him three hundred pieces. One hundred and fifty had been repaid in cash and the other one hundred and fifty by means of a bill of another person held by B. Of the latter sum, eighty was duly discharged by the drawee and seventy remained due. When the bill was conveyed as above, A told B that he preferred to have cash rather than an outstanding debt, to which B replied 'I shall be good to you for the principal sum.' B countered by saying that he did not say this but 'You need not worry, the principal sum is sure.'

The question turned on the legal implications of each of the two versions of the reply that B had made in regard to the seventy pieces still outstanding. The answer was:

> In my humble opinion, B's reply, 'You need not worry, the principal sum is sure', is not by its terms a guarantee. If B swears that he said only this, he is exempt, provided that the debt was really sure at the time, otherwise B must pay A since A relied upon B. This is like the case of the money-changer.

R. Ya'akov Weil's answer is clear and simple: if it is proved that B said to A, "I shall be good to you for the principal sum", then a form of guarantee exists, and in such a case, B will be liable as a guarantor, i.e. whether it emerges that when he made his statement, the drawee was not able to pay the debt, or whether it emerges that he was able to do so at the time, but lost his money later....But if it should emerge that he...said: "You need not worry, the principal sum is sure", then there is no cause of action under the laws of surety, but rather, under the laws of torts, for giving information upon which A acted. In such a case, B will be liable only if it should emerge that at the time of giving the information, the drawee's financial position was not sound; if, however, the drawee lost his money later, then the information that B gave was correct, and he was not negligent.

The legal conclusions drawn from this *responsum* are given as decided law by Rema to *Hoshen Mishpat* 129:2: "Whoever tells a person to lend money to another because he is to be trusted and it turns out not to be

so is liable to make restitution" (for torts: see glossators *ad loc.*).

Commentators of the *Shulhan Arukh* are divided over how it may be proved that in such a situation the informant really knew that the other relied and would act upon the information. Again we may quote *Arukh haShulhan, Hoshen Mishpat* 129:3, that sums up the position well, together with an interesting legal holding of its own:

> A person who says to a lender, give so and so a loan for he is to be trusted and the lender does so, but afterwards it transpires that he was not to be trusted at the date of the loan, such a person is liable...because the loan was made in reliance upon his statement and there is no greater *garmi* (indirect causation) than this. If, however, at the date of the loan the man was trustworthy but afterwards his situation deteriorated, he is free of liability since he did not mislead, and the statement that he made was not in terms of a guarantee to repay if the lender did not, but that he was trustworthy and in truth he was, and the statement was not negligent. Some say that even when the borrower was not trustworthy, no repayment need be made unless the lender told him that he was relying upon him. Some of the leading authorities decide according to the first view.
>
> I would hold that if the lender asked the person whether the borrower was trustworthy and he answered in the affirmative, without the lender saying that he relied upon him, he cannot be made liable, for this is usual, and possibly he really thought that the borrower was trustworthy, without being too meticulous. If, however, the informant volunteers the information, it is certain that he had inquired well into the matter, and he will be liable even if he was not told that reliance was being put upon him...
>
> Where liability arises and the informant admitted that he really knew nothing about the borrower's situation, liability still attaches since he was in essence a tortfeasor in telling the lender to make the loan without clear knowledge. He is only exempt if for some reason the borrower came on hard times after the loan.

The novelty in these holdings is connected with the circumstances from which it may be inferred that the informant knew that the lender relied and would act upon the information. Where the lender addresses himself to the informant and the latter replies that the borrower's economic situation is good, that alone is not evidence that the lender was acting in reliance thereon, since it is usual for recommendations to be made and information given without being over-meticulous, and the informant may assume that the lender will not act accordingly. The informant is therefore not liable

in tort unless the lender says he is going to act on the information. The situation is different where the informant on his own initiative asks the lender to lend the money, adding that the prospective borrower is economically sound. He was not "compelled" to say that...and should have assumed that the lender would proceed to make the loan.

Another important detail explained by *Arukh haShulhan* is that liability in tort for misrepresentation may also arise when information is given in good faith and "he really knew nothing about the position" of the borrower. Here liability arises from negligence...

I conclude with one further example of the application of the principle that derives from the money-changer case in connection with the general problem of liability in tort for negligent false representation. Here I quote Maharshal; after dealing at length (*Yam Shel Shlomo* to *Baba Kamma*, 9:24) with the money-changer case and the liability for wrong information even by word of mouth alone, he continues:

> For this reason it seems to me that where a person sells goods on credit and enquires of another merchant whether the prospective purchaser is a man of means and might be given credit and the other merchant replies that he is and may be given goods on credit, and then he is found to be a poor man, the other merchant is exempt because he can say, 'You should have been cautious and not relied on me.' Where, however, the first says, 'Look, I am relying on you' the second is liable...since it cannot be said that here, a mere passing remark was made...

The question whether credit might be given does not involve any expertise. Had the other merchant been told that he was being relied on, he would not have given any advice, since no man can know what another possesses, even if it be his son or his father; even if one saw another handling much gold and silver and money, it is possible that the same does not belong to him or that he is in debt from it. A person will not be deemed to be negligent in giving information about the economic situation of another, when the latter is his brother and he knows that he had received a large legacy and also that the latter was not in debt before the legacy fell in, or when he had previously been in partnership for some time and he knew that the other's share in the partnership was considerable and that he was not in debt to any one, but afterwards it transpires that at that time he suffered losses that reduced his possessions, a fact of which he was not aware. In such event he is deemed to have acted inadvertently and is exempt, even where the other said that he relied on him...

The rule, therefore, is that the informant is liable for damage caused as a result of reliance upon information he provided, even when that

information involves no expertise, with the exception of two cases: (a) if he had no basis for assuming that the person to whom the information was given would rely and act upon it (and any assumption that he would rely and act on it would be based either on his saying expressly that he was relying on the informant, or if under the circumstances, the informant should have assumed that reliance would be placed on his information...); and (b) if, in giving the information, he acted with such a degree of care that no reasonable person would assume that the information was incorrect (such as in the case of his brother's legacy or the partnership), for there would then be no negligence, and he would be acting inadvertently.

Here, too, *Arukh haShulhan* (*Hoshen Mishpat* 306:14) concludes as follows:

> So also where one comes to buy goods on credit and the merchant asks another if he might give him credit — then the law is affirmative [i.e. if he says 'I rely on you' or the circumstances show that he so relied, the informant is liable]. It seems to me that this will be the case when the question is asked not in the presence [of the prospective buyer on credit]; when he is present, the informant is not to be made liable since in this case he could obviously not say that the purchaser was not trustworthy....Even when the borrower merely knows that enquiry was made, it seems to me that no liability attaches and neither the merchant nor the lender should have relied on the informant...

It follows from the foregoing:

(a) A person who passes on incorrect information, even if in good faith, but negligently, is liable for the damage suffered as a result of the other party relying thereon and acting accordingly. It is immaterial whether the information was in writing or oral, in connection with business or not, by a professional or by one who is without any special proficiency; the liability of a layman may exceed that of the professional since in addition to the incorrect information he gives, the fact that he agreed to give advice and provide information about something of which he is not assumed to know constitutes negligence; as Tashbetz puts it, "he should not have involved himself in a matter about which he knows nothing, when someone might rely on him." With all respect I agree with my learned friend, Landau D.P., that "far heavier liability attaches to a person who assumes to give advice that requires professional knowledge, without being a professional. Just as a person who undertakes work that requires special skill without having the necessary skill is liable for damage due to his negligence, not because his work is bad, but primarily because he dared to put his hand to that kind of work."

(b) The crucial condition for tort liability is that the informant knew or should have known in the circumstances that the recipient intended to rely on what he said and act accordingly. Such knowledge can be proved in various ways: by the recipient saying expressly that he relied thereon; by the fact that payment was given for the opinion, giving rise to the presumption that he was knowledgeable; by the manner in which the information was given and received; by who took the initiative — if the recipient, we might assume that the informant gave it out of politeness and because it is usual to do so, but did not intend that it be relied on; and like considerations and circumstances.

(c) Liability in tort arises where the informant acted negligently and not as a reasonable person should. If he acted with reasonable care but erred because of something which need not have entered his mind — as where a new coinage is suddenly minted — he has acted inadvertently and is not liable.

This is the Jewish law relating to negligent misrepresentation that originated in the Talmudic period and found its development in the precedents of Tashbetz, R. Ya'akov Weil and R. Shlomo Luria in the fifteenth and sixteenth centuries, long before the *Hedley Byrne* Case [1964] *A.C.* 465 and *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Evatt* (1971) 2 *W.L.R.* 23, 37 (minority judgment). The facts, interestingly, of the Jewish "*Hedley Byrne*" — in the *responsa* of Weil and Luria — are similar to those in the English precedents. Both deal with information about the economic position of one with whom the person wanting the information desired to enter into some transaction. The Jewish rule is superior to the minority judgment in *Evatt* because in legal reasoning liability for negligent misrepresentation arises also in non-commercial transactions provided all the other conditions obtain. It is conceivable that in Jewish law, in addition to these conditions, misrepresentation will occur only when the informant knew both for what purpose the information was required and what was the estimated measure of damage that might be entailed by his lack of caution. These conditions are implicit in the very central requirement that the informant knew or should have known that the person seeking the information would rely on him and act accordingly. Such knowledge is absent when the informant did not know for what purpose the information was required and the risk involved therein. In all the material of Jewish law we have reviewed, which prescribes the liability of the informant, such conditions are present.

Our conclusion in the present case is obvious. The respondent turned to Amidar for assistance in finding a workshop where he could carry on his trade as a locksmith. Amidar knew very well that the respondent needed a workshop for this purpose; it even stipulated expressly that the premises

should only be used for this purpose. With such knowledge an officer of Amidar looked around for a workshop and showed the respondent one that seemed suitable. Amidar without any doubt knew or should have known that the respondent relied on the information he had received from it and would act accordingly. Although the respondent did not say to Amidar "Look, I am relying on you," the circumstances leave no doubt that he did so rely on Amidar and the latter knew that he relied on it and on it alone. The respondent, who was a new immigrant who barely knew his right hand from his left regarding the conditions attached to opening workshops—something with which sometimes even veterans are not fully acquainted—had received from the Company, which in his eyes and in the eyes of others is, in the words of Cohn J., "an arm of the governmental authorities in this country," a place for carrying on his trade of locksmith, as he was told both orally and in writing. He was clearly convinced from the moment he took the premises from Amidar that he might proceed there with his work. In such circumstances, could it have entered his mind or could Amidar really have thought—as was submitted on its behalf—that he ought to enquire whether he was legally at liberty to open such a shop at the place? Amidar certainly cannot urge inadvertence in passing inaccurate information, for who but it, with all its departments and officers, could find out whether the place was suitable in point of law for opening a locksmith's shop. It should have done so before transferring the premises to the respondent for his trade. We may say that the information which Amidar gave the respondent, namely, that the place was suitable for the required purpose, even if given in good faith, was marred by gross negligence and lack of care in finding out the true situation. It is therefore liable for the damage—foreseeable in such a case—that the respondent incurred by relying upon it and acting accordingly.

4. Invitees and Trespassers

Cr. A. 35/52

ROTENSTREICH v. ATTORNEY-GENERAL

(1953) 7 *P.D.* 58, 62, 87-90

Two children were drowned in a pool lying within the area of a factory. The appellant, the manager of the factory, was convicted of causing death by want of precaution under sec. 218 of the Criminal Code Ordinance, 1936, and sentenced to three months' imprisonment. He appealed against conviction and sentence, pleading that the act, or, more precisely, the omission attributed to him was not an offence under this section.

Assaf J.: I concur in the judgment of my learned colleague, Cheshin J. and would add briefly that Jewish law would, it seems to me, yield the same result.

According to the *Gemara* at *Baba Kamma* 33a:

> If employees come to the private residence of their employer to demand their wages from him and the employer's ox gores them or his dog bites them with fatal results, he is not liable. Others say that employees may demand their wages from their employer, and the latter is liable.

The *Gemara* explains that if the employer can be found in town and the employees could have claimed their wages other than at his house, then they entered his premises without permission, and all would agree that he is not liable. If, however. he was a person who was always at home, they entered his premises with permission to claim their wages, and all would admit that he is liable. The Sages only dispute the matter where the employer is sometimes in town and sometimes not, and his employees calling to him from the entrance of his premises are told by him "Yes". Does that reply constitute permission for them to enter?

At all events, we see from the discussion that as regards trespassers who enter the property of another, no duty rests upon the latter. Basing himself on this discussion, Maimonides holds (*M.T. Nizkei Mammon* 9:10- 12):

> Where a person enters privately-owned property without permission, even to claim his wages or a debt owed to him by the owner, and the owner's ox gores him and he dies, the ox must be stoned and the owner is exempt from damages, since the victim had no right to enter the property without the owner's knowledge. If he stood at the entrance and called to the owner and the latter replied "Yes" and then he entered

> and was gored by the owner's ox, the owner is not liable because "Yes" only means "Stay where you are until I speak to you."

In *Tur*, *Hoshen Mishpat* 389, the rule is as follows:

> When employees enter their employer's property to ask for their wages and the employer's ox gores them or his dog bites them, if the employer is not wont to go out to the market or does so only infrequently, since he is not always to be found in the market, he is liable for the injury because they entered with permission; but if he is always to be found in the market, he is not liable, for then they entered without permission. And my master Rosh wrote that today it is a widespread custom that employees enter their employer's house to claim their wages, and also it is unusual for a person at market to have enough money on him to pay his workers. Therefore by custom he is liable.

Thus Maimonides, Rosh and *Tur* all prescribe the principle that a person is only bound to act with care towards those who enter upon his premises by permission. Such permission does not indeed have to be express; it depends upon custom, provided it is widespread and generally followed. Relying on Rosh, Maharshal writes in *Yam Shel Shlomo* to *Baba Kamma* 3:28:

> The law therefore varies with the prevailing custom and an employer is liable even when he is frequently at market. The law, we see, varies among people even at the same time and in the same place, depending upon the frequency of his being at market; *a fortiori* it will vary with prevailing custom.

It is useful to cite another passage from Maharshal, *op. cit.* that is pertinent to the present case:

> One may wonder whether the "custom of Sodom" obtained, that no one would enter another's house without permission even when necessary. Since, however, the owner may always object to entry, as he desires, and refuse to accept responsibility for him, he is called a trespasser...unless it was the house of a craftsman, open for all to come and go as if with permission.

That is *a fortiori* the situation in the present case where the appellant and the employees at the place under his control continuously objected to the children bathing in the pool, a fact well-known also to the children's parents living nearby; the appellant certainly did not undertake to keep them safe, whereas persons entering a craftsman's home or a shop are considered to enter with permission and they must be safeguarded.

The distinction between entry that is permitted and that which is not

is determinative not only in tort law but also as to responsibility under Divine law and the obligation to depart to a city of refuge for inadvertent manslaughter. Maimonides (*M.T. Rotze'ah* 6:11) in reliance on the *Gemara* in *Makkot* and *Baba Kamma*, prescribes:

> Where a person enters another's premises without permission and the owner kills him inadvertently, the latter is exempt from going to a city of refuge, for it is written, "...or who chances upon his neighbour in a wood": the killer must flee to a city of refuge only if the victim entered a place analogous to a "wood", i.e. a place of free access. Hence, where a person enters a carpenter's shop without permission and a piece of wood strikes him and he dies, the carpenter is exempt from taking refuge, but if the entry was with permission, the carpenter must take refuge.

In *Y. Baba Kamma* 3:8 we find the following:

> R. Jose ben Hanina said: Where a man was felling trees on his premises and an employee enters to claim his wages and a piece of wood hits and injures him and he dies, the employer is not bound to take refuge.

The contrary view of R. Hiyya cited *ad loc.* is explained by reference to a case of entry that was not noticed, whereas R. Yossi speaks of one where entry was noticed. From this, Tosafot concludes (*Baba Kamma* 32b) rightly that even when the owner saw him enter, the former is exempt from taking refuge because the entry was without permission; only when it is with permission must refuge be taken.

We see again that a duty of particular care is owed to one who enters with permission, even when the owner is engaged in his normal business which does not on the face of it involve any danger. It is otherwise with a trespasser.

A case is reported that came before Maharam of Lublin. Because of Tartar attacks on the border districts of Poland, the people of Wolyn were obliged "to be prepared and to keep their weapons at hand to withstand them", and periodically they had to train, firing guns. One Jew did so in his own yard, firing at a target on the wall of his house. A person entered the yard from the market, although the non-Jewish squad commander in charge of training stood outside to warn passersby, and had indeed warned him. The person entered and was fatally hit by a bullet. The man who fired the shot did not know that anyone had entered and it was clear that he had no intention to injure him. Maharam was asked for his opinion. In such cases, the person involved was usually ordered to go into exile, to fast and to do other penances. Having regard to the circumstances, Maharam found grounds for dealing leniently with the person and not

sending him into exile. One of the reasons was that the deceased had been careless after being warned not to enter (*Resp. Maharam of Lublin*, 43). Although that case and the present case are not entirely parallel, because there the owner of the yard committed an act endangering life, yet it suggests and is partial authority for the rule that a person who enters without permission, and more so when warned not to enter, assumes the risk and releases the other from the duty of care, the duty to see whether anyone is on the premises.

According to Jewish law, it is true, every person must fence off a place that may endanger another's life, even one who enters without permission. Maimonides, relying on the Scriptural sources and rabbinical commentary rules (*M.T. Rotze'ah* 11:1, 4):

> It is a positive commandment to erect a parapet around one's roof....This applies to a roof or anything else that is perilous and might lead to a person's death, such as a well or a pit, with or without water. One must erect an enclosing wall, ten handbreadths high, or put a cover over it lest someone falls in and is killed. So also with every obstacle that is perilous to life, it is a positive commandment to remove it and guard it well....If a person does not remove perilous obstacles and lets them remain, he has transgressed a positive commandment.

While, however, "he has transgressed a positive commandment", he is not liable for damages or the death of a person who entered his premises without permission, nor is he criminally liable. That is the fundamental difference between one who digs a pit on public property and one who digs on private property. A person is certainly forbidden to keep a vicious dog in his house unless he is securely chained, but if a person enters without permission and the dog bites or even kills him, the owner of the dog is exempt from liability towards him (*Hoshen Mishpat* 409:3). The exception is when a person enters a craftsman's house on business, which is like entering a public place (see Riva cited in *Tur*, *Hoshen Mishpat* 421), and though "he enters for nothing" (without intention to buy), the shopkeeper is liable, for he had to guard his life.

See: ATTORNEY-GENERAL v. BERKOVITZ, p. 539.

5. Failing to Set Up Barriers

C.A. 673/66

BERKOVITZ v. ZAIONTZ *et al.*

(1967) 21(2) *P.D.* 88, 90, 91-92, 94-95

The appellant, a boy of fifteen, was seriously injured when he climbed and fell over a wall of a bridge that connected the house in which he lived with the roadway. The wall was some eighty-eight centimeters high.

Kister J.: Provision regarding the height of a parapet is to be found only in the relevant Jewish law. Scripture states: "When thou buildest a new house, thou shalt make a parapet for thy roof, and bring not blood upon thy house, if any man fall therefrom" (*Deut.* 22:8). The Sages set the height of the parapet at ten handbreadths. Modern authorities are not in agreement over the present-day equivalent of ten handbreadths. Hazon Ish—a leading decisor of the last generation—holds that a parapet must initially be 100 centimeters high or at least 98.20 centimeters but when this is impossible, 96.20 centimeters will be enough (*Shiurei haMitzvot* compiled by his brother-in-law, R. Kanyevski). Other views collected by R. Hayim Na'eh show that a height of 88.50 centimeters is sufficient. (On his calculations 85 centimeters would also be enough)...

The halakhic authorities agree that whosoever leaves in his house a parapet which does not reach a height of ten handbreadths is in constant violation of the law relating to parapets.

The question of parapets and their height is the concern not only of the scholars but is dealt with in books designed for popular use, such as the abridged *Shulhan Arukh* and even some prayer books....All the measurements mentioned are not intended merely to prevent children from falling but apply also to adults, nor do they pertain only to roofs but as Maimonides decides in *M.T. Rotze'ah* 11:4, "both to roofs and to anything else that is perilous, which might lead to a person's death, such as a well or a pit, with or without water. One must erect an enclosing wall, ten handbreadths high or put a cover over it lest someone falls in and is killed". *Hoshen Mishpat* 427:7, has the same rule. Both add that "the wall must be strong enough to keep a person from falling."

In discussing Jewish law regarding parapets, we ought to proceed to ask to whom the duty applies. *Minhat Hinukh* observes on the commandment of the parapet, cited in *Sefer haHinukh* (Commandment 406), that "the

tenant of a house is not bound by Scriptural law to make a parapet...the obligation is only rabbinical...the moment he acquires the house the positive and negative commandments apply and he is in continuous breach until he repairs the situation..."

As I have said, the law prevailing in this country contains no provision, regulation or accepted standard about the height of a parapet...

Regarding the need for prescribing some standard by legislation or regulation, it is appropriate to mention the considerations of Jewish law, which are equally pertinent today, as they are set out in Hazon Ish, *Hoshen Mishpat*, *Likutim*, 18:6:

> Apparently not every roof is a stumbling block since the likelihood of injury is not very immediate. A person standing on a roof will normally remember to be careful. Just as one may ascend a staircase, one may build a roof and a staircase without surrounding them with a barrier...except that in the case of the roof of a house the *Torah* instituted the rule that a parapet must be erected to guard against the risk of people falling...
>
> Even as regards a house, which the *Torah* required to have a parapet, it did not forbid anyone from going on to a roof that has no parapet, but it required the owner to erect one. That is the novelty, since a roof is unlike a pit or a rickety ladder, where an accident may occur to a person who does not know that he must be careful, because it is possible to warn people not to go up, the owner could not be deemed a tortfeasor unless the *Torah* had specifically mandated such a rule...
>
> The ramp [leading to the altar in the Temple] was exempt from having a barrier...though one could fall from the side at a height of ten handbreadths, since that was well-known. The *Torah* imposed the liability only in the case of a house.

It may be added that in Jewish law there are places where one can fall, where the *Torah* did not expressly require a parapet of a given height; but as Hazon Ish puts it, "if there is fear that young children will get there, a parapet is certainly required in order to prevent injury, but it need not be ten handbreadths."

These observations show that in Jewish law, where it is reasonable to anticipate danger to passersby, particularly where they are not aware of it, or, if they are, where they are inclined to disregard it, one must do everything to remove the danger. In respect of roofs and the like—though generally people will be cautious — the *Torah* introduced the parapet requirement and the Sages prescribed the height, because in the absence

of this express law, a person would not be deemed liable. Moreover, as the *Gemara* says (*Baba Kamma* 27b), "it is not usual for people to look around while walking along the road," and they are not continuously on the alert. In the case of the present bridge, a parapet was requisite so that persons hurrying along or stumbling would not fall, especially as it is used in the hours of darkness as well.

6. Placing of Obstacles

C.A. 196/68

ARBELI v. SAPAN LTD.

(1968) 22(2) *P.D.* 706, 707, 708

Cohn J.: The respondent owns a factory and the appellant is one of its employees. When the accident occurred he had been working in the carpentry shop but was sent by his superior to the general store in a separate building to bring various things that were needed in the carpentry shop, and the accident occurred there...

In my opinion the learned judge was too lenient about the duty of care an employer owes a workman. The general store was intended for supplying the respondent's employees with materials and other things required for their work, and a plain duty rested on the respondent to take precautions so that the approach to the counter of the store be free from obstacles. It is true that the commandment, "Thou shalt not put a stumbling block..." was said of the blind, but that does not mean that a stumbling block may be placed in the path of one in possession of his faculties, just as "Thou shalt not curse the deaf" does not allow one to curse one who is not deaf. My learned colleague, Kister J., drew our attention to what is written in *Sefer haHinukh* 547, "not to leave snares and obstacles on our land or in our houses so that no one is killed or injured, in respect of which it is said, 'Thou shall not bring blood upon thy house' " (*Deut.* 22:8). Where the obstacle is plainly visible, it is possible that the negligence of a workman who disregards it may counterbalance the negligence of the employer in leaving the obstacle in the path of the workman, but the fact that the obstacle was apparent is not enough to detract from the fact that it was put in a place which should remain open and accessible, in breach of the duty of the employer.

7. Medical Liability

C.A. 552/66

LEVITAL v. KUPAT HOLIM OF THE HISTADRUT

(1968) 22(2) *P.D.* 480, 483

In this appeal the main issue was the measure of damages for negligence in medical treatment.

Kister J.: Regarding this approach of taking into consideration good public order, it may be said that although it is not mentioned in the Civil Wrongs Ordinance, it is at least a reason for cautioning ourselves not to adopt any extraordinary duty of care for the medical profession and increasing responsibility for error in medical treatment or surgery beyond reasonable limits.

In relation to doctors, mainly surgeons, Jewish law recognises the principle that a person who injures another is liable even if he acted inadvertently, since man is always *mu'ad* (fully liable). Such liability was considerably limited with regard to physicians who practice "by permission of the *bet din*" (by licence of a public authority) to cases where negligence as defined in the sources (*T. Baba Kamma* 6:6; 9:3; *Gittin* 3:13) is present. The law was decided accordingly by Nahmanides in *Torat haAdam* (section on Danger) at the end of *Novellae* on *Baba Kamma*; *Resp. Tashbetz.* Part 3, 82; and *Yoreh De'ah* 336:1.

The rationale for limiting the liability of a physician is "good public order" as explained in the *Tosefta*, and Tashbetz in the *responsum* mentioned explains: "If he is not exempt when he acts inadvertently, all medical treatment will be impeded." Nahmanides saw some resemblance between the task of a physician and that of a judge who is commanded to hear and decide cases, who, on the one hand, must act cautiously, and, on the other, can only act on what he perceives to be the facts. If a physician who is commanded to heal refrains from doing so, he has shed blood, but he must be duly careful as "in capital law" and not cause injury negligently, and "he is not bid desist for fear of inadvertence." The physician is commanded to act in saving his patient and it is undesirable that he should have fears of not being successful, either incidentally or inadvertently, and desist from procedures proper in the situation as he sees it.

B. Miscellaneous

1. Trespass by Means of Uprooting Fruit Trees

C.A. 676/72
KAFTA *et al.* v. LASKOVSKI *et al.*
(1973) 27(2) *P.D.* 247, 252

Cohn J.: Incidentally, whilst learned counsel expended much effort but found no express rule either in Israeli or English Common law precedents regarding trespass on land by the uprooting of fruit trees, Jewish law contains an express provision in the matter: "A person who steals the land of another and renders it less valuable by digging pits, ditches and holes therein or by felling trees, contaminating wells or pulling down buildings, is liable to make it good or to pay damages" (*M.T. Gezelah* 9:1; so also *Hoshen Mishpat* 371:1). Here also the damage is made good by *restitutio in integrum* or (at the option of the tortfeasor) by paying the value of the trees when they were felled. This will also apply where the trees felled were ready to be cut down because they might injure the public, and someone anticipated the owner and cut them down without permission (*M.T. Hovel uMazik* 7:13). A person who cuts down his own plantation is free of liability even where he is not permitted to do so, whereas others who cut down his plantation are liable (*M. Baba Kamma* 8:6).

2. Defamation

C.A. 30/72

FREEDMAN v. SEGAL

(1973) 27(2) *P.D.* 225, 244

Etzioni J.: This is an appeal and counter-appeal in an action for slander...

Clearly we need not be bound or guided by the sums awarded by English courts, and for this purpose we may set our own criteria. We may draw inspiration from the severe approach of Jewish law, under which anyone who relates something denigratory of another, even if true, transgresses the prohibition of defamation. Maimonides, in *M.T. De'ot* 7:2 and 6 has the following to say:

> Who is a tale-bearer? One who goes around relating that someone said something or that he heard something about someone. Even though it be the truth, he destroys the world. A much greater transgression included in the prohibition [against tale-bearing] is "evil speech", i.e. when a person speaks ill of another, even though what he says be true. But if it is not true, then it is slander.
>
> All these are slanderers in whose vicinity it is forbidden to dwell and *a fortiori* to be in their company listening to what they say. Evil fortune beset our ancestors in the wilderness by reason only of slander.

C.A. 7/79

HAHAYIM PUBLICATIONS v. BROADCASTING AUTHORITY *et al.*

(1981) 35(2) *P.D.* 365, 366, 368, 369

Cohn D.P.: The appellant publishes not only books...but also children's games. On the television programme, "Kolbotek"...two illustrated children's booklets and a game called "Football" manufactured by the appellants were presented in a manner that, it was submitted, was defamatory. A claim for damages was dismissed by the District Court. Hence this appeal...

As for what the critic said, "Don't buy a pig in a poke"—that is good advice for potential purchasers. In fact it is only a popular translation of a

well-known legal aphorism, *caveat emptor*. The appellant, however, urges in the context of its football game that this remark must be construed as a warning to potential purchasers against the fraudulent intent of the appellant. That, however, does not necessarily follow at all. The whole purpose of Kolbotek is known to be to warn purchasers and consumers against offers of spurious deals and the warning given in such broadcasts not to buy a pig in a poke refers, in the nature of things, not to a specific merchant, but to all merchants. I doubt whether the warning can amount to defamation even in other contexts. It would enter no one's mind that it is slanderous of the owner of lost property to have to bring evidence that he is not a liar, although indeed as a matter of fact liars are numerous (consider well *Baba Metzia* 28b). But this is a matter that we can leave for consideration on an appropriate occasion.

Elon J.: I concur in the judgment of my learned colleague, Cohn D.P. I also think that the criticism did not go beyond what is permitted in law, though part of it overstepped the bounds of good taste...

Beyond this, said the Sages, even when disparagement is permissible, "care must be taken not to exaggerate, not to omit the smallest detail that might be said in favour...; it is strongly forbidden to omit such a detail, in order not to enlarge the wrongdoing more than necessary" (R. Yisrael Meir Hacohen, *Hafetz Hayim* I, 10:14). *A fortiori* is that the situation here, where it is well-known that what is televised spreads far and wide. It is proper therefore that the respondents should seek the appropriate means of appeasing the appellants.

C.C. 113/56

BEN-GURION v. APPLEBAUM *et al.*

(1960) 14 *P.M.* 307, 382

Tzeltner J.: The task of the court in this action for damages for libel is to enquire whether the matter published by the defendants in a pamphlet issued in December 1955 and in an open letter to "Davar" of 16 January 1956 contained anything libellous of the plaintiff within the meaning of the Civil Wrongs Ordinance. If the answer is in the affirmative, we must decide whether the plaintiff is entitled to damages from the defendants and the measure of the damages.

The intention of the defendants to better things by fighting corruption and to found the State on justice and integrity is desirable and is to be

welcomed, though in presenting the problem there was some dangerous exaggeration that might lead to falsifying the image of the young State and its fundamental problems in the difficult field of security, building and creation, by ignoring every positive achievement. It is, however, clear that the problem of public integrity exists. Corruption persists and one should strengthen the hands of those who help in removing this malignant plague.

However, the battle to improve things must be conducted cleanly; evil will not eradicate evil. The plague of nepotism is not a new thing; it has been appearing among us and other peoples in one form or another from early times. Sometimes it is manifest, sometimes its symptoms are only to be seen when viewed close up. Sometimes, however, it is only imaginary, and the decisive factor is personal feeling. Accordingly those who wage the fight against corruption must be very cautious about aiming their shafts at the right target.

Regard should also be had to the fact that the integrity for which one is battling includes avoidance of defamation. The ways of the tale-bearer and the disparager are forbidden, so much so that our forebears regarded groundless defamation which leads to causeless hatred as having the enormity of the three grievous sins of idolatry, incest and the spilling of blood. Our Sages said: "Evil fortune beset our ancestors in the Wilderness by reason only of slander."

3. Bearing a Defective Child

C.A. 518/82

ZEITZOV *et al.* v. KATZ

(1986) 40(2) *P.D.* 85, 95-96, 109-110, 125

The issue before the Court was the question of suing a physician for negligent genetic counselling to a couple whose child was born with a hereditary disease. The only options were for the child to be born diseased, or not to be born at all.

Ben-Porat D.P.: Without entering into a dispute with the well-established approach towards the issue of shortening of life expectancy in the law of torts, there is, in my opinion, an important distinction between death on

the one hand and non-existence on the other. Although one ought not to be deterred from assessing the relative value of life in either situation, it is nevertheless important to observe that whilst death occurs where once there was life, the latter — which is our case — is non-existence *ab initio*. The principle of the sanctity of human life applies in the main, although not excusively, to questions involving choices between life and death. Proof for this proposition may be found in the approach to induced abortion adopted in sec. 316(a)(3) of the Penal Law, 1977, according to which abortion is permitted if the result of running the pregnancy to term will be a physically or mentally defective child. On the other hand, once such a child is born, he may not be harmed, and he enjoys the full protection afforded to him by the sanctity of life principle.

The contrast between life and non-existence appears, in *prima facie* terms at least, in the following extract from *Eruvin* 13b:

> For two and a half years Bet Shammai and Bet Hillel were in dispute, the former asserting that it were better for man not to have been created than to have been created, and the latter maintaining that it is better for man to have been created than not to have been created. They finally took a vote and decided that it were better for man not to have been created.

I have not cited this extract in order to engage in an in-depth analysis of its significance... but merely to demonstrate that life and non-existence are also set off against each other in Jewish sources. As a result, I am strengthened in my opinion that my view (on the issue of shortening of life expectancy) is not in conflict with either the principle of the sanctity of human life once it has emerged from the womb, or the settled law regarding shortening of life expectancy.

Barak J.: The phenomenon of handicapped children have existed since antiquity. It is, however, only in the last few decades that the existence of such children has become a matter of public concern. This is due in a large part to the development of medical science, which has opened a window to the secrets of human existence, and has permitted a certain measure of control over basic biological processes. This explanation is nevertheless only a partial one. The point was correctly made by Prof. Tedeski in his article, "On the Problem of Damages in the Context of Birth," *Massot beMishpat* (Harry Sacher Institute for Legislative Research and Comparative Law, Hebrew University, 1978) 209, 287, that there is an additional factor at work in this context:

> Today there is an entirely different attitude towards parents, towards life and towards fate than that which existed in past societies.

There has indeed been a great change in the attitude of people to their own lives, to their parents and the societies in which they live. That which in the past was understood as cruel fate, placing tremendous burdens on individuals in the spirit of the Mishnaic dictum, "for despite yourself you were formed" (*M. Avot* 4:29) is now being understood as a human event, in the creation, the prevention and the compensation of which society has an interest. The question of legal liability for causing such a defect arises naturally from this argument.

D. Levin J.: In making the distinction between a child born with a defect and one who has never seen the light of the world, we must deal with the grave philosophical and moral problem of whether or not the situation of a born individual can be worse than that of an unborn person. At first glance, someone who has seen the sun rising and the bright blue of the skies, someone who has felt life pulsing within him and tasted its wonders, is in a better position than one who never lived at all. In general, life itself constitutes a supreme value — almost a sacred entity —and ought to be treated as an unmitigated good and an almost axiomatic benefit.

This idea emerges from the following statement of Silberg J. in *C.A.* 461/62 *Zim Israel Shipping Co. Ltd. et al.* v. *Maziar* (1963) 17 *P.D.* 1319, 1333:

> Judaism has always emphasized the supreme value of human life. The law of Israel is not a philosophical system comprising particular beliefs and opinions, but a law of life. It is anchored in life, and is to be applied for the sake of the living.

4. Physical Injury by Parents and Teachers

See: RASSI v. ATTORNEY-GENERAL, Part 6, Penal Law, p. 462.

5. Emotional Injury

C.A. 328/76

THE COMPETENT AUTHORITY FOR THE PURPOSES OF THE INVALIDS (NAZI PERSECUTION) LAW, 1957 v. ENGEL

(1977) 31(1) *P.D.* 169, 173-174

The Objections Committee set up under the Law held that people who were in an extermination camp for a given period and were affected by neurosis were invalids.

Cohn J.: Learned counsel for the appellant submitted that "injury" only means physical injury. He relies not only upon Even Shoshan's dictionary, but also on the language of the *Mishnah*, according to which one may injure another by putting out his eye, cutting off his arm or breaking his leg (*Baba Kamma* 8:1). And he quotes the rule from Maimonides (*M.T. Hovel uMazik* 2:7) that where one intimidates another, who falls sick from fear, not only is he not a tortfeasor, but he is exempt under human law and is only liable under Divine law.

It is very true that in the Jewish law of torts, physical injury and pain alone provide a cause of action (*Baba Kamma* 87b); however, in torts there is also indirect causation that may spring from mental affectation — but this is not the occasion to discuss the matter. That, however, does not mean that "injury" in Hebrew cannot embrace figurative or psychological injury. The Holy One, Blessed be He has no bodily form, yet (we say), "We have surely injured" Him (*Nehemiah* 1:7); the Babylonian Sages, who certainly did not strike and wound one another, would "injure [each other's feelings] when discussing the *halakhah*" (*Sanhedrin* 24a). Tosefot have already pointed out that no difference exists between injury to the body and injury to property: the word "injury" is employed for both, the first being the primary, though not exclusive, meaning (*Sanhedrin* 2b).

In connection with victims of Nazi persecution, I suspect that psychological injury is primary and physical injury takes second place. The Committee rightly wrote that "to break a person psychologically was central in the enslavement; every recognition of the idea of persecution and Holocaust necessitates recognition of the idea of mental injury." I find it difficult to understand how the Competent Authority, or any state attorney, can argue that all the oppression, "special" treatment, hardship and suffering, that did not involve physical injury, do not come within "injury" in the sense of the Statute.

There was persecution, such as restriction of movement or the wearing of the yellow badge, that either did or did not entail injury to the mind, "according to the individual concerned" (in the words of *M. Kelim* 17:11). A person who suffered from persecutions such as these has the burden of proving that he was mentally injured. The proof need not be medical. In most cases one can infer from the evidence of friends or relatives what was the observable effect of persecution; and the evidence of the persecuted person himself of what happened to him might suffice to show that he was indeed mentally injured. No hard and fast rule can be laid down, and each case depends on its circumstances.

6. False Witness

C.A. 572/74

ROITMAN v. UNITED MIZRAHI BANK LTD. *et al.*

(1975) 29(2) *P.D.* 57, 61-63, 64, 78-80

This appeal centred on the question whether local law recognizes a cause of action for false evidence leading to an erroneous judgment whereby the plaintiff incurred damage.

Kister J.: Before clarifying the problem before us, I must preface some general remarks.

There is no need to dwell upon the need for just trial in every human society, and the importance of true evidence in order to give true judgment is also well-known. As *Sefer haHinukh* writes in Commandment 37 (not to give false evidence):

> The root of this Commandment is obvious since untruth is abhorrent and blighted for every intelligent person, especially as the whole world rests on truthful witness...and therefore mendacious evidence is a cause of the destruction of settled society.

Many obstacles, however, stand in the way of attaining truthful evidence, and witnesses who lie are always with us. King David prayed (*Psalms* 27:13):

> Deliver me not over unto the will of mine adversaries, for false witnesses and such as breathe out violence are risen against me.

And it is related of Ahab (I *Kings* 21) who, being unable to set aside the law in order to obtain the vineyard of Naboth, procured false witnesses to kill Naboth and seize his vineyard.

Not only people who willfully testify falsely may mislead the court and bring about miscarriages of justice, but also a witness who has not borne testimony to what really occurred, or whose memory fails him or who gives his evidence negligently may do so. The Vilna Gaon described this aptly in his commentary on *Is.* 1:17 (and on the same lines in his commentary to *Prov.* 22:12):

> The upright judge must...first be adept in the byways of the *Torah* to give truthful judgment, and secondly, he must be expert in the ways of the world, so as to be able to distinguish between truth and falsehood in both the statements of the parties and the evidence.

Hence, there are people worthy of being judges, who may refrain from accepting office for fear that they may pervert judgment because of false evidence, as to which the *Talmud* says, (*Sanhedrin* 6b): "lest the judge should say, 'why should I have all this trouble', Scripture observes 'He is with you in judgment' (2 *Chron.* 19:6): the judge is to be concerned only with what he sees with his own eyes" (and if he intends to give judgment justly he will not be punishable: Rashi, *Sanhedrin* 6b).

According to tradition, only in messianic times will we be able to arrive at a situation where a judge will not err as a result of false testimony. As Isaiah says (11:3): "And his delight shall be in the fear of the Lord, And he shall not judge after the sight of his eyes nor the hearing of his ears." In the meantime, we cannot avoid the possibility of the courts erring in their finding of the facts from what witnesses and parties say, even under Jewish law which is so insistent that witnesses should have no disqualification at all.

The question is how to prevent as far as possible, either by moral and ethical persuasion or by legal means, the giving of evidence that is false or imprecise, and in addition, how to get people to come forward and give the evidence they possess. Though the giving of false evidence is a most serious misdeed, and was already proscribed in the Ten Commandments: "Thou shalt not bear false witness against thy neighbour" (*Ex.* 19:4) (for the severe warning given to witnesses in penal cases, see *M. Sanhedrin* 4:4 and *M.T. Sanhedrin* 14:3), the *Torah* forbids a person to suppress the evidence that he may have, as is written in *Lev.* 5:1: "And if anyone sin...being a witness, who hath seen or known, and doth not utter it, then he shall bear his iniquity." *T. Shevuot* 3:2 states that whilst a person who suppresses evidence is exempt from punishment under human law, he is liable under Divine law. A person conscious of his obligation will take these things to

heart, and knowing that he possesses evidence will not hold back from testifying in court and will take care to be precise so that his testimony is truthful. However, not every person answers to ethical and religious dictates. Hence the question of what to do when it is submitted and evidence is given that a witness has lied. Is it possible, and, if so, under what conditions, to punish the witness and make him liable to compensate the injured party? The main difficulty about an action for false evidence is how to establish that the witness, testifying against the one accused of false evidence, is himself not a false witness, and so on, and so on.

According to Jewish law, punishment only arises in the case of "adverse" witnesses, as described in *Deut.* 19:16 ff. and in the *Talmud* and later authorities. An "adverse" witness is not one who contradicts the evidence of another but one who "testifies that it is not possible for the testifying witness to have observed the act involved because he was not present at the place where it was committed." The *Talmud* and the commentators point out that preference of the evidence of the adverse witnesses over that of the original witness is novel (see *Sanhedrin* 27a). The *Torah* therefore cautions the judges to cross-examine them thoroughly and if the original witness is indeed found to be "controverted", then "you shall do to him what he conspired to do against his neighbour." In civil, as against penal, matters Maimonides holds (*M.T. Edut* 20:2) that "if property has passed from one to another on their evidence, they must compensate the owner."

A person who by his false testimony causes damage to another must make compensation therefor under the rules regarding indirect causation (*garmi*), but not when the injured party has been repaid by the other party that which he paid him; the latter is clear since no injury has been caused by reason of the false witness. Moreover, a false witness is only liable to pay when he admits the falsity: so Nahmanides decides in his note on *garmi* at the end of his commentary to *Baba Batra*; so also is it decided by Rosh (*Resp. Rosh* 58:6) cited in *Hoshen Mishpat* 38. The reason for this seems to be that a witness may not be made liable except on clear evidence that is beyond all doubt as against the evidence of the witness who has been controverted.

For any person of conscience who sees that, in consequence of imprecise testimony he has given, another has suffered damage, his first duty upon coming to repent is to compensate the other for the damage caused by his testimony; he must in addition appease the other, as decided by Maimonides, *M.T. Teshuvah* 2:9:

> Offences between individuals, such as when one injures another or curses him or steals from him and the like, are never forgiven until the offender has paid what is due to the other and appeased him.

(The same rule is laid down in *M.T. Hovel uMazik* 5:9, on the basis of *M. Yoma* 8:9).

One may also rightly mention here the principle of *res judicata* which prevails in modern law, and which is designed to put an end to litigation. It is not accepted in Jewish law, at least not to the same extent. Where a person has been sentenced to death, he can ask to be retried, as Maimonides decides (*M.T. Sanhedrin* 13:1): "Where one says, I have submissions to make in my favour, he may be retried once and twice...and a third time if there is substance in his submission." In civil matters, Maimonides decides (*M.T. Sanhedrin* 7:6 ff. and *Hoshen Mishpat* 20:1) that where new evidence is available, "even when trial has been concluded, it may be reopened."

Cohen J.: The correct understanding of the prohibition of false evidence is that it is not designed for the benefit or defence of one of the parties, and the damage caused thereby to one of the parties is not the type or nature of damage which the legislator sought to obviate when commanding people to attest truthfully.

This "correct understanding" of the prohibition involves, in essence, judicial policy: the danger of conflict between the duty of truth and the interest of a party is what leads us to interpret the prohibition as "solely a public duty."

Counsel submits that if judicial policy is determined, or in other words, if we determine the public interest in Israel as we see it, it is proper—even if not required by law — that we turn to the traditions of Jewish law and distill from its principles and provisions whatever is necessary for us to determine our public interest today. Again, for myself I am ready to adopt this suggestion in full. If we find in Jewish law principles and provisions on which we can found public order for this time and place, we are commanded so to act.

However, we have found in Jewish law no principle or provision from which we can deduce that the duty of truthful evidence and the prohibition of false evidence is not "solely a public duty", but it is also a duty towards the parties. Counsel bases himself on the rule in *Hoshen Mishpat* 38 (also given in 29:2) that where witnesses admit that they attested falsely, "their first testimony prevails, since once they have given it they cannot go back on their words and say something else, but they are believed for the purpose of paying (the party) the loss he has suffered by their doing." That means that the damage they have inflicted on the party by their false evidence is, as it were, the damage which the legislator meant to avoid by the prohibition; and since it is the witnesses who must make

good the damage, the prohibition applicable to them turns out to be for the benefit and protection of the parties.

This rule finds its source in one of the *Responsa* of Rosh (58:6) already quoted in the judgment of Kister J. The case before Rosh was that A owed money to B. Witnesses came and signed a deed of waiver whereby B waived A's debt....Later these witnesses alleged that A had made them drunk and got them to sign what he wanted. Rosh decided that the witnesses are not to be believed for the purpose of setting aside the deed, since "their signatures had been confirmed in court" and they cannot involve A in a loss of what he had obtained under the deed. They were, however, to be believed as against themselves, since an admission has the force of a hundred witnesses and they must pay under the rule of *garmi* for the damage they had done to B by the execution of an incorrect deed, "since they themselves had inflicted the damage to B by signing what was untrue."

It is easy to see that this is unlike evidence. The wrong the witnesses had committed by signing a deed in favour of A is — in the terms of the Civil Wrongs Ordinance — the tort of deceit, for they had mendaciously represented the fact of the waiver, knowing it to be false or not reliable. Their liability in tort has nothing in common with the bearing of false witness.

It is very true, as my learned friend showed, that under Jewish law a false witness must repair the loss that a party has suffered because of his testimony — that is not because he attested to a lie or because he owes any duty of truth to the party as such but because of Scriptural decree, "Then ye shall do unto him as he had proposed to do unto his brother" (*Deut.* 19:19)....This is not compensation that derives from any duty towards the party but a criminal sanction which the *Torah* has prescribed for a"controverted" witness—a witness who testified that he was present at the relevant time at the *locus acti* and is afterwards shown to have been elsewhere. That is different from the ordinary "false" witness whose evidence is subsequently refuted by contradictory evidence. Maimonides puts it (*M.T. Edut* 18:1-2) as follows:

> It is a positive commandment to do to him (the "controverted" witness) what he wished to do to his fellow by his testimony; in the case of an offence that entails stoning, he is stoned...and so with all other forms of penal punishment, including flogging....Where such witnesses gave evidence in a matter of property, the amount is divided according to of penal punishment, including flogging....Where such witnesses gave evidence in a matter of property, the amount is divided according to their number and each contributes his share....Where, however, there are two groups of witnesses who contradict each other so that no evidence

exists, no one of them is punished since we do not know which group is lying.

Thus, where witnesses "conspire" to give evidence in a penal case in order to bring about the punishment of the defendant, by sentence of death or by flogging or by imprisonment, the same punishment they conspired to bring upon him is inflicted upon them, but they are not made liable nor are they liable to compensate the defendant by money payment for the damage he has suffered by being punished: only if their testimony was directed at the imposition of a monetary obligation on him will the appropriate punishment for them be to obligate them to pay this sum. The question then arises whether the money, which is in the nature of a fine, must be paid to the party against whom the evidence was given or whether "the court may pay it over to whomsoever it wishes." Radbaz held that it is to be paid to the party, as it is written, "Ye shall do unto him as he had proposed to do unto his brother" — the "doing" must be to his brother (*Resp. Radbaz* 3:1049). That, however, does not deprive the payment of the character of being a criminal sanction and not civil compensation.

Since what "controverted" witnesses have to pay is strictly a criminal fine, "they do not pay on their own evidence", and even their confession —which in civil law has the force of a hundred witnesses—cannot render them liable to make the payment (*Tur*, *Hoshen Mishpat* 38:5; Maimonides, *op. cit.* 8).

No different conclusion is to be derived from the terms of the warning administered to witnesses in penal cases. They are cautioned that whilst in civil matters payment will atone, in penal law "his blood and the blood of his issue are upon your head until the end of days" (*M. Sanhedrin* 4:5). That means that if they give false evidence and cause only financial loss they can always "atone" by a payment of money — not that they must do so, but they can repair the wrong. In capital matters, however, there is no atonement by payment of money, either voluntarily or by force of law, since no money in the world can atone for the spilling of blood. In like manner, it can be said that no money can atone for denial of freedom.

7. Extraneous Expenses

C.A. 180/71

LAVI v. PENSIONS OFFICER

(1972) 26(2) *P.D.* 501, 510, 511

This appeal was concerned with the amount of legal costs awarded to a discharged soldier for invalidity.

Kister J.: I agree with the results arrived at by my learned colleagues. I too have found no statutory provision or express Common law rule that gives appeals committees like those under the Invalids (Pensions and Rehabilitation) Law, 1959, the power to award costs against the pertinent authority, but I agree with Witkon J. that we may assume that the appeals committee whose decision is being appealed here possesses such power.

I reach this conclusion by reference to the sources of Jewish law regarding the causing of unnecessary expenses. According to Jewish law every ordered society must institute a legal system—courts to which all may apply without difficulty. If, in a dispute between two citizens, each puts his case properly and correctly, the one who fails need not pay the legal costs of the one who succeeds. If, however, one side acts with stubbornness or the like and entails unnecessary costs to his fellow, he will be made liable for all such costs since he caused the damage and expense (*Hoshen Mishpat* 14:5 and commentaries *ad loc.*).

It seems to me that justice demands that the pertinent authority should be liable for the costs incurred by the citizen where it has not properly considered his application as it should have done in order to avoid the citizen's having to resort to the courts.

I might add that the rule of awarding costs to the successful party, very common nowadays, was not recognised by ancient Roman law but was adopted much later.

8. Fraud

See: ROITMAN v. UNITED MIZRAHI BANK LTD. *et al.*, p. 569.

9. Theft

See: ILIT *et al.* v. ELKO LTD., Part 6, Penal Law, p. 475.

10. Extortion

See: ILIT *et al.* v. ELKO LTD., Part 6, Penal Law, p. 475.

11. Torts of Neighbours

See: MEFI CO. LTD. v. ASHKENAZI AND PARTNERS, p. 524.

12. Torts by Animals

See: SELA v. STATE OF ISRAEL, p. 532.

Chapter Three

BURDEN OF PROOF

1. The Goring Ox

C.A. 349/59
ZLOTZOVER v. BE'UMI *et al.*
(1960) 14 *P.D.* 956

Cohn J.: A question of fact is in dispute in this appeal: Was the appellant gored by an ox or did he happen to fall on the ox's horns in stumbling? When one says the ox gored him and the other that he happened to be hurt, the burden of proof is upon the plaintiff. The evidence brought by the appellant, the plaintiff in the lower court, did not satisfy the learned judge that it was the ox which gored him.

The appellant submits that no one would pierce his own eye on an ox's horn. Hence that fact is overwhelming evidence, and since the ox was at that moment in the domain and under control of the third respondent, the burden of proof that he acted with care and not negligently passes to him. But not all oxen are equal before the law. Our forerunners already distinguished the "forewarned" ox (*mu'ad*) with a propensity to injure and the "innocent" ox (*tam*) not known to have that propensity. Had the appellant brought any evidence of this ox being *mu'ad*, we would have followed his submission and held that the onus of proving absence of negligence fell on the shoulders of the third respondent. But appellant's counsel admitted that he had not presented such evidence. From the material before the court it emerges that the ox was *tam* and not *mu'ad*.

2. Torts to Neighbours

See: MEFI CO. LTD. v. ASHKNAZI AND PARTNERS, p. 524.

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2. Torts to Neighbours

See: MEFI CO. LTD. v. ASHKNAZI AND PARTNERS, p. 524.

Chapter Four

REMEDIES

1. Mitigation of Damage

C.A. 61/47

KADDAR PORCELAIN LTD. v. ADIF LTD.

(1949) 2 *P.D.* 897, 899, 904

Dunkelblum J.: The appellant, the defendant in the lower court, is a company that manufactures pottery. The respondent, the plaintiff in the lower court, is a company manufacturing eau-de-cologne and other perfumes. Eau-de-cologne contains about 80% alcohol and about 20% water and aromatic matter.

The respondent ordered bottles from the appellant from the samples submitted to it by the appellant, which in turn were made by the latter in accordance with sketches made by the respondent. The order was effected following a letter from the appellant in which it wrote that the samples were not yet perfected and were still not impermeable. In the same letter, the appellant assumed responsibility for the bottles that it supplied being impermeable.

Some months later, the respondent ordered a further supply of bottles. The respondent subsequently wrote to the appellant that the quality of the bottles was very poor, and that many of them leaked. A director of the respondent company testified in the lower court that he had relayed the complaint to the appellant by telephone as soon as he learned that the bottles were porous, and he had confirmed the complaint by letter soon after. The appellant acknowledged receipt of this letter in its reply...in which it pointed out that the bottles had been examined for permeability to water but not to alcohol, that many bottles that were defective or permeable had been destroyed, and that for this reason, it dismissed the complaints of the respondent.

...What damage has been caused to the respondent and what is the appellant's liability? It is well to recall two rules of the English law of torts

which, in my opinion, apply here as well. The first is that the purpose of compensation is to restore, insofar as possible, the injured party to the position in which he was before the damage occurred: in other words, the purpose of compensation is *restitutio in integrum*. See, for example, Maine, *On Damages* (1946) 9. The second rule is that the injured party must do everything reasonable to mitigate the damage. His duty is not to sit back with arms folded and wait for the compensation that the tortfeasor will pay him. He must do everything he can to reduce the damage or loss he has suffered.

My learned colleague, Assaf J....has drawn my attention to the fact that the above rules are prescribed in Jewish law as well. Regarding the first, see *Tur* and *Shulhan Arukh, Hoshen Mishpat* 304:5. As for the second, our Sages held that "the owner deals with the carcass", and the reduction in value of the goods of the injured party, after the damage has been done, falls upon him, since he has the duty to try to prevent the damage becoming greater by not doing anything about it (see *Baba Kamma* 10b, *Hoshen Mishpat* 403:2 and *Be'er haGolah ad loc.*).

2. Restitution for Executing Erroneous Judgment

See: PLYIMPORT v. CIBA-GEIGY LTD. *et al.*, Part 8, Obligations, p. 691.

3. Restoration of Gain Procured

See: Part 8, Obligations, p. 587.

4. Calculation of Damages

C.A. 524/80

AVIDAN *et al.* v. HALPERIN *et al.*

(1983) 37(1) *P.D.* 29, 39

The husband of the first respondent was killed in a road accident. Following his death, his farm was run by his widow, her brothers-in-law and the same workers who had helped to run the farm during the lifetime of the deceased. Prior to her husband's death, the respondent had been a housewife. The appeal turned on various questions relating to the compensation to be paid to the widow as a dependent of the deceased.

Sheinbaum J.: This method of working out compensation is also found in Jewish law, *M. Makkot* 1:1:

> The assessment is made on the basis of how much one might be willing to offer for [the difference between] holding the sum of one thousand *zuz* to be paid within thirty days or within ten years hence.

According to R. David b. Zimra (*Resp. Radbaz* 1:84) this means "the money he would be able to earn in that period." This interpretation is also cited in the *Otzar Mefarshei haTalmud* on *Makkot* (p. 100) as follows: "According to the *Mishnah*, we estimate the amount he would have been able to earn with this money during a period of ten years."

In a case where the potential profits of a particular property are known, there is no problem with regard to forecasting future earnings, since these are equivalent to the amount earned in the same period prior to the transfer of the property. This criterion was indeed accepted by the Court in *C.A.* 112/58 *Motor Union Insurance Co. Ltd.* v. *Provek et al.* (1959) 13 *P.D.* 871 in relation to hired property. In working out the damages to be paid where the property was damaged, the rental money was deducted in accordance with this method of assessing future earnings.

5. Equitable Damages

C.A. 350/77

KITAN LTD. v. WEISS *et al.*

(1979) 33(2) *P.D.* 785, 809-810

The appeal turned on the question of the liability in tort of the appellant company, whose watchman had used the gun issued to him for purposes of his security work in order to kill the husband and father of the respondents.

Elon J.: I have one further point to make. It is indeed true that in strictly legal terms, the appellant is not required to pay any compensation to the respondent. In the course of the present proceedings, the appellant offered to go beyond the letter of the law and to make a substantial payment towards compensating the respondent's family for their loss, over and above a payment which had already been made to them. The appellant deserves praise for this, since the obligation to go beyond the letter of the law is part of the tradition of Israel and constitutes one of the fundamental principles of Jewish law. It is particularly noteworthy that this obligation finds its most forceful exposition in the area of tort law and in circumstances almost identical to those confronting us in this case. The following excerpt from Prof. Asher Gulak's work (*Foundations of Jewish Law* 2, p. 18) sums up this issue admirably:

> There are obligations in relation to which there is absolutely no coercion and they are fulfilled solely as a result of the wrongdoing party's goodwill. In terms of human law there is clearly no obligation here, since sanctions are the direct and necessary result of all human law. This type of obligation only exists on the moral and religious planes and is therefore characterised by the phrase, "exempt from human law but liable according to the laws of Heaven..."
>
> Liability under Heavenly law is imposed whenever positive law lacks a category for moral obligations which any decent man would nevertheless feel obliged to fulfill. The special nature of Heavenly law is well-illustrated in the context of tort law.
>
> Damage inevitably causes a loss to the party suffering the damage, although the question of causation always needs to be dealt with before payment of compensation is imposed upon the tortfeasor. In a situation

> in which the causation point is in doubt, i.e. either it is not sufficiently proven or it cannot be proved at all, then the tortfeasor is liable according to the laws of Heaven to compensate for the damage.
>
> Causation is established in the main against a background of normalcy, i.e. under normal conditions the damage that resulted would indeed have been caused by the act that preceded it. Where abnormal conditions were at work, and under normal conditions no damage would have resulted, the tortfeasor is only liable to compensate the injured party under the law of Heaven—he is free from human sanction.

This indeed is an almost exact description of the issue in the case before us.

In the history of the development of the principle of going beyond the letter of the law in Jewish law, we find that in certain circumstances, there are many authorities who are prepared to apply sanctions against those who ignore it. This point is made by R. Yoel Sirkes, the author of *Bayit Hadash* on the *Turim*:

> And it is the practice of all Jewish communities to compel a rich man to pay where it is fair and fitting to do so, even though he is exempt from any positive liability (Bah on *Tur*, *Hoshen Mishpat* 12:4; see Elon, *Jewish Law* Part 1, 176 ff.).

This approach is anchored in the wider perspective of Jewish law which finds expression *inter alia* in the well-known principle that "we force people to give charity" (*Ketubot* 49b) and even though this principle is only operative under certain conditions and circumstances, it serves as the basis for the mandatory maintenance of children and relatives, even where there is no legal obligation to maintain (see Elon, Part 1, 155 ff.).

In our legal system, no person may be forced to go beyond the letter of the law. Such a course is entirely within the discretion of the litigant. In certain situations, however, it is fitting that the request be made from the bench. This approach is based upon Jewish law in this area, and I permit myself to cite words I wrote elsewhere:

> The halakhic system makes a clear distinction between normative rulings accompanied by legal sanctions and rulings lacking in such sanctions. However, the common sources and background of both legal norms and moral principles gave rise to the following basic halakhic principles: the positive law will from time to time advert to a moral norm which has no accompanying moral sanction. The court may not cast off all responsibility for a particular case simply because there is no relevant legal remedy in positive terms: the responder in his *responsa*, the

decisor in his code and the court in its decision—all take into account the relevant moral norm, and make it an integral part of their responses and decisions (Elon, *Jewish Law*, Part 1, 173 ff.; 2, 619-620).

I myself would recommend to the appellant to go beyond the letter of the law and compensate the respondents as they had initially proposed doing. In such circumstances, the words of the wisest of all men (Solomon)—"In order that you walk in the path of the good and preserve the ways of the just" (*Prov.* 2:20) will have been fulfilled. Indeed, this is the very verse from which the obligation to go beyond the letter of the law is derived.

C.A. 842/79

NESS *et al.* v. GOLDAH *et al.*

(1982) 36(1) *P.D.* 204, 220-221

This appeal involved the sale of an apartment, payment for which was delayed and repossession of which was claimed by the respondents.

Elon J.: I am left with a question that I direct to Goldah. As we have seen, he received from Ness, albeit after many postponements, the sum of IL. 140,000 for the apartment. When he got the apartment back...he should rightly have returned this sum since he was not entitled both to the apartment and the money. The learned District Court judge, as we have seen, held that Golda was bound to refund only IL. 90,000 because under his contract with Ness he was entitled to retain IL. 50,000 as fixed damages for breach of contract by the latter. That is in strict law, but in equity he should rightly return this sum as well. It is a rule of Jewish law that where a person causes damage to another, but the necessary causal connection between the tortfeasor's negligence and the injurious act is absent, he is in law exempt from paying for the loss. In certain circumstances, however, he will still be liable in order to be free from divine judgment (se e.g. *Baba Kamma* 55b) and the court should properly inform the parties to this effect (*Raban ad loc.*). Such reparation for the damage, wholly or in part, rests on the important principle of acting beyond the strict letter of the law which the Sages based on the words of the wisest of men: "...that thou mayest walk in the way of good men and keep to the paths of the righteous" (*Prov.* 2:20; and see *Baba Metzia* 83a). I have already discussed the matter elsewhere (*C.A.* 350/77 *Kitan Ltd.* v.

Weiss et al. (1979) 33(2) *P.D.* 785, 809-810; M. Elon, *Jewish Law*, 171 ff.). Goldah's conduct does not prevent him from having the apartment back, since it never passed from his ownership, and it certainly cannot render him liable in tort for the loss incurred by the other, but without a doubt it did contribute something to the situation, as explained above....In these circumstances, it is proper for Goldah to make some compensation for the loss incurred....He is not liable in law but it is a *desideratum* to act equitably.

6. Removing Offending Trees

See: KAFTA *et al.* v. LASKOVSKI *et al.*, p. 562.

7. Repayment of Extraneous Expenses

See: LAVI v. PENSIONS OFFICER, p. 575.

8. Seizure to Prevent Damage

See: SELA v. STATE OF ISRAEL, p. 532.

9. Payment for "Shame"

C.A. 357/80
NA'IM *et al.* v. BARDAH *et al.*
(1982) 36(3) *P.D.* 762, 815

Elon J.: In connection with damages payable under the head of "shame" in tort law, the question has already arisen before the Sages. According to one view, payment under this head varies with the importance and status of the injured person. The rule is that all depends upon the respect in which he is held. In R. Akiva's view, however, "even the poor in Israel have to be regarded as freemen (wellborn and nobles: cf. *Ecc.* 10:17) who have been but reduced in circumstances, for they are the descendants of Abraham, Isaac and Jacob", and therefore the measure of damages for "shame" is the same for all of them (*M. Baba Kamma* 8:6 and *Baba Kamma* 90b).

Part Eight

OBLIGATIONS

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Chapter Thirteen: AGENCY

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Chapter Fifteen: EQUITY — THE VOLUNTEER

Chapter One

RESOLVE TO ENTER INTO CONTRACT

1. Resolve as the Basis for Contractual Undertaking

C.A. 250/70
SHARABI *et al.* v. SUBERI
(1971) 25(1) *P.D.* 429, 430-432

This was an appeal against the dismissal of an application for probate on the ground that the document in question did not comply with the statutory requirements of a will.

Kister J.: According to the submission of counsel for the appellants, the burden of proving lack of soundness of mind falls on those who oppose probate, even where there is a defect in the form of the will.

I cannot accept this submission. All the provisions regarding the manner of drawing up wills are not only intended to ensure that the testator's signature on the will is authentic; for that alone the detailed statutory provisions are not necessary. These provisions are intended to ensure that the document constitutes a serious expression of the true and absolute wishes of the testator that his estate will pass and be divided exactly as stated in the document that purports to be his will. Jewish law knows the term "intent" (*gemirut da'at*) and Hazon Ish, *Hoshen Mishpat* 22, cites the following in the name of his father:

> It is a leading rule in acquisition that a person shall intend to vest the thing in his neighbour and that the latter should rely on that. There are matters in which the Sages held that a mere oral declaration may demonstrate that a person has made up his mind to vest something in his neighbour but there are matters in which intention is only shown by the modes specified in the Torah or by the Rabbis.

Regarding wills it has long been common to impose various formal requirements for ascertaining whether intention was complete, since it is

difficult to adduce evidence about the mind of the testator, about pressure or undue influence, and the testator himself can no longer explain his motives in making the will.

C.C. (Misc.) 386/73

AMPA LTD. v. SHEFER *et al.*

(1975) 2 *P.M.* 176, 177, 185-186

The defendants signed a memorandum of agreement to sell to the plaintiff a certain building still in the course of construction for consideration of IL. 250,000. The memorandum stated that IL. 25,000 was payable upon signature of the contract, but the dates of subsequent payments were not stipulated. It was also agreed in the memorandum that a contract would be signed. The following day the plaintiff confirmed the memorandum in writing. After some correspondence the defendants subsequently informed the plaintiffs of their intention not to sell the property. The IL. 25,000 was not paid to the defendants but was deposited in court.

Tirkel J.: It has already been said "that the substantive question whether negotiations have matured into a contract requires an answer at two levels, the subjective and the objective. At the subjective level there is no contract unless the two sides think they have concluded a contract. If they so think, then at the objective level the conclusion must cover at least the main terms" (*per* B. Cohen J. cited in *C.A.* 700/72 *Abramov* v. *Kadar* (1973) 27(2) *P.D.* 498 at 503. It has also been observed that "the two sides think that they have 'concluded a contract' means that they regard themselves bound by a binding agreement" (*ibid.*).

It is illuminating to point out that the resolve of the contracting parties is essential for a contract under Jewish law; whether the formal (physical) act of "*kinyan*" (acquisition) required for transfers under Jewish law is regarded as "an integral part of the resolve" or the "mode of proving the resolve", it is clear that the act of *kinyan* has no legal force in the absence of resolve, i.e., the intention to create legal relations (see Z. Warhaftig, *The Law of Contract in Jewish Law*, 1974, ch. I; S. Deutsch, "Resolve in Obligations under Jewish Law" in (1972) 3 *Dinei Yisrael* 207). Such resolve is objective and in any given case is determined by judicial assessment (*ibid.* pp. 208-11). Since 1973 it has become a recognised element under the Contracts (General Part) Law, 1973 (secs. 2 and 5; see also sec. 25).

It therefore appears that examination of the present case in the light of these principles yields the same conclusion as above under Jewish law as well.

RESOLVE TO ENTER INTO CONTRACT

C.A. 440/75

ZANDBANK et al. v. DANZIGER et al.

(1976) 30(2) *P.D.* 260, 266

The District Court had held that two letters exchanged between the parties constituted a contract binding the appellants to transfer to the respondents all their interest and rights in certain companies, the provisions of the Contracts (General Part) Law, 1973, being applicable.

Shamgar J.: The first question before us is whether a contract was concluded between the appellants and the first four respondents. This matter, which transpired in December 1974, is governed by the Contracts Law, according to which a contract is made by offer and acceptance: consideration as understood in English law is no longer necessary. Any approach by one person to another is an offer if, in the words of sec. 2, it attests to the offeror's resolve to enter into a contract with the offeree and is sufficiently clear to enable the contract to be concluded by acceptance of the offer. The acceptance must be contained in a notice that the offeree delivers to the offeror, attesting to the offeree's resolve to enter into a contract with the offeror according to the terms of the offer.

The two points, therefore, which call for full examination in the present connection are that of "resolve" and whether the offer was sufficiently specific to enable a contract to be made..

The term "resolve" derives, as we know, from Jewish law. It imports the idea that both the offer and the acceptance must show the intention of the offeror or offeree, as the case may be, to create binding legal relations.

Prof. Z. Tzeltner (*The Law of Contracts in the State of Israel*, 1974, pp. 37 and 55) contends that "resolve" is a synonym for "seriousness", and it is in reliance on this view that the lower Court decided as it did. I find more acceptable the view that in employing the term "resolve", the legislature did not simply intend to single out the seriousness of intention but adopted elements common to both the Continental and English legal systems and sought to regard "the intention to create legal relations" as the basis for making a contract. That emerges from the Explanatory Notes to the Bill of the Law... it also accords with the view expressed by Prof. Tzeltner elsewhere in his book (pp. 40-42) and is also supported incidentally by the meaning of the term in Jewish law. Needless to say, there is no obligation to interpret a phrase in a statute, taken from Jewish law, in accordance with its original meaning (per Cheshin J. in *Mitova* v. *Kazam* (1952) 6 *P.D.* 4).

2. Formal Requirements

C.A. 451/62

COHEN v. COHEN

(1963)17 *P.D.* 1605, 1609

Husband and wife agreed upon a divorce settlement. Later, the wife refused to accept the deed of divorce, and in a claim by her for maintenance the husband argued that in view of her refusal the wife could not, under the terms of the settlement, sue for maintenance, or that at least he was released from the obligation to pay maintenance. In the District Court it was held that this provision in the settlement was not binding and did not negate the wife's right to maintenance, either under Jewish law of under English common law. The husband appealed.

Cohn J.: It is well-known that under Jewish law, the binding force of contracts depends not only on the taking of an object, i.e., *kinyan* [the formal mode of making a contract binding], but also on the employment of particular language, in order to avoid such problems as *asmakhta* [a situation which denies validity to a contract] or in order that a condition be binding... When such language is employed, we do not inquire into whether the situation is as described. It appears to me that at the present time and place, when people are no longer careful or meticulous to draw up contracts regarding marriage and maintenance with all the learned talmudical niceties, but rather, write them in contemporary, everyday language, it is right that every contract should be presumed to be made with all the necessary formalities having been fulfilled, even if that is not expressly stated.

I have found very sound authority for this view in a judgment of the Supreme Rabbinical Court of 1945 (*Collection of Rabbinical Court Judgments* published by the Ministry of Justice, 86). There it is said, *inter alia*:

> A clause in a contract that involves compensation in the event of non-fulfillment of the contract, is not at all affected by the rule regarding *asmakhta*, for were it otherwise, all transactions would be nullified. Such a clause is to be construed as expressly stating that it is not an *asmakhta*.

The law is so decided in *Hoshen Mishpat* 42:15—"The language normally used in drafting documents, although not in accordance with rabbinical

regulation but rather that used by laymen in the place concerned, is to be followed, and even when not so used it is treated as if it were."

It is true that a woman who has undertaken by contract to accept a divorce is not to be compelled to do so, for if she were compelled she would not be accepting it voluntarily. The same applies to a husband who has undertaken to give his wife a divorce (see Schereschewsky, *Family Law*, 256). This means that a contractual obligation of this kind is not enforceable and in this respect differs from a contractual obligation to pay over money or to be released from doing so or to debar a money claim. The law is that every condition concerning money subsists.

See: BOHAN INSURANCE CO. LTD. v. ROSENZWEIG, below.

3. Rescission

See: SHIMONI v. LECHAIM HALLS LTD., p. 651.

4. *Asmakhta*

F.H. 13/67

BOHAN INSURANCE CO. LTD. v. ROSENZWEIG

(1968) 22(1) *P.D.* 569, 570, 581-582

The Supreme Court had held that the requirement of writing under the Ottoman Insurance Law was substantive and not simply probative and that therefore the applicant remained bound to indemnify the respondent, notwithstanding an oral variation, proved to the satisfaction of the District Court, changing the policy from a comprehensive policy into a third-party risk policy.

Silberg D.P.: Here I wish to quote the reason given by the German scholar, Enneccerus, for the requirement that a guarantee be in writing:

> The agreement to guarantee is particularly perilous because generally it stems from the anticipation that the principal debtor will fulfill his obligations, and therefore one may without risk do him a favor (by giving a guarantee). In order to bring to the guarantor's awareness the importance of the act, art. 766 makes the validity of the guarantee conditional upon the obligation being in writing (Enneccerus, *Lehrbuch des Buergerlichen Rechts*, vol. 2, part 2 (15 ed.) p. 546).

Had the Sages of the *Talmud* had occasion to give expression to the idea of Enneccerus, they would have put it in the following terms—the liability of the guarantor is *asmakhta* (speculative), he relies on the debtor himself discharging the debt, and *asmakhta* does not avert unless made in writing. Rashi to *Sanhedrin* 24b says that a person who gambles with dice is ineligible to act as a witness, because he is "a thief" (obtains money unlawfully), since the consent of the other person to pay him the money he has won is only *asmakhta*, as distinct from a voluntary and serious transaction, the expectation being that one will sometimes win and sometimes lose. There was indeed a view in the Talmud that if the rule is that *asmakhta* does not vest, then a guarantor can in truth not encumber himself, because every guarantee is *asmakhta*. "The guarantor relies on the fact and is sure in his mind that the loan will be repaid, and had he known it would not be repaid he would not have entered into the guarantee" (Rashbam to *Baba Batra* 173b; see also the *Gemara ad loc.*).

The only difference therefore between the B.G.B. and the *Talmud* is that the former thinks that the time interval given to the guarantor by the written guarantee cancels the *asmakhta* (the "speculative" nature) of the matter.

The other reasons given by Enneccerus for the formality required in certain transactions are equally, it not more, logical. Thus he writes elsewhere in his treatise:

> Nevertheless the B.G.B. prescribes a particular form in many places. The purposes of these provisions of form is to protect a person from being precipitous, to render more certain that a transaction has been concluded (i.e. "striking the last blow", in order to distinguish between this and the non-binding negotiations), and sometimes also to provide easier proof to render the transaction apparent to third parties (*op. cit.*, vol. I, part 5.2, p. 386).

The first reason, protection of the obligee against his own haste reminds us by way of association of something very similar in the *Talmud*, the "stitched" or "folded" bill of divorce. Formerly, it was customary to distinguish between a *get* (bill of divorce) given by an Israelite to his

wife and one given by a member of the priestly tribe to his wife. The former divorced his wife by a "plain" *get*, the writing of which was simple and speedy, whereas the priest divorced his wife by giving her a "stitched" *get*, folded and sewn together; the folds were so made that the (three and not two) witnesses signed not on the face of the *get* but on the back of it, between the stitches, on the outside. Such a *get* took some time to draft and prepare for stitching and folding. Why was such a *get* specially instituted for a priest? The reason was in order to protect him from haste, which might cost him very dearly, since a priest is not able to remarry his divorced wife, whilst an ordinary Jew who changes his mind after giving his wife a *get* (and before she married another man) may remarry her.

> Why did the Rabbis institute a folded deed? Where the priests were very hot-tempered and hasty in divorcing their wives, the Rabbis instituted this provision so that in the meantime they might cool down (*Baba Batra* 160a; see Tosafot and Rashbam *ad loc.*).

In the Mishnaic period the legislator would often prescribe complex forms for effecting a transaction so that a person might be defeated in his impulsive purpose. This idea still operates today, because human nature has not changed since the creation of the world.

See: BEN-SHAHAR v. MAHLEV, p. 657.

5. Ostensible Contract

See: SHEFI v. SHPITZ, Part 9, Property-Physical and Intellectual, p. 743.

6. Extent and Validity of Obligation

C.A. 99/60

SHMUEL v. ISRAEL

(1960) 14 *P.D.* 1642, 1646-1648

A father sued his son on the basis of an agreement made in Ethiopia under which the son undertook to pay his father a certain sum in Israel in sterling. The court held that the obligation to pay was not void on the grounds that it contravened the currency regulations, since it is assumed that at the time of the agreement, both parties intended to obtain the relevant permits and licenses required in order to deal in foreign currency. The court also held that under the law of the Torah, a document recording an obligation is not void because of the absence of a kinyan *(formal act of acquisition) even if there was no consideration. The analogy here is to the English deed which is valid by virtue of being written for the purpose of imposing an obligation and handed over to the obligor for that specific purpose, even though there is no consideration. According to Jewish law, any person who undertakes a specific obligation may not claim that the obligation is not binding upon him on the grounds that it relates to property which he does not possess or something which is unlimited or insufficiently defined. The son's obligation to his father to pay for an apartment in Israel is, therefore, a binding one, and requires him to buy his father a suitable dwelling of average quality, since this is the type of property to which a debtor is entitled under Jewish law.*

H. Cohn J.: With the consent of both parties—and it is not inconceivable that we would have adopted a similar course even without their express consent—we have decided to deal with the obligation in question in terms of the law of the *Torah*. The claim that the obligation is invalid on the grounds that there is no formal act of transfer (*kinyan*) is baseless: there is a document which serves as a *kinyan* and the obligation is, therefore, a fully binding one:

> A person who undertakes a financial obligation towards someone else without attaching any conditions and notwithstanding that he owes no money to that person is nevertheless obliged to fulfil his undertaking. What is the operative procedure? He says to witnesses: Bear witness that I am liable to pay so-and-so one *maneh*, or he writes a document to the effect that he owes him a *maneh*... he is liable to pay (*Hoshen Mishpat* 40:1).

Our early Sages also dealt with the problem of consideration and discussed the possibility that such an obligation would only be valid if it was made with respect to an already existing debt. However, the authoritative ruling is that such an obligation is binding "even though they both admit, and the witnesses know, that there was no prior debt but the obligation was created entirely by the obligee..." (*Hoshen Mishpat* 40:1). There is, nevertheless, at least one school of Talmudic Sages which was very well aware that an obligation without consideration does not come into existence without a *causa*, i.e. a reason or cause. "Rav Aha and Ravina differ: One says, gifted property is like inherited property, in that it comes of itself (i.e. without any effort on the part of the recipient). But the other says, gifted property is like bought property, for if the recipient had not exerted himself to win the favour of the donor, the latter would not have given him the present" (*Baba Metzia* 16a). The distinction between a debt which existed prior to the obligation, and an obligation lacking any prior cause is brought out by R. Tam who explains that the latter type of obligation is not in the same category as an admission. An admission, according to R. Tam, is when someone admits to a debt which already exists "but only now is he undertaking a formal obligation and writing it in a document: the transfer of the document constitutes the beginning of the formal obligation..." (cited in *Tur, Hoshen Mishpat* 40:3). There is, therefore, no need for consideration when the obligation is undertaken in writing, in a similar fashion to the English deed which is valid from the time of handing over without any need for consideration.

A more difficult issue than consideration—at least from the perspective of *Torah* law—is the question of undertaking an obligation with respect to something that does not exist or which is not in the possession of the obligee, such as a house in Israel. The same difficulty applies with respect to unspecified obligations such as monthly maintenance. In this context, there is a disagreement between the classical authorities, which is expressed by the Baal haTurim as follows:

> According to Maimonides, any person who undertakes a non-specific obligation, e.g. he says to someone, I hereby undertake to clothe or to feed you, has not obligated himself to do anything, since there is no known, specified object to which the obligation can apply. R. Abraham b. David disagrees and cites Nahmanides, according to whom a person who undertakes an unspecified obligation, e.g. he says to someone, I hereby undertake to support you, or to supply you with a certain quantity of wheat throughout the year, is required to fulfil this obligation just like any other. In the case of the wheat, the uncertainty is caused

> by the fact that the price of wheat fluctuates and cannot be fixed at the time the obligation is undertaken. Therefore, if...someone undertook an obligation and recorded it in a document, his creditor can distrain property which has a lien attached to it. Any person who undertakes an obligation with respect to property which has not yet come into existence or which does exist but is not in his possession is required to honour that obligation, even though we generally maintain that no ownership may be transferred in property which does not yet exist. This rule only applies where the transfer was made in terms of sale or gift; where it was made in terms of obligation, the obligation stands...(*Tur, Hoshen Mishpat* 60:9-10).

The opinion of Ritva is as follows:

> It is both my opinion and that of my teachers that whoever undertakes a formal obligation to support his fellow...is obliged to support him...even though there is no specific limit to the maintenance. Although Maimonides rejected this position, most authorities disagree with him, and my teachers have ruled in accordance with their opinion in many cases since it is borne out in the sources. If the obligation was undertaken in writing, then the creditor may distrain on property which is subject to a lien...(cited in *Bet Yosef, Tur, Hoshen Mishpat* 60:9-10).

One of the reasons offered for this ruling is that the obligation generates a lien upon the body of the obligee, and his body is both definitive and in existence at the time of the obligation (*Resp. Maharit, Hoshen Mishpat* no. 23). On this basis, the ruling was made that if the person attempting to sell or donate property which has not yet come into existence knows the rule that ownership in such property cannot be transferred, then it is assumed that he is undertaking an obligation for which his body will be subject to a lien. An example of such a person is a scholar learned in the law. A scholar cannot, therefore, be heard to claim that he knowingly led the buyer astray, since it is the rule that "no person incriminates himself" (*Resp. Maharit, Hoshen Mishpat* no. 69). It is abundantly clear that where a person undertakes a specific obligation, he cannot attempt at a later date to relieve himself of the obligation by claiming that it did not bind him *ab initio*.

7. Error in Law as Ground for Rescission of Gift

C.A. 570/70

HAI v. COHEN *et al.*

(1971) 25(2) *P.D.* 339, 356

The issue in this appeal was whether a waiver of a right to succession was effective and could not be revoked.

Cohn J. : I am prepared to assume that the respondent—like her brother and sisters and their late mother—was in fact mistaken in thinking that she and the others were the sole heirs of her late father. She was well aware that there were grandchildren from a sister who had died previously but she thought erroneously that they had no right to inherit from their grandfather.

It is of no import that this was a mistake of law and not of fact. The distinction between these two kinds of mistakes has become obsolete regarding the right of the mistaken party to rescind what he has done as a result of the mistake alone and not of his own free will... The question is whether the mistake indeed negated the wishes of the donor or, in other words, whether it was "a fundamental mistake that removed all foundation from the intention of the donor" (in the words of Prof. Friedman, *Unjust Enrichment* (1970) 165). There are circumstances that attest to the fact that, were it not for the mistake, the gift would never have been effected. That is "the well-grounded assumption" of Jewish law, according to which the testamentary disposition of one who had heard that his son had died, and had thereupon gifted over his estate to a third person, is set aside if it is later established that the son is still alive (*Baba Batra* 132b). Thus the disposition of a person who thought he was dying, leaving nothing for himself, is of no effect if he recovers (*ibid.* 146b). These and other like mistakes go to the very root of the gift, its intention and purpose, and negate its voluntary nature.

Chapter Two

UNDECLARED INTENTION OF PARTIES

I. Undeclared Intention and Mistake in English Law

C.A. 130/50

AMAL LTD. v. SCHINDLER

(1952) 6 *P.D.* 710, 711, 714-717

Silberg J.: We disallowed this appeal *in limine* when it was heard. The following are our reasons in detail.

The subject matter of the appeal was a dispossession order made by the Haifa Magistrate's Court that was later confirmed on appeal by the District Court. The main legal problem canvassed before us was whether the mutual mistake of the contracting parties regarding the identity of the rented premises affected the validity of the tenanancy agreement. The mutual mistake of the parties occurred because they both thought that they were *ad idem* whereas in fact each had in mind a different thing.

An interesting fact should be noted here, i.e., that traces of the principles and criteria of modern English law may be seen in the sources of Jewish Law. All this ensues directly or indirectly, from the well-known laconic maxim that "mental stipulations are a nullity" (*Kiddushin* 49b, 50a). Its form testifies that it is more than a legal maxim; it is indeed very deeply rooted in the philosophy of Judaism. At all events, its legal ramifications are very widespread and it resolves in its own way the most modern of problems. Mental stipulations are a nullity whether what inspired the transaction was a hidden "motive" ("A certain man sold his property with the intention of migrating to the Land of Israel but on the occasion of the sale he was silent": *ibid.* and *Ketubot* 97a and *Tosafot ad loc*), or some undisclosed error as to some quality of the subject matter of the agreement ("I thought she was the daughter of a Priest whereas she was the daughter of a Levite": *Kiddushin, loc. cit.*), whether unilateral or mutual,

even where it concerned the identity of the thing sold. This is attested to, I believe, by the debate over the pitcher and the barrel (*Baba Kamma* 27a) from which it emerges, if we examine the matter carefully, that a person cannot interpret his contractual statements in a manner contrary to the clear, popular meaning of the words used; not because he is not believed as to his intent but because people locally do not understand the words in the sense urged (*ibid.* and *Resp. Rashbash* 288). That is precisely the idea which the dictum that "mental stipulations are a nullity" embodies; such stipulations will not be permitted to controvert what has been expressly declared. This idea itself gives rise to the opposite conclusion as well, that there is nothing to prevent recourse to the undisclosed but true intention of the contracting parties, their mental stipulations, where these are intended to interpret, in one way or another, ambiguities in what has been declared. That indeed appears to be the rule in Jewish law, indirect support for which is provided by the foregoing (cf. Ran to *Kiddushin* referred to below).

The line of thought just indicated receives content and full expression in several dicta and rules, explanations and distinctions propounded by both the earlier and later commentators and judicial authorities. For the sake of brevity I shall only mention a few of them that are most clear and explicit. These also are not of one "texture" and reveal here and there differences of nuance, but the central idea that runs through them like a "scarlet thread" is that as between the explicit and implicit, the explicit has priority.

Thus Mordekhai to *Ketubot* Ch. XI in the name of Re'em, the author of *Sefer haYere'im*:

> Mental stipulations are a nullity for defeating oral statements because, since the latter go to one matter and the former to another, even where it is clear to us that the intention was to nullify an oral statement, we follow the latter.

What constitutes "an oral statement"? When will a matter be considered as such? "The matter does not depend on him but on the ordinary speech of people generally".

Resp. Rashbash 288: "Throughout the *Talmud* it is known that in business transactions one follows the usages of ordinary speech".

Mordekhai to *Kiddushin*, Ch. II repeats what he said as above: "In matters about which people speak in general terms, which they feel need no explanation, the general terms are taken in their simple meaning."

The emphasis is therefore on the contradiction between what has been expressed and what one has in mind. Thus, *Tosafot* to *Shevuot* 23a observes: "Mental stipulations are a nullity... where they contradict what has been

explicitly stated, but where no contradiction exists such stipulations are valid." So also Ritba in his *Novellae* to *Kiddishin* 50a in the name of Nahmanides: "Therefore... he has in mind something that does not come within the meaning of what he said, and this is a mental stipulation that is a nullity."

All this begs the conclusion that mental stipulations are valid where explicit statements are ambiguous and the stipulations serve to explain the statements, as appears from the observations of Ran to *Kiddushin loc. cit.*:

> When do we say the mental stipulations are a nullity? When they contradict what has been stated explicitly... Where, however... they only explain... where it is certain that only one of two things were intended... mental stipulations are interpretative.

As to the value of "a mental stipulation" and "an unspoken motive" Maimonides, *M.T.Mekhirah* 11:9, decides:

> But in an ordinary sale, although the seller had in mind that he was selling for a certain reason, and even though the circumstances appear to show that he was selling for that purpose, which is in fact not effected, he cannot rescind, since he was not explicit, and mental stipulations are a nullity.

This view is not unanimous and there are authorities who dispute it, all depending on the understanding of the classic case cited in the *Talmud* (*Kiddushin* 49b) of the man who sold his property with the intention of migrating to Palestine but did not expressly say so on the occasion of the sale. "Said Rava: 'This is a mental stipulation and a nullity'." Doubt arises over the meaning of "intention" and "on the occasion of the sale" but this is not the place to go into that.

To sum up briefly, the manifest tendency of Jewish law is (i) to reject mental stipulations in the face of explicit statements; (ii) to treat as explicit the objective meaning of the words in ordinary simple language as used in the concrete instance; (iii) to resort to mental stipulations for understanding ambiguous statements. It is clear how close to these are the modern ideas in this field of law.

2. Notice of Resignation as "Pressure" on Employer

H.C. 566/76

ELKO...LTD. v. NATIONAL LABOUR COURT *et al.*

(1977) 31(2) *P.D.* 197, 205

This was an application for a declaration that all employees who had signed a letter of resignation should be regarded as having resigned their employment with the petitioner. The employees argued that the letter did not constitute an intent to resign but only a threat of collective resignation.

Berinson J.: It is not impossible that the employees gave notice of resignation in the hope and expectation that the management would react in their favour and they would return to work victorious. As in the case of the well-known vineyard of *Is.* 5, they hoped that "it would bring forth grapes" but it brought forth only sour grapes. Counsel argued that the management knew in good time of the plan of the employees' application and their true intention but did not play the game according to the rules as expected of them, and hastened to seize upon the letter submitted and to regard the signatories as having actually resigned. The leading rule is that mental stipulations are a nullity. As the *Encyclopedia Talmudica*, vol. 7, p. 170, puts it: "Things which a person thinks in his mind are not effective to set aside or to change the meaning of oral statements or acts done." The fact that the management did not meet their anticipations and did not play the game they wished to play, cannot affect the legal consequences flowing from the documents submitted to it, clear and express, that put an end to the employment relationship between the parties. Such resignation takes effect on delivery of the letter of resignation to the employer, and there is no need for acceptance, agreement or confirmation on his part.

Chapter Three

GOOD FAITH

1. Source of Duty and Its Extent

C.A. 242/70

MISHOL HAKRAKH LTD. *et al.* v. GROVNER *et al.*

(1970) 24(2) *P.D.* 692, 702

Kister J.: A universally accepted principle in Contract law is that the parties must act in good faith. According to the Sages, the first question a man is asked on being ushered into the (heavenly) court is: "Did you deal honestly in your business affairs?" (*Shabbat* 31a).

See: LOT 677 BLOCK 6133 LTD. v. COHEN *et al.*, **Part 9, Property—Physical and Intellectual, p. 754.**

C.A. 148/77

ROTH v. YESHUFEH (CONSTRUCTION) LTD.

(1979) 33(1) *P.D.* 617, 631-637

The contract for the sale of the apartment included an exemption clause according to which the acceptance of possession of the apartment constituted "final and conclusive proof of the vendor having fulfilled its obligations under the contract." The purchaser's suit for damages for breach of contract was dismissed in limine.

Elon J.: We will return to the meaning of the concept of negotiations in good faith below, but we can already say that this universality of

the principle of acting in good faith in fulfilling a contract is of great significance for the way in which Israeli judges interpret this concept, which is found in the laws of the Israeli legislature.

Allow me to explain. When we interpret basic concepts in the laws of Israel such as good faith, the nature of which are universal and which are the legacy of the legal thinking of every civilized legal system, we are bound primarily by the meaning of these concepts in the light of Jewish law and the heritage of Israel. For although it is true that the manifestation of this type of universal principle is to be found in the various legal systems of today, its roots lie in those fundamental values which were bequeathed to mankind by the legal systems of old... And if this is the case with the legal systems of the various countries, it is certainly so with respect to the laws of the State of Israel, for we are directed to seek the bases for the fundamental principles of these laws first and foremost in the ancient heritage of Israel... This court, *per* Silberg J. said with regard to the principle of public interest, which is also a universal legal principle, that "it will be interpreted by us on the basis of fundamental views which are deeply entrenched in the Jewish consciousness... on the basis of our ethics and culture" (*C.A.* 461/62 *Zim* v. *Maziar* (1963) 17 *P.D.* 1319, 1332), and we are under a similar obligation to interpret the universal principle of good faith by the same criteria... And the words of H. Cohn J., uttered in relation to the principle of doing justice, are appropriate:

> Wherever and whenever, for the purpose of doing justice, we deem it appropriate to disregard English and American precedents, I have accustomed myself to first finding out whether a solution can be found in the *Torah*; not, Heaven forbid, that the English precedents bind us as long as we cannot find a precedent in Jewish law, and not that we are bound to rule according to Jewish law; but the justice that we must try to do will be more sure and more established if it finds support in our legal tradition and in the wisdom of our forebears... (*F.H.* 22/73 *Ben Shahar* v. *Mahlev* (1974) 28(2) *P.D.* 89, 98).

These words apply with even greater force to the matter at hand. The principle of good faith in sec. 39 stems from original Israeli legislation in which the autonomy of the law is stressed (sec. 63 of the Contract Law) and the very expression "good faith" is an original Hebrew expression, as will be mentioned below. For this reason, with regard to the interpretation of this concept, we are directed to turn first and foremost to Jewish law.

I would add another comment. Far be it from me to say that we must not study and learn from the wisdom and precedents of the sages and judges of other legal systems. Such study serves well to increase one's scope and deepen one's knowledge. Our Sages too, in their openmindedness,

acted thus in ancient times, and I would like to quote from what I wrote elsewhere:

> The Sages of the *halakhah* knew the law that prevailed in the general courts, and they sometimes even recommended that a foreign legal usage which seemed good to them be accepted. Sometimes, the Sages of the *halakhah* recognised the special social value of foreign law, and they did not hesitate to praise gentile justice when it was conducted in a manner superior to that practised by the Jews (M. Elon, *HaMishpat haIvri*, Vol. 1, p. 49-50).

And if this is the case in a legal hearing conducted solely in accordance with Jewish law, then it is certainly the case when we interpret the laws of the State of Israel today, the source of validity of which is the sovereign power of the Knesset to enact that which it deems to be good and desirable, and when it is clear that its legislation is made after study of various systems of law against the background of the social and economic needs of our times. For this reason, it is certain that an enactment of the Knesset — and particularly those laws which are accompanied by a provision concerning autonomy and their severance from art. 46 of the Order in Council—should and must be interpreted, as stated so succinctly by Silberg J., "from within itself on its own content" (see *C.A.* 74/57 *Ratner* v. *Plalum Ltd.* (1958) 12 *P.D.* 1465, at 1471). However, should this path not yield a satisfactory answer, then we must have recourse first and foremost to the principles of Jewish law, as the predominant source for finding a solution for the problem at hand.

And this is what we learn from the authors of the Succession Bill, which was the first in a series of Bills dealing with a whole branch of civil law. In the introduction, the authors of the Bill stress that even though the Succession Bill is only "a section of a wider legislative act, we view this law as a plan for laws which will follow. The basic lines upon which this law is founded are those which will underlie other civil laws". And what are these basic lines?

> Our purpose was to propose a law which could be interpreted from within itself by studying its provisions and on the basis of its general treands... Our law is based on:
>
> 1. The legal and factual situation pertaining to Israel at present;
>
> 2. Jewish law, which is one of the legacies of our national culture and which we must renew and continue;

> 3. The laws of other countries, in the West and in the East, out of which our people have gathered here to merge into one community.
>
> With respect to the existing law, we felt at liberty to either adopt or reject it... We viewed Jewish law as the primary source, but not exclusive or binding... With respect to the law of other countries, we hold that both the practical experience and the scientific bases they embody must serve as an auxiliary source for our guidance...

This is what we have said, and this is the hierarchy in the interpretation of independent Israeli legislation in general, and of its basic principles, such as the concepts of justice, public welfare and good faith—in particular.

And if one should say... that access to the sources of Jewish law is not simple nor convenient, the answer is: First—"it is not in Heaven... nor is it over the sea... but it is very close to you, in your mouth and in your heart to do it" (*Deut.* 30:12-14), and it is the *Torah* and requires study. And there is an ever-increasing number of authors of books and articles which deal with Jewish law and elucidate it. And second, is recourse to the rulings of the courts in Germany and on the Continent, which, it is argued, is the source of sec. 39, any easier?

And now let us look at the meaning of the principle of good faith as it is interpreted in the Jewish law sources. In sec. 242 of the German B.G.B., which, it has been argued, influenced the enactment of sec. 39 of the Contract (General Part) Law, we find:

> Der Schuldner is verpflichtet die Leistung so zu bewirken, wie Treu und Glauben mit Rucksicht auf die Verkehrssitte es erefordern.

An appropriate translation is as follows:

> The obligee must fulfill his obligations according to the requirements of loyalty (trust) and faith, in the light of prevailing usages in the business world.

It would seem that the main resemblance between sec. 242 of the B.G.B. and sec. 39 of the Israeli Contract Law is in the combination of the two requirements, i.e. in addition to "good faith", the act must be performed in the "normal manner". Indeed, the word *Verkehrssitte* may reasonably be translated as "the normal manner". In my opinion, however, this is not the case with respect to the words *Treu und Glauben*, which translate as loyalty (or trust) and faith... It is interesting that in Jewish law, too, the concept of negotiations in good faith appears, but in that system, the import is moral-religious, and has no legal significance in the sense of affording the relief of enforcement or damages.

Thus, for example, the *Mekhilta*, in *Parshat Beshalah, Masekhta Deveyasa*, 1, states: "Whoever negotiates in good faith and people are happy with him, he is considered as if he upheld the whole *Torah*."

And in *Shabbat* 31a, we read: "Rava said: When man is led in for judgment [in the Heavenly Court] he is asked, Did you deal faithfully... did you fix times for learning?" (And see *Orah Hayim* 156:1)

As we have said, these belong to the arena of moral-religious obligations in man's conduct, and this concept has explicitly been relegated to the realm of a provision with no legal force. Thus, for example, in the case of an agreement between two people which had not yet reached the stage of being legally binding, it was ruled that the parties ought to uphold the agreement so as not to be morally tainted by "lack of faithfulness" (*Baba Metzia* 49a). And in *M.T. Mekhirah* 7:8, the formulation is as follows:

> Whosoever negotiates with words alone [i.e. without any formal act of acquisition, without which the deal is not legally binding] ought to keep his word... and whoever goes back on his word, be it the buyer or be it the seller... he is one of those lacking in faithfulness and the sages are dissatisfied with him. [On the meaning of this last expression, see Silberg, *Kakh Darko Shel Talmud*, p. 118 ff.].

The expression "good faith" is found in five places in the *Torah* (*Gen.* 20:5-6; I*Kings* 9:2; *Psalms* 78:72; 101:2), and the word "*tom*" from the Hebrew expression "*tom lev*" (good faith) means rectitude, integrity and truth. In *Genesis* and in *Kings*, Onkelos and Yonatan ben Uziel translate this expression as meaning "with true heart", and in *Psalms*, the translation is "with integrity of heart". The expression "good faith" is synonymous with rectitude, and it appears thus in *I Kings* 9:2:

> And you, if you will walk before Me as David your father did walk with good faith and in righteousness, to do all that I commanded you, to keep My statutes and My judgments...

The basic element in the concept of good faith is, therefore, rectitude, straightforwardness and integrity, and it constitutes an integral part of the meta-principle in the world of the *halakhah* which found expression in the words, "And you shall do that which is right and good" in the Book of *Deuteronomy* 6:18. This meta-principle served as a guiding principle for our Sages, a kind of "Royal Provision", in the whole world of *Halakhah*, and the principle is applied in one of two ways; sometimes, the doing of right and good is only a moral-religious requirement to act within the letter of the law, as an act of kindness which cannot be enforced; and sometimes, by virtue of this principle, laws with full legal force have been created. Thus, for example, the law concerning the rights in neighbouring property

arose in Jewish law, "since it says: And you shall do that which is right and good. Our Sages said: Since a sale is a sale, it is right and good that he should buy this place which is near rather than one which is far" (*M.T. Shekhenim* 12:5). This is a fully-binding law. On the other hand, in the opinion of various Sages, this very principle serves as the source of a non-binding behavioural obligation, such as going beyond the letter of the law:

> For at first it was said, that you should keep the commandments and the laws which He has commanded you, and now it is said, also those which He has not commanded you—take care to do that which is right and good, for He loves that which is good and right. And this is a matter of great import. It is impossible to mention in the *Torah* every manifestation of a person's behaviour towards his neighbours and friends, and every aspect of his dealings, and the laws of all the cities and countries. But after specifically mentioning many of these, He turned to the general statement that the right and the good shall be done in every matter, which would include compromise, and going beyond the letter of the law, as was said in relation to the law concerning neighbouring property (Ramban, *Commentary on the Torah*, *Deut.* 6:18, 12:28).

And elsewhere Ramban coined an appropriate phrase to define the nature of such conduct. A person who conducts himself in accordance with the technical and formal meaning of the laws of the *Torah*, i.e. who is pedantic only about those things which are stated explicitly and not those which are not expressed even though they are implicit from the general nature of the text, such a person is a "scoundrel within the bounds of the *Torah*", and therefore "It is the way of the *Torah* to particularise and then to generalize: after warning about the details of the laws concerning interaction between people — do not steal and do not cheat and so on, it says, in general, And you shall do that which is right and good..." (Ramban, *Commentary on the Torah*, *Lev.* 19:2).

And *Maggid Mishneh* on Rambam, *M.T. Shekhenim* 14:5 summarizes as follows:

> For our perfect *Torah* gave rules for directing man's qualities and his conduct in the world, and it said: And you shall do that which is right and good. And this means that man should conduct himself well and in a straightforward manner with other people.
>
> And it would not have been appropriate to specify the details, as the commandments of the *Torah* apply at all times, and to every matter... and peoples' qualities and conduct change according to the times and the particular individual.

> And our Sages of Blessed Memory handed down useful directives which fall within these general rules. Of these, some became full laws and some became rules to be followed by "dictate of kindness" (and see further M. Elon, *Jewish Law*, vol. 1, p. 171 ff. and 179 ff.).

And this important principle, with its two consequences, just as it served as a yardstick for the Sages of the *Talmud*... thus it operates throughout the system of Jewish law, in all generations and at all times. Rosh summarises the matter thus (*Resp. Rosh*, 78:3):

> From all these we see that whoever wishes to cheat and to disregard the regulations of the Sages and to trick his associate, the Sages in their cunning trapped him, and stood in his way in order to frustrate his evil designs;
>
> And we can learn one thing from another; for the Sages of the *Talmud* did not manage to cover every future manifestation that every new day brings, but those coming after them follow in their footsteps and liken one thing to another.

What arises from all the above is that in the principle of good faith in sec. 39, as an integral part of the general principle in Jewish law of doing that which is right and good, the legislature handed the judiciary a powerful tool, and therefore great responsibility, and the result may be one of two things: lack of good faith may amount to no more than conduct which is not in accordance with the dictates of kindness, but with no legal ramifications, and the court cannot enforce it, or the lack of good faith may give rise to a need to "trap" the perpetrator in his deceitfulness, to take a stand against him, and to frustrate his evil design... And the court, when it invokes the principle of good faith, must act with the utmost caution, as befits the circumstances of each individual case. On the one hand, if the conduct of one of the parties displays elements of the conduct of a scoundrel within the bounds of the *Torah*, the court will insist on fulfillment of an obligation under the contract, or on the other hand, if the conduct of one of the parties amounts to no more than a defect in the extent of charitable behaviour, the court will refrain from making it into enforceable, binding law.

And the words of Prof. A. Yadin.... in his outstanding article, "The Principle of Good Faith in Recent Legislation" (cited above) are particularly apt and pertinent:

> We find that the commandment to do that which is right and good constitutes a type of super-principle standing over and above the principle of good faith. It imparts a special character to the new Israeli legislation;

and perhaps, this somehow reflects a revival of Jewish law in its deepest and most exalted sense.

See: LUGASI *et al.* v. MINISTER OF COMMUNICATIONS *et al.*, Part 3, Social and Administrative Regulation, p. 182.

2. Competition on Sale of Goodwill

C.A. 276/69

HILKOVITZ *et al.* v. ELVIS LTD.

(1970) 24(1) *P.D.* 85, 90-91

After the sale of a business and its goodwill to the respondent company, the appellants established a competing business. The respondent obtained an order restraining the appellants from soliciting the respondent's customers. The appellants appealed.

Kister J.: A further question arises here. What is the situation when a person sells his business with its goodwill and no stipulation is made about competing? May the vendor on the next day approach customers and take them to himself and so render naught the sale of the goodwill? That is clearly unfair. The law recognises the obligation of a contractual party to act fairly and in good faith in carrying out his part of the contract. Hence also the rule that a person who sells or hires out property may not engage in business with the property or deprive the purchaser or lessee of the enjoyment of the property intended to be vested in him. The same principle obtains on the sale of goodwill. I would note that this requirement is not peculiar to English law. In Jewish law the question of a vendor competing with his purchaser when nothing was expressly stipulated in that regard has been dealt with in *Mutzal Me'esh* (2:11) by Mahari Katzbi, published... in 1736. The case concerned a person who sold vegetables to another, who took them to his village to sell "at a profit". The next day the vendor arrived at the village and sold similar vegetables at the same price as he had charged the shopkeeper. The latter was as a result unable

to sell off his stock... Katzbi wrote that there was "a strong presumption" in favour of the purchaser and it was clear law that the vendor was not entitled to act as he did, although nothing had been stipulated. From this it may be understood that the court could enjoin the vendor. Since, however, the sale had been completed, a difficult question remained. Could the vendor be charged to make a money payment? Katzbi persuaded the parties to compromise. Further examples can be brought from the *Responsa* literature and the judgments of the Rabbinical Courts in Israel. The present, however, is not the occasion to expand on the subject. All I wished to show is that in equity the matter is clear — when one sells another merchandise for doing business, the vendor may not preempt the purchaser with the same merchandise.

Chapter Four

FRAUD AND DECEIT

1. Obligation to Refrain from Fraud

See: RISHON LE-ZION ZIKHRON YA'AKOV VINTNERS COOPERATIVE v. YEKEV HA-GALIL, Part 9, Property — Physical and Intellectual, p. 755.

See: FELDMAR v. STEIN, Part 9, Property — Physical and Intellectual, p. 756.

C.A. 453/80

BEN NATAN v. NEGBI

(1981) 35(2) *P.D.* 141, 146-147

The parties were partners in a business carried on in a shop belonging to the appellant. It was a term of the partnership that upon its dissolution the appellant would either pay the respondent for his share of the goodwill of the partnership or close down this partnership business for a year and not sell in the shop goods of the kind that the partnership had made and sold. The partnership was dissolved and the appellant undertook to close down the business for a year. He closed the shop but immediately rented another shop opposite and advertised in the newspapers that the partnership business had moved to the new site. The respondent obtained a temporary injuction in the District Court. The issue was whether a narrow literal interpretation of the agreement was to be preferred to one that follows the parties' intention but departs from the literal meaning of the contract.

Tirkel J.: The opening of a business next to the shop that had been closed down—along with the posting of a notice from which it would appear that the business had not closed down but had been moved across the road —is not consistent with the "balance" (between the parties) and therefore contradicts their true intention when they entered into their agreement. A restrictive, literal interpretation of clause 18 of the agreement would enable the appellant to achieve his desire and rid himself of the obligation to pay for the goodwill... and, as it were, in one stroke "seize hold" of the goodwill and not leave it to be wasted, by means of the new-old business

across the road. As our master, Maimonides, decided, "it is forbidden to defraud and deceive people in business" (*M.T. Mekhirah* 18:1). Neither probity nor good faith was shown here, and in their place deception was practised.

Chapter Five

DURESS

1. Definition of Duress

See: GREEN v. GREEN et al., p. 620.

2. Notice for the Purpose of Rescission on Grounds of Duress

C.A. 162/72

AMZALEG v. AMZALEG *et al.*

(1973) 27(1) *P.D.* 582, 588

These proceedings were based on an agreement of divorce, one of the terms of which provided for indemnity of the husband. After the agreement was given the force of a judgment, the wife claimed maintenance for her children. The appellant defended the action by claiming the indemnity.

Cohn J.: One cannot criticize a wife for feeling compelled to make certain concessions in order to obtain a divorce and subsequently pleading "coercion" or the like in order to be released from the agreement. We can, however, criticize the lawyer who so pleads on behalf of the wife, when he should have known that in point of law her plea is in vain.

Here there was no "compulsion" ("*oness*") in the sense of Jewish law, since compulsion is not effective to void a sale—and a compromise agreement is treated as a sale — unless a prior declaration had been made before two witnesses that the person concerned does not wish to sign and only does so because of the compulsion put on him (see *Hoshen Mishpat* 205:1, 3). Where a woman makes such a declaration before a rabbinical court prior to signing a divorce agreement, the court is presumed to have gone into the matter carefully and to have seen whether the compulsion was

indeed sufficient to set aside the agreement, or whether, in spite of the compulsion, the agreement is to be upheld so as to save the woman from becoming a "deserted" wife. The statement made here by the respondent to the rabbinical court was not one of compulsion and was not received as such by the learned *dayanim* (judges). It was merely a declaration of the motives of the woman in signing the agreement and of her strong desire to obtain a divorce.

C.A. 457/61

GREEN v. GREEN *et al.*

(1962) 16 *P.D.* 318, 324-327, 329-336

On the basis of an agreement made between a woman and her husband who had abandoned her and left for distant parts, the Rabbinical Court decided that the parties should be divorced and that the wife was to maintain their infant daughter until the age of eighteen without making any claim against the husband for maintenance. The wife also signed a declaration that should she obtain a divorce from the husband, the moneys and valuables she had received from him should be treated as payment for the child's maintenance, and she undertook to repay him any payments he might be ordered to make in proceedings for the child's maintenance. Some time after the parties were divorced, the child, through her mother, sued her father for maintenance. The District Court held that the above agreement between the spouses and the Rabbinical Court judgment did not bind the child or abrogate her right to claim maintenance from her father. The Court also dismissed the claim of the husband for indemnity against the mother, holding that the fear of becoming a "deserted" wife was sufficient "coercion" to annul any "consent" on her part.

Cohn J.: I see no need in this appeal to decide whether indeed the personal law determining the duty to maintain one's children applies also to the obligation of the mother to indemnify the father for paying for the maintenance of their children, or whether—as my learned friend, Silberg J., thinks—what we have here is an indemnity agreement to which, like any other such agreement, the civil law enforced by the courts applies. In my view, even if Jewish law does apply, the present indemnity agreement is void thereunder as well, because of compulsion (*oness*).

Regarding compulsion, Jewish law distinguishes between sale and gift; whilst compulsion is ineffective to annul a sale unless a "declaration" is made in the course thereof, a gift given under compulsion is a nullity even without any declaration, as "in gift one follows manifest intention, and if the donor does not wholeheartedly desire to vest the gift, the donee

does not acquire it" (Maimonides, *M.T. Mekhirah* 10:3). For this purpose a compromise is treated as a sale, and to forgo a thing is treated as a gift (*ibid.*; *Hoshen Mishpat* 205:2-3). If the present case is one of compromise, as Silberg J. thinks, the agreement subsists, because there is no dispute that the wife did not make any declaration before the Rabbinical Court at the relevant time (although I am inclined to think, with the greatest of respect to the learned *dayanim* (judges) of the Rabbinical Court, that they well knew, even without any express declaration being made before them, what was truly happening and what actually lurked behind the fine words); whereas if it was a waiver, as I think it was, the agreement is voided, since the woman never wished to "vest wholeheartedly".

According to Silberg J., the "compromise" that was made here between the father and mother consisted of the father "waiving the pecuniary claims he had against her with regard to certain articles and valuables, and she, in consideration, waived maintenance already due to her and undertook to support and maintain the daughter and to indemnify him against any claim for maintenance that might be made against him in the future."

The mother testified before the learned judge, and he believed her, that "she had not received anything in consideration for her undertaking to keep the child." Even if we assume, as did the learned judge, that the woman had in in fact received from time to time, both before and after the marriage, various gifts from the appellant, that does not mean that she was bound to give them back upon divorce; on the contrary, whatever he gave her after marriage she acquired absolutely and he does not even have a right of usufruct therein. And as to what he gave her before marriage, these are *nikhsei melog* (wife's estate of which the husband has usufruct without responsibility for loss or deterioration) and although he has a right of usufruct as long as the marriage subsists, what remains of them on divorce belongs to her and not to him (*Even haEzer* 85:2, 7, 8).

The learned judge also said in his judgment that he also believed the mother that "paragraph 2 of the declaration does not reflect reality and was only introduced at the request of the defendant (the appellant) and his advisors."

Hence, there were no mutual waivers and renunciations in good faith...in the manner of compromises similar to sale or exchange, where one party gives up some article and receives another in exchange; but in order to obtain a divorce and be saved from the tragedy of "desertion", the woman gave the appellant a waiver and an undertaking but received nothing in return — a "bare" waiver of a claim that never existed. Of such a "compromise" the *Halakhah* holds as follows:

Where A threatens B with force if B does not give him the money over

> which they are disputing and A has no lawful right to the money, and they enter into a compromise by *kinyan* (formal act of transfer of ownership) and declared abandonment, B may rescind (*Hoshen Mishpat* 12:11).

All the more so may she rescind where a woman's husband threatens her with "desertion" if she does not make waivers and enter into obligations to which he is not entitled and which she is not obliged to make or give by law, and the "compromise" is made with *kinyan* and declared abandonment.

A question once arose before Rashba. A claimed one hundred zuz from B but had no evidence to support his claim, and B, who "denied everything and absolutely refused to admit anything" agreed to pay A fifty zuz in exchange for "Heavenly and temporal forgiveness". A, "in order not to lose everything", was appeased and forgave him. Can A renege on the compromise and claim the rest of the money? It will be noted that there are neither threats nor intimidation here, and the compromise was a regular compromise between a plaintiff claiming in good faith and a defendant denying the claim because he knows the plaintiff has no proof. Rashba allowed A to renege on the compromise, and in his incisive ***responsum***, we find, ***inter alia***, the following pearls:

> And you should know that in the said matter [that one may not renege on a compromise that has been made with a *kinyan* (formal act of acquisition) and declared abandonment]...a mistaken compromise is not a compromise. He thought he would not find evidence, but he found it. And as for forgiveness from Heaven — the Heavens gave firm testimony that the forgiveness [of the debt] was only because of coercion. And even if he was not coerced, and thought that no more was due, and finds that more is due — his forgiveness is void, for what is not known cannot be waived. And even though he writes that he renounces without coercion...his words have no effect, unless he says, "I know that you have more of mine,but I wish to renounce, without coereion" (*Bet Yosef* to *Tur, Hoshen Mishpat* 12:14).

We therefore find that every compromise contains an element of renunciation; and this renunciation is not effective if it was made in error. Moreover, the fact that the plaintiff has insufficient evidence to support his claim will in itself be considered coercion: it is this which forces him to agree to the compromise. And even though compromise, like sale, is a bilateral transaction, with each of the parties giving and taking, nevertheless, to the extent that the "giving" is a "renunciation", the "renunciation" must be voluntary and not forced, it must be made out of awareness and not in error, and if not—the "forgoer" can withdraw from the compromise.

There would seem to be a contradiction between the rule that a

compromise is like a sale as regards coercion, and between the decision of Rashba according to which the compromise is voided under the laws of renunciation under compulsion, as distinct from the laws of sale under compulsion. And indeed, elsewhere *Bet Yosef* writes:

> And a compromise is like a sale, because the plaintiff is afraid that he will lose everything in a lawsuit, so he therefore is satisfied to take a little by way of compromise...here we have a real sale, for the one sells to the other any right he has in this claim, for the amount of the compromise; and thus, if he was coerced to make a compromise, the compromise would be valid, unless he made a declaration...but if he was coerced into renouncing, and there were witnesses to the coercion, even though he did not make a declaration...his renunciation is of no effect (*Tur, Hoshen Mishpat* 205:12).

In other words, a compromise which involves mutual renunciation is like a sale, but one which consists of a unilateral renunciation is like renunciation and not sale. The situation is well explained in *Netivot haMishpat* by R. Ya'akov of Lissa to *Hoshen Mishpat* 25:2):

> If a compromise is made over a doubtful question of law, both compulsion and declaration are necessary for setting it aside. Compulsion alone or declaration alone is insufficient to this end, since it is like a sale. Where, however, the law is clearly on the side of one of them and the other compels a compromise, it is like a gift, and it is revoked because of the compulsion....Where a compromise is made because each denies the other's claim, then if later it emerges from the evidence that the law is with one of them, the compromise will be set aside, even in the absence of compulsion and declaration...

In view of the factual findings of the learned judge as aforesaid, the present agreement is without a shadow of doubt of the kind which is similar to renunciation and to gift and is revocable for compulsion alone. If there is no real "renunciation", it was certainly a gift and the same applies.

As to whether there was "compulsion" in the sense of Jewish law, I need not spend much time. Maimonides gives the following example:

> It happened that a person rented an orchard from his neighbour for ten years but the owner held no deed. After the tenant had enjoyed the produce some three years, he said to the owner, 'If you do not sell me the orchard, I will conceal the rental agreement and say that it was purchased by me.' The Sages said that this is compulsion (*M.T. Mekhirah* 10:4).

Another example is the case of a person who wanted to marry a woman and she said to him, 'I will not marry you until you have signed all your property over to me.' His oldest son heard about this and protested that he would be left with nothing. The person told witnesses to secretly draw up a deed of gift to his son. Thereafter he wrote over all his property to the woman and married her. The matter came before the rabbis and they held that the son had acquired nothing and neither had the woman, since the person had not voluntarily written over the property to the woman but acted like one under compulsion since he had shown his intention by the first gift although it, too, was void because it was undisclosed (*Hoshen Mishpat* 242:10).

If a woman's threat that she will not marry is compulsion, a man's threat not to give his wife a divorce, and leave her "captive and deserted" the rest of her life is *a fortiori* compulsion.

In truth, in this regard duress is any circumstance that denies the person doing the act his free and willing resolve, not merely duress by force but also duress by temptation, mistake and even forgetfulness or unconscious sleep.

Silberg J.: I shall begin by saying that if I also thought that Jewish law was the material law governing the mother's claim for indemnity, I would grant the appeal and charge her, not gladly but with misgiving, to indemnify and compensate the father for all the sums he might be obliged to pay for the child's maintenance. In Jewish law, duress does not annul every transaction. This, however, is not the occasion nor is there any need to delve deeply into this complex matter. In modern terms one can say without much hesitation that where a transaction is reciprocal, consideration given in exchange for consideration, then duress, even when absolute, will not abrogate the transaction. For instance, a sale, as distinct from a gift, is not voided in consequence of duress, since "were he not compelled, no seller would sell" (*Baba Batra* 47b and Rashbam *ad loc.*). This viewpoint, which may entail very serious consequences, has in Jewish law given birth to another institution that can mollify the situation — delivery of a declaration. The causal historical connection between the plague of compulsion and the remedy of declaration issues from one word ("therefore") in Maimonides, a matter which attests to the extraordinary preciseness of this great author:

> Where a person is compelled to make a sale and received the purchase price...the transaction subsists whether it involves chattels or land, since by reason of the compulsion he had completed it and passed title.....*Therefore*, if he delivered a declaration in the presence of two

> witnesses before he sold: "Know that I am selling this article or this field to so-and-so because I am compelled", the transaction is voided....The witnesses must know that he is selling under duress and that he is certainly being compelled to do so; they may not rely on what he says....This is the case where a person sells or compromises. In gift or renunciation, a declaration delivered prior to the gift — even if he is not compelled — will void the gift, since in gift we follow the declared view of the donor; if he does not wish to vest the gift wholeheartedly, the donee acquires no title. Renunciation constitutes a gift (*M.T. Mekhirah* 10:1, 2, 3).
>
> This will only obtain in the case of a sale declaration. But with gifts, renunciation or divorce, compulsion need not be acknowledged since even where the person concerned was not compelled but merely said that he does not make the gift or renounce willingly, the gift or renunciation is a nullity. Only in the case of sale do we say that since he received the money he concluded the transaction and passed title; it is otherwise in gift and renunciation (*Tur, Hoshen Mishpat* 205:12).
>
> He who makes a gift by reason of compulsion, the gift is a nullity...even if no declaration has been delivered yet we know of the compulsion, the gift is void (*Hoshen Mishpat* 242:1).

The Vilna Gaon, relying on what Rashbam writes in *Baba Batra*, observes that "in gift there is no need for a declaration...so long as we are aware of it" (*Biur haGra* to *Hoshen Mishpat* 205:28).

Sale and gift are the prototypes, and their derivatives, as we have seen, are compromise and renunciation. "Compromise is treated like sale and renunciation like gift" (*Hoshen Mishpat loc. cit.* 3: see *Sema, ibid.* 9) But not every "compromise" is a compromise: "Compromise arises where there is a dispute between the parties, which remains unclarified in court" (*Resp. Mabit* part 3, 115). So also Maharit, the son of Mabit:

> You may think that this is a compromise and is treated like a sale....Compromise will only occur when there is an obligatory aspect and before the parties knew which way the law will go, since it may be said that a person will pay in case he is made liable for more. Here, however, it is known that the woman is not bound to be penalised, since they had already appeared before the rabbi... (*Resp. Maharit*, part 4, 98).

Hoshen Mishpat 12:11, cited by my learned friend, also speaks of "money, which was the subject of litigation, but to which he had, in fact, no legal right"; that is, it deals with compromise after proceedings were commenced,

as distinct from compromise before proceedings, along the lines of the distinction made in the *Responsa* of Mabit and Maharit, as above. Even if not directly confirmed, the same is suggested by *Ketzot haHoshen* (to *Hoshen Mishpat* 205:3 (b)).

And conversely, not every "renunciation" is renunciation: "Where a person renounces something in favor of another for nothing, it is a gift, but where renunciation is made because the other party has given him something, it is like sale" (*Resp. Rashdam, Hoshen Mishpat* 44).

To sum up: in sale, as well as in true compromise, the transaction is not voided unless there was compulsion, together with declaration. In gift, as well as in true renunciation, the transaction is voided either on account of proven compulsion or by the making of a declaration. Sale and compromise are not defeated in the wake of compulsion alone, even if the judges — in the words of Cohn J. — "well knew...what was truly happening and what actually lurked behind the fine words." What can we do if such is the rule in Jewish law?! Under Jewish law, where consideration is present, the presumption is that in spite of the burden there was intent to sell, and the transaction was properly completed (*Baba Batra* 48a; Maimonides, *loc. cit.*). Only in true gift and renunciation is knowledge of compulsion sufficient to void the transaction, as explained above.

The *Responsum* of Rashba, cited by my learned friend, is with the greatest respect not in point at all for we are concerned here with avoidance of a compromise on the grounds of compulsion, not with its avoidance on the grounds of mistake. The two situations are dissimilar because of the idea: "There was intent to sell and the transaction was properly completed."

Let us now inquire into the nature of the agreement made by the spouses in the present case. It is obvious to me that it is in contemplation of the law a compromise, and I see no need to cite special precedents in this regard. Since, however, my learned friend differs from me and urges that we have here an agreement of renunciation and waiver, or something like that, I wish respectfully to expand a little on the matter.

In my opinion, however strong our abhorrence of this forced agreement — which I share — on close analysis in the light of the logic of Jewish law, one cannot avoid the conclusion that the agreement is not a renunciation or a speculative obligation, but really only a compromise. My reasons are as follows.

(i) A deed of renunciation, it most certainly is not. As will be recalled, the wife undertook to provide for and maintain her daughter and indemnify her ex-husband for all sums he may be required to pay, if at all, to that end. A person who undertakes to pay and discharge a debt can hardly be called one who renounces. The only renunciation in this agreement was a waiver of the maintenance that had already accrued to the woman,

but this renunciation is not the subject of these proceedings since she never sued to void the waiver on the ground of compulsion.

(ii) The only doubt that might *prima facie* arise is whether or not the indemnity stipulated in the agreement was made for consideration. If it was not, then the indemnity term is to be treated as a gift where compulsion alone voids the transaction. In my view consideration was very certainly given, and that for two reasons: (a) The husband's action for the return of the articles and valuables was not dismissed by the Rabbinical Court: it was not even gone into there. We still do not know "which way the law goes" had it been discussed — for the law relating to gifts made by one spouse to the other has many facets and this is not the place to examine them at length — and *a fortiori* the woman did not know that when she entered into the agreement for divorce and indemnity. The compromise therefore was not post-proceedings but was before them, and such a compromise is always treated as a sale, as we saw in the *responsa* of Mabit and Maharit. (b) The important thing is that even if we assume — and I am prepared so to assume for the sake of the argument — that, upon the determination of the District Court in 1961, it was shown retrospectively what the situation had been when the agreement was drawn up in 1959, and that nothing remained of the consideration given her by the husband for waiving the articles and valuables, another consideration still existed, the very delivery of a *get* (bill of divorce). One of our leading authorities, R. Yosef Colon, writes: "Since Reuven obtained a benefit...it was quite like a forced sale which is a sale so long as no declaration was delivered" (*Resp. Maharik* 118).And elsewhere he says: "Where one has been compelled to do something but obtains a benefit thereby, it is quite like a sale, even though the benefit is of little value compared to what he is compelled to do." (*ibid.* 186, cited in *Bet Yosef* to *Tur, Hoshen Mishpat* 205)

Thus, even any small benefit, bearing no relation to the value of the matter in question, is sufficient. Although there may be differences of opinion about it, the delivery of a *get* is not a minor matter, especially for the wife here "afflicted and tossed with tempest and not comforted" (*Isaiah* 54:11), who was desperate to be freed from the chains of "the deserted wife".

Clear and decisive proof that delivery of a *get* is lawful consideration, for a transaction on the part of a woman, and converts an agreement between her and her husband into a compromise that requires, for avoidance, both compulsion and declaration is provided in one of the *responsa* of R. Yosef ibn Migash, the details of which are surprisingly similar to those of the present case. It will be useful and interesting to quote it here with certain omissions:

Question: On Reuven betrothing Leah, it was stipulated between them that she would give him certain articles and gold trinkets. Subsequently on requesting her to marry him he claimed the things she had promised, but she refused to hand them over. In the meantime he formally agreed to be satisfied with what she might give him. He then changed his mind and claimed all that she had promised but the local judges ordered him to marry Leah and put him into prison. He threatened her that he would leave her "deserted" if she did not get him released. Leah declared before witnesses that she feared to be left "deserted" and therefore did not waive the penalty [which apparently had been stipulated on their engagement or betrothal in the event of one of them rescinding the marriage (see Tosafot to *Kiddushin* 8b; *Resp. Noda biYehudah*, Mehadura Tinyana, *Yoreh De'ah* 148)] and that after he had given her a *get*, she would proceed against him for the penalty. When she did so, Reuven argued that the declaration was a nullity since Jews are not presumed to be wrongdoers and in any event he would have done nothing to carry out his threat.

Answer: If Reuven threatened her with sanctions, it was lawlessness to the extent that the matter was implemented. There can be no greater compulsion than this. The declaration subsists if what she feared from him is proven by the witnesses [in precise terms] and not by way of exaggeration and menaces. If renunciation of the penalty subsists, the condition also persists and the *get* is valid. If Reuven acted as first indicated, the woman's declaration subsists and she can claim the penalty...(*Responsa haRi Migash* 122).

Incidentally, the observation that "the declaration subsists if what she feared from him is proven by the witnesses etc." shows that haRi Migash was punctilious about the conditions that render a declaration valid. (See *Baba Batra* 40a-b—"the Nehardeans say that a declaration that does not state 'we are cognizant that so and so is acting under compulsion' is no declaration"; Maimonides, *M.T. Mekhirah* 10:2; *Hoshen Mishpat* 205:1.) This means that haRi Migash regarded the transaction between the spouses not as "a gift" but as "a sale" which requires both compulsion and declaration for avoidance. Why was knowledge of compulsion alone insufficient here, for after all, renunciation of the penalty was involved, and in the opinion of all the authorities (including Maimonides, a pupil of ibn Migash) that is not treated like a sale but like a gift? There is only one answer to this perplexing problem: the divorce given to the woman by her husband who had threatened her with "desertion" was lawful consideration therefor, and a renunciation which a person makes in favour of another in order that the latter should give him something in return is treated as a sale,

as we have seen from the *Responsum* of Rashdam above. If the giving of a *get* converts a renunciation into a sale, it will for the same reason convert all the "abstract" obligations of the woman into a sale, such as the indemnity obligation in the present instance, even if we assume that the husband's waiver of the articles and valuables do not constitute such consideration.

This is precisely what I said above. Had the claim of indemnity been dealt with in accordance with Jewish law, it would not have been voided because of the woman's compulsion, i.e., the pressure put upon her by the husband in refusing to release her from "desertion".

Nevertheless — as I suggested at the beginning of the previous section — the indemnity claim is not to be dealt with according to Jewish law for the simple reason that it is not a claim for maintenance and *ipso facto* is not a matter of personal status. We have heard of a Jewish husband being under obligation to support his wife and of a Jewish father being under obligation to support his children or of sons who must support their parents, but of a Jewish divorced woman who must support her ex-husband we have never heard. And if, in reliance on the agreement between the spouses, she is bound to indemnify him for the money he has paid or will have to pay for the maintenance of their children, as between the man and the woman this is not maintenance but an ordinary civil debt, to be dealt with by the secular court in accordance with civil law. What is the difference between indemnity intended to cover a loss incurred by paying maintenance and one intended to cover a loss incurred in paying a bill or performing a contract? The Romans said *pecunia non olet*, and the pecuniary loss which the indemnifier must make good is alike in all respects in both cases.

I now turn to the main part of this appeal, the obligation of the appellant-father to pay for the upkeep of his daughter. Here the first question is whether the District Court was competent to hear this maintenance claim, in view of the previous judgment of the Rabbinical Court exonerating him from maintenance. The answer *prima facie* should be in the negative; that should be axiomatic, having regard to the majority judgment in *S.C.* 1/60 *Winter* v. *Beiri* (1961) 15 *P.D.* 1457.

Nevertheless, on close examination the situation seems to be otherwise since *Winter* is unlike the present case. I have come to the general view that the District Court was competent to hear and decide the child's claim against her father for the following reasons:

(i) Sec. 3 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 1953, provides that "where a suit for divorce between Jews has been filed in a rabbinical court, whether by the wife or by the husband, the rabbinical court shall have exclusive jurisdiction in any matter connected

with such suit, including maintenance for the wife and for the children of the couple."

The section speaks of "Jews", without any qualification such as "a national or resident". It is, however, clear that this section... has in mind Jews who are nationals or residents. Exclusive jurisdiction in matters of child maintenance derives from the exclusive jurisdiction of the claim for divorce, and this exclusivity is surely not conferred unless the two conditions prescribed by sec. 1 are fulfilled: "Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts."

(ii) In the present case, every one admits that the defendant-father was not at any relevant time either a national or a resident of the State.

(iii) It is not sec. 3 (as in *Winter*) but sec. 9 of the Law that applies to the present case: "In matters of personal status of Jews, as specified in art. 51 of the Palestine Order in Council, 1922-1947, or in the Succession Ordinance, in which a rabbinical court does not have exclusive jurisdiction under this Law, a rabbinical court shall have jurisdiction after all the parties concerned have expressed their consent thereto."

(iv) The child was, without any doubt, "a party concerned" in the sense of sec. 9; she did not give her consent to releasing her father from fulfillment of the duty of maintenance; her parents' consent, as her natural guardians under sec. 3(a) of the Women's Equal Rights Law, cannot take the place of her own consent for two reasons:

(a) The parents did not act on behalf of the child at all but were settling their own affairs, as emerges from the very indemnity stipulation that assumes that someone, including the child, might file a claim for maintenance against the father. When parents are only thinking of "straightening out" their own affairs, no agreement they make, even if approved by a rabbinical court, can negate the right to a claim filed later in a civil court...

(b) Even if they did act in the name of the child, I think it very doubtful whether the agreement and the judgment were effective to release the father from the duty to maintain, having regard to sec. 3(b) of the Women's Equal Rights Law which enables the court in "matters of guardianship"—a phrase that includes representation of a child by its guardian—to take into account the interest of the child alone. In the present case, the release of the father was not in the interest of the child.

Therefore the conclusion I have reached is that in the present case, the District Court was competent to charge the father with the maintenance of his young child.

The second and final question is whether the District Court was right in dismissing the father's claim to indemnity on the grounds of pressure. The rules relating to pressure have been dealt with countless times by this

Court....Recently the judgments have been collected by Sussman J. in the leading case of *C.A.* 152/59 *Suari* v. *Bergerman* (1960) 14 *P.D.* 2354. In view of the rules laid down by the Court, I harbour no doubt that the conduct of the father leading to the woman's fear of permanent "desertion" constitutes "pressure" in the full sense of the word. It is manifest that the Jewish Sages at all times and in all places endeavoured as far as they could, and even beyond that, to free the woman from the chains of desertion. This approach is set by the *Talmud* itself: "The Relief of Deserted Wives" (*Gittin* 26b and 33a), "on account of the danger of a woman becoming a deserted wife, the rabbis made concessions" (*Yevamot* 88a and *Gittin* 3a). Thereafter the *Geonim* and the early and later authorities down to modern times have emphasized it strongly in thousands of their *responsa*. There is no subject in Jewish law in which "the permissary power" is so greatly adopted as here, in spite of the "prohibition of the married woman (in adultery)" being one of the most serious. Any one interested in the rabbinical literature on the subject will find abundant material in Y.Z. Kahana's *Sefer haAgunot* (Jerusalem 1954). Although Jewish law relating to the effect of pressure does not bind the civil courts, as we held above, when we come to weigh and measure the great wrong that would have been done to the woman had she not agreed to the indemnity condition here, we may most certainly have recourse to the Jewish moral viewpoint from which all these laws and rules have blossomed. A woman whose husband leaves her to endure the pains of the last months of pregnancy and goes travelling through the wide expanses of South America without disclosing where he is to be found, and this poor woman, abandoned to the terrors of permanent desertion, agrees after negotiations through the brother of the vanished husband, to assume the maintenance of her child and "assure" him against any debt and obligation, provided he is gracious enough to give her a "redeeming" *get*—such a woman acts under brutal and inhuman pressure, and this Court may set aside the agreement and totally disregard the indemnity condition it contains.

3. Duress by Injured Party

C.A. 403/80
SASI *et al.* v. KIKAON
(1982) 36(1) *P.D.* 762, 768

The parties agreed to exchange their apartments, but the respondent's apartment was far more valuable than that of the appellants, and she was successful in having the agreement set aside by virtue of sec. 18 of the Contracts (General Part) Law, 1973.

Tirkel J.: Cases can occur where a person is pressured from more than one source, and the court will consider their cumulative effect, even though no one of them is by itself sufficient.

It is instructive to note that Jewish law in general displays a similar tendency. According to the *halakhah*, pressure exerted by one contracting party who is himself injured—called "internal compulsion" (*Baba Batra* 47b), as where a person sells something whilst in financial distress — is not regarded as pressure at all (see S. Warhaftig, *The Law of Contract in Jewish Law*, p. 117).

From a literal point of view, I accept the interpretation of Elon J. in *C.A.* 719/78 *Ilit Ltd. et al.* v. *Elko Ltd.* (1980) 34(4) *P.D.* 673 that the reference is to a severe and continuing situation, not a temporary or passing difficulty. That also emerges from the fact that in the expression "distress and anguish" (*Job* 15:24), the word "distress"is taken to mean "pressure and stress" and appears largely in association with and parallel to "anguish" (see A. Hakham, Commentary on Job, *Da'at Mikra*). That is the literal understanding, but it cannot be argued that the legal meaning of this concept is congruent therewith. In this regard, I would propose that we proceed with some flexibility and not lay down any hard and fast rule going beyond the matter under review.

4. "Distress"

See: ILIT LTD. *et al.* v. ELKO LTD., Part 6, Penal Law, p. 475.

Chapter Six

FORBIDDEN CONTRACT

1. Validity

C.A. 110/53
JACOBS v. CARTOZ
(1955) 9 *P.D.* 1401, 1403, 1413-1417

Silberg J.: In the course of the hearing of this action in each of the three instances, the larger part of the appellant's submissions fell away and only one question lies before us today: to what extent is a lease made contrary to reg. 46B(9A) of the Defense Regulations, 1939-1943, valid? More precisely, can the lease serve the lessee as a protective shield against proceedings for possession instituted by the landlord-lessor?...

The position taken by Jewish law towards a contract that "comes from an offence" is diametrically opposite. We know the Talmudic dispute (*Temurah* 4b) as to whether or not an act which Divine law forbids has, after being done, legal effect. Abaye says that it does; Rava says that it does not. The final rule, according to several authorities, follows the former (*Mishneh LaMelekh* to *M.T. Gerushin* 3:19; *Lehem Mishneh* to *M.T. Bekhorot* 6:8: *Noda biYehudah*, Tinyana ed. *Even haEzer* 129; *Shemen Roke'ah', Even haEzer* 60 and others: *cf.*, however, *Resp. Rosh* 7:4; Mordekhai to *Shevuot* (*ad fin.*)). Be that as it may, from the broad theoretical aspect, the majority of the specific rules scattered throughout the *Talmud* and the later authorities clearly show the tendency of Jewish law to distinguish between the "prohibitive" and the legal aspect, and not to negate either the right of title or the right of action that flows therefrom because of the attendant offence:

> Where a person sells or passes title on Sabbath... although he is punished, his act subsists. So also where a person acquires something on the Sabbath, the acquisition subsists: and the transaction is finalised after the Sabbath (*M.T. Mekhirah* 30:7; *cf. Hoshen Mishpat* 235:28).

The first sentence above deals with a "real" transfer of property, the second covers an obligation as well. Accordingly, the partner in the offence is not denied his right of action. The source of this rule is the *Jerusalem Talmud*, which according to the version cited by Rif to Tractate *Betzah*, ch. *Meshilin* provides that "a person who commits a transgression and acquires land or chattels on the Sabbath, his acquisition takes effect." Maimonides adds that this includes the legal force of the binding formal act of acquisition (*kinyan sudar*). *Hoshen Mishpat* 195:11, is to the same effect: "One may not acquire anything on the Sabbath by *kinyan sudar*, but if one does so acquire, the acquisition is effective although an offence has been committed."

It is proper to add here that an acquisition made on the Sabbath holds good not only where the offence is actually effecting the acquisition, which is classified as *shevut* and is only a rabbinical prohibition (see *Hoshen Mishpat* 235:28), but also where the act of acquisition is effected in the course of committing a scripturally forbidden offence, even if that involves the death penalty, as in the case of transferring an article from one domain to another and the like. This emerges clearly from the discussion concerning a person who stole something and sold it on the Sabbath (*Baba Kamma* 70a-b).

Or take the case of interest which, as all know, is prohibited by Jewish law both for lender and borrower (*Baba Metzia* 61a; *M.T. Malveh veLoveh* 4:2). The borrower may nevertheless claim from the lender the return of direct interest (*ribit ketzutzah*) (*Baba Metzia* 61b; Maimonides, *M.T. Malveh veLoveh* 6:1). The borrower is not told that he too has sinned, and therefore the advantage lies with the lender-defendant. Obviously the latter cannot sue the borrower for payment of the interest since to allow the claim would be to assist in the commission of the very offence, and that is clearly not possible.

> A transaction effected by a prohibited act... accompanied by one of the formal modes of acquisition, takes effect, the transaction subsists... and no one can set it aside (*Hoshen Mishpat* 208:1).

That means that the purchaser may demand delivery of the article sold but the seller cannot sue for the price in excess of what is permitted.

> It is not to be said that the transaction is abrogated... because it involved a prohibition. As long as it was properly effected by one of the modes of acquisition, the prohibition does not abrogate it, as long as one party so desires it to stand. (*Nimukei Yosef* to Rif to *Baba Metzia* 65a).

The question whether a contract made under a prohibition can give rise

to title and a right of action has been dealt with at great length and in considerable depth in recent rabbinical literature. Even those who think that the rule follows Rava, i.e. that the transaction has no legal effect, have tried to circumscribe it with so many limitations and restrictions that the rule itself has almost totally "disappeared" under a mass of fine distinctions. That is, incidentally, one of the notable courses in the development of Jewish law.

To be brief about the innovations introduced into this interesting topic, I will only refer to some of the rules I have gathered from various places in the vast field of our legal literature. I shall not cite in full all that has been said, but shall try to define, in more modern terms, the substantive ideas they embrace.

(i) We do not say that a prohibited transaction, if carried out, has no legal effect except when the offence pervades the entire substance of the act (the acquisition, the obligation); but not where the offence is "partial", and prohibits the doing of the act only beyond a certain limit. That emerges from *Sema, Hoshen Mishpat* 208:1(3). In such an instance, "what is permitted is not penalised by reason of what is prohibited" and the act holds good within the permitted limit.

(ii) The rule that the act has no effect applies only, according to Shakh to *Hoshen Mishpat loc. cit.* (2), when the act can only be carried out by means of the offence, but if "it is possible to do it in a permitted manner" it will have effect even if actually done in a prohibited manner.

(iii) The following distinction is "well grounded" according to Taz (*Hoshen Mishpat loc. cit.*): the rule that the act has no effect applies only when the prohibited aspect of the act is "a prohibition on its own", i.e., it is linked with a particular act as such. The rule will not apply when "the prohibition depends on the occasion when it is done" (such as a sale on the Sabbath) or "on a vow and not on the sale itself" (such as a vow not to sell) or when "there is no prohibition on the sale itself but on the additional money paid" (as in the case of the prohibited sale mentioned above). The means that if the attendant prohibition flows from some "incidental" of the act, it does not entail abrogation of the legal consequences. A similar principle, though not so clear or embracing, is to be found in *Resp. Maharam Alshikh* 75:

> It seems that they are not at all alike. In the case [of sale on the Sabbath] there was nothing prohibited in the amount of the money, but in the act of acquisition, which is proscribed on the Sabbath, but this does not derogate from the pact of acquisition.

(iv) One distinction, which reminds us somewhat of the principle of *in pari delicto*, is found in *Resp. Panim Me'irot*, part I, 34. Where the

prohibition involved in a joint transaction attaches to one party alone, it takes effect in respect of the other. The debate between Abaye and Rava, as above, is—

> ... only over what one does oneself where others have no part thereof. But if one party does a prohibited act and the other party does not, all will agree that the act has effect, for the other party can say. 'what difference does it make to me that you committed a prohibited act'.

Later on this idea is repeated and stressed:

> Where the seller and not the buyer does the prohibited act, or the purchaser and not the seller, it will obviously have effect... For we are concerned with what one does wholly by oneself in which case we say that the act has no effect, but where others are involved, the prohibition attaches to him and not to the other and his act will subsist.

(v) A very fine and clever distinction is made by R. Akiva Eiger. Briefly the idea is that when an offence as defined by law can be carried out both by an act with legal effect or by an actual physical act that has no legal consequences, the prohibition inherent in the act does not affect its legal consequence if the offence is committed by means of an action with legal effect, since in such an instance the scriptural command — "Do not commit the act" — cannot be said to intend that the act committed be "undone". Only when the offence, as defined, is restricted from the outset to a legal act alone may one assume that the legislator (the Torah or the Sages) intended to void the act. R. Akiva Eiger obviously does not employ these modern terms; the first ground, being of much wider scope, he calls "general" and the second restricted group is called "particular". Thus he writes, with certain reservations — the source of which is due to his well-known modesty:

> Moreover, were I worthy of differing from our great early Sages, I would say that an act does not take effect only when it attaches to a "particular" thing, as with respect to... the negative command, "It shall not be exchanged nor redeemed," Scripture being construed as admitting of no power to change or redeem it, and any change or redemption being ineffective. The situation is different with a "general" manner, as "Thou shalt not do any work" which cannot be understood as denying a person the power to do work, for surely when a house is built or a garden planted it is built or planted, and perforce the prohibition must be understood as meaning only that the act may not be done; therefore, everything embraced by this type of negative command is not covered by the rule that the act done has no effect (*Resp. R. Akiva Eiger* 129).

I shall not go on to cite further sources. The ideas behind the above passages are most interesting. Some of them—in paragraphs (i), (iii) and (iv) —can provide a solution to the problem that has arisen before us. I did not, however, have that in mind. Rather I intended to indicate the tendency existing in Jewish law to separate as far as possible the prohibitive aspect from the legal effect of an act... Jewish law is very strict indeed with those who transgress the law, but the indubitable reason for the above tendency is the desire to obviate the unjust result that necessarily flows from the unrestrained nonrecognition of the legal effect of an unlawful contract. Lord Mansfield said long ago that a plea of illegality "grates upon the ear" when it comes from the mouth of a defendant. This grating on the ear can only be the deep revulsion against the wrong which would be caused by acceptance of the plea. I have not ignored the other ideas that operate in the opposite direction in this area of law: the honor and esteem of the court, denial of legal effects so as to distance a person from an offence, "crime and punishment" and other like factors, although not all of them are of equal weight in the eyes of many. For example, the idea that the court "should not soil its hands" by dealing with such an argument has not been accorded much weight in the philosophy of Judaism. On the contrary, the greatest merit which King David, according to legend, assumed for himself was that "all the kings of East and West sit with all their pomp among their retinue, whilst my hands are soiled with blood, foetus and placenta" (*Berakhot* 4a).

Modern writers also, loyal to the concepts and outlook of English law, are beginning to voice criticism both of the grave "untouchability" which the courts display and of the moral and pseudo-moral cover given to the entire problem. Thus in an article entitled "*In Pari Delicto*" in (1955) L.Q.R. 254-74, Grodetzky advises the court not to be over-concerned with feelings of reproach and indignation towards an individual who litigates, but should regard itself as the authorised representative of the general public.

I do not know the way out, or the "golden path" to pursue, but our task is to search for it. "He who says I have laboured and not found — do not believe him" (*Megillah* 6b). It is for this reason that I wrote what I did above.

C.A. 174/65

BADASH v. SADEH

(1966) 20(1) *P.D.* 617, 619, 623

Kister J.: The respondent commenced proceedings in the District Court for damages in the sum of IL. 25,000 for breach of promise to marry. In her Statement of Claim she pleaded that she had been married to another between 1950 and 1962 and had two daughters when the appellant influenced her to divorce her husband in order to marry him. She divorced her husband, relying on obligations and promises made expressly and implicitly by the appellant. The Statement of Claim also sets out that the parties lived as husband and wife for two years and that she had become pregnant by the appellant. The latter, however, did not fulfill his obligations but instead married another woman, thereby ruining her life and future...

I must first emphasize that an action for breach of promise to marry is based upon English contract law, and the concepts of that law and not of Jewish law must be applied. Yet, where a promise of marriage is involved, one must not overlook the question of whether the parties are even at liberty to marry according to their personal law, since if they are not allowed to marry — either because the marriage is void or because it is forbidden and under their personal law the parties must be divorced — that would amount to a contract to do a legally prohibited act in respect of which no claim for compensation is available for a breach of undertaking.

Apart from this point, every plea of defect of contract is dealt with according to the principles of English law.

I emphasize this because with regard to the facts of the present case, the approach of Jewish law rests on other foundations, with some consequences that are similar and some that are not.

An outstanding example is the matter of the earnings of a harlot. Harlotry, in the eyes of Jewish law, is undoubtedly immoral and forbidden, not merely because under the law the earnings of a harlot would not be accepted for sacrificial purposes but because even today such earnings may not be used for any meritorious deed (*mitzvah*) such as the building of a synagogue or the writing of a *Torah* scroll (*Orakh Hayim* 153:1). Nevertheless, a harlot may sue for her hire and the man cannot defend with the plea of abhorrence in order to avoid payment. Obviously an agreement for extra-marital relations is not enforceable, but after the relations have taken place the woman can sue for her "hire" and the man will possess

no defence based on the act being forbidden. I shall not embark here on a fundamental explanation as to when it is possible or not possible to sue, and when an act forbidden under law can or cannot provide a cause of action. I have only given this example for its importance in awarding damages for breach of promise to marry under Jewish law.

C.A. 311/78

HOWARD V. MIARA *et al.*

(1981) 35(2) *P.D.* 505, 516-521

The parties had made a contract between them, according to which the appellant sold to the respondents a parcel of land at a price which was higher than that specified in the contract. The difference was paid, as it were, for iron and building materials that were on the land. The appellant declared in the contract that she is the sole owner of the parcel of land, and that the land is free of any encumbrance. After making the contract, the respondents learned that one third of that parcel had been expropriated by the Municipality prior to the making of the contract. The respondents sought to lower the price accordingly, but when the appellant refused to comply, they did not complete the outstanding payments according to the contract. The appellant viewed this as a breach of contract and cancelled their agreement. The District Court ruled that this cancellation constituted a breach of contract by the appellant, and it awarded cancellation of the contract, with restitution of the sums paid and agreed damages, to the respondents. Hence this appeal.

Elon J.: My learned friends discussed, *inter alia*, the problem of upholding a concealed contract in the matter before us. This complicated question was not argued by counsel for the litigants, and I therefore take the liberty of discussing it in their stead, when the time is right. In my opinion, the decision will be made on the basis of secs. 30 and 31 of the Contracts (General Part) Law.

The said secs. 30 and 31 introduced a great and original innovation on the question of the invalid contract—which is the title appearing in the margin of the section for a contract tainted with the defects mentioned in the section. The innovation lies in the conclusions, arising from the provisions, and which are found in both the sections together. Sec. 30 stipulates that a 'contract, the making, contents or object of which is or are illegal, immoral or contrary to public policy, is void.' If this absolute, unequivocal stipulation stood on its own, it could mean only one thing: a contract which suffers from the defects listed in the section is null and void, and it is legally worthless. This section does not, however, stand alone: alongside

it stands its partner, sec. 31, a helpmeet of sorts, and each of these sections complements the other. Sec. 31 contains two main provisions: a) In general, the right of restitution exists in relation to an illegal contract, as stipulated in sec. 21 of the Law, unless the Court sees fit to exempt the parties, wholly or partially, from this obligation. b) If one party fulfilled his obligations under the contract, the Court may—if it sees fit—obligate the other party to uphold the contract, wholly or partially. The section thus provides that not only will the court deal with a suit for restitution of something received by virtue of the illegal contract, but it can and may 'revive' the void contract and order, in certain circumstances, that the obligations therein be fulfilled. And since it is assumed that the legislator had no interest in reviving the dead and in creation *ex nihilo*, we learn, from the first principles, about the nature and substance of the nullity of the contract, as specified in sec. 30. We will say more about this below.

The innovation embodied in the said sec. 31 is discussed by Prof. D. Friedman in his original and excellent article, 'The Consequences of Illegality in Israeli Law in the Light of Sections 30-31 of the Contracts (General Part) Law', (1976-77) 5 *Iyunei Mishpat* 618-619, where he says, *inter alia*:

> This provision is not taken from a foreign legal system. It is not compatible with English law, nor even with German or French law. In all those systems, the rule which negates, subject to certain reservations, the right of action in a case in which both parties were equally to blame, pertains. Sec. 31 of the Contract Law, however, stipulates as a rule the right to restitution in the case of an invalid contract, with the exception — i.e., negation of the right to restitution — being conditional upon the exercise of discretion by the court....As opposed to this, sec. 31 of the Contract Law proposes an original solution, which is not based upon the sources upon which Israeli law usually relies.

I agree with the abovesaid, except for the last part. The author was not quite correct in his general statement concerning the sources upon which Israeli legislation usually relies, and neither was he quite correct in his particular statement concerning the matter at hand....The general statement was not quite correct, because the author disregarded one special source amongst the others, upon which Israeli law generally relies. That source is Jewish law, which—as attested to by the formulators of the draft laws in civil matters—the legislator viewed as a primary source for his civil legislation *oeuvre*, other legal systems serving as an 'auxiliary source of illumination and guidance'... The Preamble of the Contracts (General Part) Bill, 1970, stated that 'the principles upon which the proposed law is based were discussed by a Public Commission after examination of

various systems of law, with special emphasis being placed on the system of Jewish law'. On the particular matter of an invalid contract, we find the following in the Preamble:

> The loss caused by its non-fulfilment should remain where it fell. These provisions were the cause of a great wrong, as was demonstrated by Dr. M. Silberg in his research, as well as in the case of *Jacobs* v. *Cartoz* (9 *P.D.* 1401), and the decisions which followed it. The proposed Law stipulates that an invalid contract is void, and at the same time, it lays down a number of alternative remedies which the court may award, according to the circumstances of the case: restitution, partial restitution, exemption from restitution, and if one of the parties fulfilled his obligations—also the enforcement, in part or in whole, of the contract on the other party.

Further on, in the Explanatory Notes to secs. 31 and 32, which are almost identical to secs. 30 and 31 of the Law, we find:

> These varied remedies allow the Court to rule in every case according to the circumstances, in order to do substantive justice between the parties.

A full and incisive explanation of the nature of the source of the invalid contract in the Contract Law...and on the extent to which these laws are based on the approach which Jewish law adopts on the question of the illegal contract, may be found in the words of MK Benjamin Halevi, who served as a member of the public committee which prepared the Contract Law, when the discussion was held in the Knesset:

> The Honorable Minister of Justice has already said that we have here an innovation which is truly positive in all respects. It is positive with respect to the approach in Jewish law, which has been given significance that is not necessarily semantic, as is sometimes the case with our legislation, i.e. that we use Hebrew words or words drawn from the sources, but not in their original sense or in faithfulness to their legal significance. Here, in the matter of the illegal contract, we have moved from the English approach, which was deplored even by the English courts which could not shake themselves free of it, to a much better system, which has been illuminated by the approach of Jewish law. Allow me to quote from Silberg J....who said, in one of his decisions, that "the trend in Jewish law is to separate, insofar as possible, between the prohibited aspect and the legal consequence of the act. Where the solution and the golden path lie — I do not know. But we must search for them, and 'do not believe that you may strive but not find'; it is for this purpose that I wrote what I did in this last paragraph" (*C.A.* 110/53).

> He was forced to write things for the sake of Heaven, if one may say so. But now he has been truly vindicated, and the legislator, if the legislation passes, will give binding force to his words by means of one of the important provisions of this bill, which would accord the court complete freedom to decide, at its own discretion, where justice lies in each case of an illegal contrat or a contract which is contrary to public order or to morality. This is a real manifestation of progress, and of modernization. Here, the old and the new touch upon each other (*D.K.* 57 (1976).

As we have said, the provisions in the Contract Law concerning an illegal contract are based on the *substance* of Jewish law, in that they are not identical to the position adopted by Jewish law, for in Jewish law, an illegal contract is not, in general, void from the civil perspective, and a party to such a contract can pursue his rights, as long as this does not constitute commission of the offence itself. On the main points concerning the law of an illegal contract in Jewish law I have already written elsewhere (M. Elon, *Jewish Law*, Magnes Press, 2nd ed., 1978) 163 ff....and I quote (*loc. cit.*, 164-165):

> Jewish law distinguishes, therefore, between the 'monetary' aspect and the 'forbidden' aspect of the law, and accords full legal force to a contract which contains a religious offence, as long as the actual fulfillment of the contract involves no such infringement. This absolute distinction allows for the conduct of a stable legal life, and it is also compatible with the mutual relations between the law and morality in the system of Jewish law, which requires that the offender be deprived of any additional 'enjoyment' from the rescission of the contract. For this reason, when in a particular social setting, it emerges that according validity to a legal transaction gives some encouragement to the perpetration of offences, then the *halakhah* dictates that in such a case, the Court will not order the remedy of enforcement of the contract (for example, in a case of hiring false witnesses, the Court will not accord a remedy to the hirer who is suing for his money from a person who promised to give false evidence and who in the end did not testify (*Resp. Shevut Yaakov*, part 1, 145)).

The issue of the illegal contract in the Israeli Contract Law is an interesting example of the absorption of principles and trends within Jewish law unaccompanied by absorption of some of the details of the laws and the positions adopted by the *halakhah*. The position of Jewish law according to which in general, the illegal contract is valid insofar as its civil consequences are concerned, was not adopted: the rule, as we find in sec. 30, is that

such a contract is void. However, two substantive principles which are fundamental to the laws of an illegal contract in Jewish law were accepted by the Contract Law. The first principle is the very fact that the Court will hear an action which is based on a contract tainted with illegality. This is a complete negation of the approach that an illegal contract is 'untouchable': the Court has a duty to see that there is justice between the parties, and to this end, it may have to 'get its hands dirty' in this kind of action. It is true that in exercising its discretion as stipulated in sec. 31, one of the considerations of the court will be the conduct of each of the parties and the contribution of each to the illegality of the contract, and it will thereby take into consideration the need 'to educate the public to stay away from manoeuvres which must raise the suspicions of every honest person' (as per Landau J. in *C.A.* 41/75); and as we have seen, this element was accepted as one of the important considerations in the context of the illegal contract in Jewish law as well, in order to discourage, in a particular social reality, acts that ought not to be done. All this, however, is part of the considerations which arise in the course of discussion of the illegal contract: such discussion itself, the necessity of looking over the contract and its provisions, consideration of the circumstances of the case, and first and foremost, the aspect of according justice to whosoever merits it —none of these will the court attempt to evade, even when it is discussing a contract that is not in accordance with the law.

The other principle which was accepted in the context of the illegal contract in the Israeli Contract Law is the basic trend in Jewish law that 'the offender is not rewarded', i.e. that a transgressor will not gain an advantage in addition to his illegal act, from the non-fulfilment of the civil consequences of the contract. In order to preserve this trend, in sec. 31 the legislator stipulated that as a rule, the monies which were received must be returned, and discretion was given to the court to order, on certain conditions, the fulfilment of the obligations arising from the contract: all this was in order 'to rule in every case according to the circumstances, and in order to do substantive justice between the parties' (Contracts (General Part) Bill).

It seems to me that in the light of this legislative trend, we must, insofar as possible and within the framework of the provisions of the said secs. 30 and 31, try to limit outcomes which might deprive the parties of rights to which they are entitled under a contract that they made between them. This could be manifested in two directions: first, we should attempt to extend, as far as possible within the framework of sec. 31, the duty to fulfil obligations imposed on the litigant by virtue of the contract that they made between them; secondly, we must limit the ramifications of illegality, insofar as possible in the framework of sec. 30, by distinguishing,

for example, between the illegality arising from the very essence of the transaction dealt with in the contract (such as a contract to implement an illegal purpose), and illegality which is secondary and auxiliary to the actual transaction....

According to what we have said, we reach one additional conclusion, as I already hinted before. True, sec. 30 says that an illegal contract is void. In view of the provisions of sec. 31, however, we learn about the extent and nature of this nullity. The court has the power to order the fulfilment of the obligations in the contract, and it will use this power as generously and as liberally as possible. We see that what is before us is a living contract, and when necessary, when the court says, 'act', the actor acts, both in the area of the laws of obligations and in the area of property law (when the court uses its authority, by virtue of sec. 31, and negates the right to restitution). The illegal contract in Israeli law is not, therefore, as 'the dust of the earth', a worthless scrap of paper, or, in the words of my learned colleague, a total nullity, for the court does not presume to indulge in creation *ex nihilo* and to order that obligations which do not exist be fulfilled. The meaning of the nullity in sec. 30 is, therefore...that the contract is alive and well, but sleeping, and the word of the court awakens it from its slumber. The concept of nullity in sec. 30 does not indicate something which 'shall not be binding nor shall it exist'; rather, it 'is not binding but does exist', and by virtue of its existence, in the framework of sec. 31, it can also acquire a binding nature.

2. Exemption Clause Regarding Physical Injury

See: ZIM ISRAEL NAVIGATION CO. LTD. *et al.* v. MAZIAR, Part 1, Jewish Law in the State of Israel, p. 28.

C.A. 285/73

LAGIL TRAMPOLINES AND SPORTING EQUIPMENT ISRAEL LTD. v. NAHMIAS *et al.*

(1975) 29(1) *P.D.* 63, 80

The respondents were injured in using a trampoline belonging to the appellant. The ticket of admission to the appellant's sports centre contained an exemption clause —"the company is not liable for any accident, damage or injury that may be caused to any person jumping"—as did also a notice at the entrance.

Kister J.: My starting point is the principle of "the sanctity of life" in Jewish tradition on which Silberg D.P. dwelt in *Zim...* v. *Maziar* (1963) 17 *P.D.* 1319, at 1333-1334. I shall briefly explain how this principle is expressed in the *Halakhah* as we find it in the *Talmud*, and in the commentators and the later literature. It seems that the following obligations may be said to exist in this matter:

(i) A person may not strike another and injure him (*M.T. Hovel uMazik* 5:1).

(ii) A person may not injure himself (*ibid.*).

(iii) A person must take care not to harm his neighbour; it has been said that more care is to be taken not to injure another than to see that he himself not be injured (*Tosafot* to *Baba Kamma* 23a).

(iv) A person must take measures to prevent danger to his neighbour (see *M.T. Rotze'ah* 11:1-4).

(v) A person may not endanger himself, and should he ask what concern it is of others if he does so, he is punished for "rebelliousness" (*ibid.* 5).

(vi) In view of the foregoing, it is doubtful whether in Jewish law the rule *volenti non fit injuria* obtains regarding physical injuries but even if the rule does obtain, the presumption is that a person does not intend to forgive physical injury done to himself: "No man pardons injury to his main limbs" (*Baba Kamma* 93a). It is noteworthy that the *Mishnah* in *Baba Kamma*, as cited by Silberg D.P., does not deal with the possibility of actual physical injury alone but with the request of the injured person to be injured. The *Jerusalem Talmud* (*Baba Kamma*, ch. 8 *ad fin.*) as well as the *Tosefta* (*ibid.*, ch. 9 *ad fin.*) explain that such a request can occur where the injured party is suffering from some disease of the eyes or legs. Nevertheless, it is at least doubtful whether his pardoning of damages for the injury done to him is fully effective or whether the person said what he did because of the pain or because he thought that he would in fact not be injured.

(vii) I have dwelt on the duty of the person doing the injury and on the injured and I have mentioned incidentally the duty or power of the public (the court) to penalise a person who lightheartedly places himself in unnecessary danger, but the court has further obligations to prevent mishaps.

These are the halakhic points from which, in my opinion, we may learn something for the present case. It should, however, be remembered that the measure of liability for carelessness and negligence as well as the amount of damages awarded under State law differ from those in Jewish law. In addition, today there is always the possibility of taking out insurance against injury and accidents.

3. Retraction

See: SHIMONI v. ULAMEI LEHAYIM LTD., p. 651.

4. Sale of *Spes successionis*

See: YEKUTIEL v. BERGMAN, Part 9, Property — Physical and Intellectual, p. 711.

5. Meaning of "Public Policy"

See: ROITMAN v. UNITED MIZRAHI BANK LTD. *et al.*, Part 7, Torts, p. 569.

C.A. 566/77

DICKER v. MOCH *et al.*

(1978) 32(2) *P.D.* 141, 149, 150-152

Elon J.: I concur in the conclusion at which my learned friend, Kahan J., arrived.

We are called upon to elicit the essence of the notion of "public policy" that appears in sec. 30 of the Contracts (General Part) Law, 1973, which provides: "A contract, the making, contents or object of which is or are illegal, immoral or contrary to public policy, is void"...

In the course of crystallising the meaning of "public policy" — which sec. 63 of the said law directs us to construe without recourse to foreign pastures — a foremost place must be assigned to Jewish law, its principles and provisions. That is in no way novel, since judges of this Court have already so instructed with regard to the notion of "public order" in sec. 64(1) of the Ottoman Civil Procedure Law, which governed this situation until the Contracts Law took effect. Thus, Silberg J. observed in the well-known case of *Zim* v. *Maziar* (1963) 17 *P.D.* 1319, at 1332:

> Should we be asked what legitimacy there is in forming our own outlook on a rule which has its source in Turkish legislation, the answer is that the

> rule that a contract is voidable for being contrary to public order is derived from sec. 64(1) of the Ottoman Civil Procedure Law, but what public order or public policy is must be gathered from our own ethical and cultural perceptions since no other course exists.

Cohn J. held likewise in *Yekutiel* v. *Bergman* (1975) 29(2) *P.D.* 757, concerning the validity of an obligation to sell and transfer a future inheritance. The District Court had held that such an obligation was contrary to public policy under sec. 64 of the Ottoman Law as above, but this view was rejected because "the tradition that has proved itself in creating a healthy public opinion among us is the tradition of Jewish law", according to which such an obligation is perfectly valid. Let me quote further from Cohn J.:

> From the viewpoint of 'public policy' under Jewish law, every statutory provision that exempts a contracting party from fulfilling his obligations is merely a legislative prescript, but whoever wishes to 'put the world right' will abide by his obligations beyond the strict letter of the law. There can be no 'public order' in breaking one's promise in civil law....Public policy is promoted by extending, not restricting, freedom of contract; by safeguarding observance, not facilitating breaches of obligation. Before the court will set aside a contract on grounds of public policy, a sense of justice, equity and morality must rise up against performance of the contract (at 765).

Kister J. concurred in the views of Cohn J. on how and by what standards one is to understand the notion of public policy (*ibid.* at 769; see also *Roitman* v. *Bank Mizrahi* (1975) 29(2) *P.D.* 57, at 79, where Cohn J. again held that public policy is to be construed in accordance with the principles of Jewish law).

If "public policy" that has its birth in Ottoman law is so to be construed, "public policy" that is fathered by the Contracts Law of the Israeli Knesset must *a fortiori* be construed in the same fashion and in this way the autonomy of the Law enjoined by sec. 63 will be given substance.

I now turn to the particular matter which is the subject of our case law. It is a leading principle in Jewish law that once a person has made up his mind to obligate himself, he must fulfill the obligation, and only for very special reasons can it be abrogated. Cohn J., as above, has described this attitude of Jewish law most clearly. The rule is so widespread that it does not require support, and we can infer from it, by analogy, two other matters mentioned in sec. 30 of the law. A contract is void when affected by illegality or immorality, but Jewish law greatly restricts the possibility of voiding a contract on these grounds — except where

the purpose of the contract is illegal or immoral, when the contract is void and may not be performed — as set out in detail in the judgment of Silberg J. in *Jacobs* v. *Cartoz* (1955) 9 *P.D.* 1401; see also Silberg, *Principia Talmudica*, pp. 82 ff. and Elon, *Jewish Law*, Part I, pp. 163 ff.). As I have said, only in special cases will a contract be abrogated for reasons of public policy or the like. The subject is an extensive one and this is not the occasion to expand thereon but I shall briefly indicate what is involved...

Jewish law, in its usual manner, does not speak in generalities nor engage in definitions; it determines the legal rules governing a particular group of concrete facts. From the particular, the general may be inferred, but only after careful inquiry. I shall mention a few relevant examples. It has been held that an agreement between two manufacturers or merchants, that involves the creation of a monopoly and an increase in prices to the disadvantage of the consumer public, will have effect only if approved by "a person of esteem" — a scholar and public leader concerned with local needs — whose task it is to ensure that the public will not be adversely affected by the agreement (see *Baba Batra* 9a and the *Novellae* of Nahmanides, Ran and Ritba *ad loc.*; Elon, *Jewish Law*, Part 2, pp. 608 ff.). Similarly no agreement that involves "physical pain" to one of the parties will be valid (*Ketubot* 56a and Rashi *ad loc.*; Elon, *op. cit.*, Part 1, pp. 161 note 99) and similarly an agreement between spouses whereby the woman waives the duty of the man under her *ketubah* (marriage document) to ransom her if she falls into captivity, is void, "so that she not fall in among the Gentiles" (*Ketubot* 47b; *Even haEzer* 89:5). The axiom underlying these examples is that where the public interest is especially affected, or one of the parties to a contract is injured in some manner, the contract will be void. These are only examples and I do not mean to lay down firm rules.

Whatever the scope of the concept of public policy in Jewish law, the restriction imposed on the appellant's business by clause 22 of the contract in the present case is insufficient to warrant the appellant's plea for voiding the contract, both from the aspect of prejudice to his personal interests and from the aspect of detriment to the public interest, as specified in the judgment of Kahan J.

Chapter Seven

FRUSTRATION

1. *Vis major*

See: ALBARANES v. SCHMETERLING, Part 9, Property—Physical and Intellectual, p. 724.

Chapter Eight

REMEDIES FOR BREACH

1. Penalty Clause

C.A. 99/49

DWEIK v. LALO

(1951) 5 *P.D.* 625, 628, 629, 643-644

Under an agreement dated 15 May 1944, the appellant sold to the respondent a plot of land for IL. 450, of which IL. 50 was paid on the signing of the agreement. The parties undertook to complete the transfer within two months of the date of the agreement and for that purpose to appear before the Land Registrar on notice from the person instructed to prepare the necessary papers. Notice was given for 5 July 1944, but the appellant did not comply and failed to transfer the plot either at that date or later, notwithstanding notarial warning sent by the respondent. In the meantime, on 25 May 1944, the respondent had contracted with another to sell him half of the plot for IL. 500. The agreement contained the following stipulation: "5. Any party who changes his mind, is in breach of, or does not comply with, one or more of the terms...shall pay the other party all expenses and damages and in addition the sum of IL. 150, and this without need for any notice or notarial warning or otherwise; a letter sent by registered mail shall be deemed to be and take the place of notarial warning."

Silberg J.: The statutory disqualification of a penalty clause is intended to protect a debtor against unjustified consequences of his own undertaking, and a creditor may not reap any benefit from such disqualification. In other words and in the reverse, it is not in the least equitable or reasonable for a person liable to make compensation to be in a worse position than he would be in were it not for such protection, since it was for his sake, and not for the sake of his creditor, that the Law has annulled his obligation to pay the prescribed penalty. A similar legal notion may be found developed and emphasised in the theory of Jewish law. "Whoever says 'I have no desire to avail myself of such a rabbinical regulation' is listened to" (*Baba Kamma* 8b; *Baba Batra* 49b; *Ketubot* 83a; *Gittin* 77b); that is, a regulation

made for the benefit of a person may be renounced if it entails unfavorable consequences for him...

We may also say here, in consequence of this notion, that were it not for the illegality of the penalty clause, i.e., the "regulation" made for the benefit of the person liable to pay compensation, the appellant would not have had to pay more than IL. 150 on account of the difference in price. Thus I agree with the interpretation given by Witkon J. to "expenses and damages" in clause 5 of the agreement. Now that this term has been voided, he does not have to pay more, since what was an advantage cannot become a disadvantage. No person, as it were, can be compelled to receive a statutory "benefit".

2. Sanctions Against One Who Does Not Keep His Word

C.A. 626/70

SHIMONI v. ULAMEI LEHAYIM LTD.

(1971) 25(1) *P.D.* 824, 840

A contract between the parties giving the appellant exclusive rights to take photographs in the respondent's banqueting hall was declared void by the District Court as being contrary to the Restrictive Trade Practices Law, 1959, and the appellant's application to submit the matter to arbitration was dismissed.

Cohn J.: In former days among Jews, when a person went back on his word and retracted a contract he had made, even though in strict law he could do so (for lack of *kinyan* for instance), the court before which he appeared would pronounce: "He who punished the generation of the Flood and the generation of the Tower of Babel, the people of Sodom and Gomorrah and of Egypt (who drowned in the sea), He will take vengeance on one who does not stand by his word" (*M. Baba Metzia* 4:2; see R. Ovadiah miBertinoro *ad loc.*; *M.T. Mekhirah* 7:1-2).

Today we no longer censure, but by virtue of the discretion conferred on the court we will send away empty-handed those who ask for declaratory relief that will allow them to retract from their obligations and not fulfill them because of some illegality to which they themselves were party. Such applications are, in the descriptive language of Silberg J. (*Jacobs* v. *Cartoz*,

(1955) 9 *P.D.* 1401, at 1408), "untouchable because of loathsomeness, with which uncleanliness the court will not soil its hands."

3. Equitable Damages

See: NESS *et al.* v. GOLDAH *et al.*, Part 7, Torts, p. 583.

4. Specific Performance in Land

C.A. 155/52

PARHODNIK v. AKERMAN

(1956) 10 *P.D.* 72, 76-77

Silberg J.: I may point out parenthetically that the very high regard and primacy attaching to land in various branches of the law is not exclusive to the legal outlook of the Anglo-Saxon peoples. Jewish law, much earlier in time and much wider in scope, preceded it. Land, said one *Amora*, is "a thing that is worth all money" (*Baba Kamma* 14b—any amount that one may give for it, as Rashi explains *ad loc.*). Land is not subject to the law of over-reaching (*Baba Metzia* 56a and 108a), even where, according to both Maimonides and *Shulhan Arukh*, land that is worth one dinar is sold for a thousand dinars (*M.T. Mekhirah* 13:1; *Hoshen Mishpat* 227:29). According to the *Talmud* the source of the rule is scriptural but the rationale, according to a leading commentator on the Commandments, is "because land endures forever and a person may forgive all over-reaching after acquiring it..." (*Sefer haHinukh*, Commandment 337). "A *prosbul* (a legal device for avoiding the cancellation of debts in the Sabbatical year) is only made out in respect of land" (*Gittin* 37a). "Land is not subject to the law of robbery" (*Baba Kamma* 95a). All the chattels in the world can be acquired in conjunction (*agav*) with the purchase of the minutest area of land (*Kiddushin* 26-27). Land is called "property which serves as security for debts" absolutely, irrespective of whether it remains in the hands of the debtor (*ibid.* 26a and Rashi *ad loc.*). Anything made

and intended to be attached to land is not susceptible to ritual impurity, even if it is a metal vessel that "has a name of its own [which would otherwise be so susceptible]" (*M. Kelim* 11:2). There are many similar rules and dicta scattered throughout the *Talmud* that describe in the utmost variety the high status of this very special kind of property. In truth, even the love of the People of Israel for the land of Israel is largely a love for the land in the sense of soil and terrain.

Chapter Nine

INTERPRETATION OF DOCUMENTS

A. Modes of Interpretation

See: Part 12, Interpretation

1. Usage, Language and Place

See: BRITISH AND COLONIAL ESTATES LTD. v. TREBLUS, Part 12, Interpretation, p. 853.

See: EFRAT v. STATE OF ISRAEL, Part 12, Interpretation, p. 871.

2. Custom

See: KHALATI v. UZAN, p. 662.

See: KATAN v. MUNICIPALITY OF HOLON *et al.*, Part 12, Interpretation, p. 857.

3. Express Intention

See: BALIN v. EXECUTORS OF THE WILL OF LITVINSKY dcd., Part 12, Interpretation, p. 864.

4. The Holder of a Document is at a Disadvantage

F.H. 23/60

BALIN v. EXECUTORS OF THE WILL OF LITVINSKI dcd.

(1961) 15 *P.D.* 71, 83-84

This further hearing concerned the interpretation of an ambiguous direction in a will that bequeathed "To Mrs. Theresa Balin — the amount equal to IL. 500,000 (five hundred thousand) French francs."

Silberg J.: The provision in this will may be treated in one of three ways: (a) as a continuous sentence, containing two different sums; (b) as two subordinate clauses, each containing a different sum; (c) as a continuous sentence, the inconsistency of which deprives it of all logical meaning and which is not to be understood unless "IL." is omitted. One of these three views cannot be avoided, since no fourth view exists!

It seems clear that taking each alternative separately, Jewish law leads to the sole legal conclusion that the applicant is entitled only to the sum of 500,000 francs.

As to the first alternative, the holder of a document is "at a disadvantage" and takes the lesser of the two sums, which is 500,000 francs. Warrant for that is the following:

> (When in a bond) there is written, "A hundred *zuz* which are twenty *sela*" (when in fact they equal twenty-five *sela*), the lender will only receive twenty *sela*. If it is written "A hundred *zuz* which are thirty *sela*", he receives only a *Maneh* ([one hundred *zuz*) (*Baba Batra* 165b; *M.T. Malveh veLoveh* 27:14; *Hoshen Mishpat* 42:5).

If we adopt the second alternative, the rule that the latter expression has effect applies and again the applicant will only be entitled to 500,000 francs:

> If a *maneh* is written above and two hundred below or two hundred above and a *maneh* below, all goes according to what is written below (*Baba Batra op. cit.*).
>
> If an instrument contains the sum of a *maneh* above and later two hundred *zuz* or vice versa, the later sum is followed. Why is the lesser sum not followed? Because one sum is not dependent on the other. Had it been written "A hundred which is two hundred" or "Two hundred which is one hundred", the holder of the instrument would receive one hundred. But where two things are independent of each other, the one appearing last governs (*M.T. loc. cit.*).

Finally if we adopt the third alternative, which is the most logical in the situation here, it is a well-grounded assumption that "IL." was a slip of

the pen and should rightly be ignored or erased from the will. Support for that may be inferred from the fact that the dictum, "the omission of a guarantee is an error of the scribe" (*Baba Metzia* 14a; *Hoshen Mishpat* 39:1 and 225:1), is effective by virtue of the assumption that a person will not venture his money without a guarantee. (Rashi *ad loc.*) The same should therefore apply to every scribal error (Rema to *Hoshen Mishpat* 49:2).

See: MIZRAHI v. YADID, Part 10, Commercial Law, p. 783.

See: ALPEROVITZ v. MIZRAHI, Part 12, Interpretation, p. 863.

5. Primacy of Affirmative Interpretation

See: ALPEROVITZ v. MIZRAHI, Part 12, Interpretation, p. 863.

6. Later Term Operative

See: BALIN V. EXECUTORS OF THE WILL OF LITVINSKY dcd., p. 655.

7. Scribal Errors

See: BALIN V. EXECUTORS OF THE WILL OF LITVINSKY dcd., p. 655.

8. Normal Terms Implied

See: COHEN v. COHEN, p. 596.

B. Implied Terms

1. Power to Vary Contractual Terms to Ensure Justice

F.H. 22/73

BEN SHAHAR v. MAHLEV

(1974) 28(2) *P.D.* 89, 96, 98-100

Under a consent judgment, it was stipulated that if the tenant fell into arrears of rent he would have to vacate the apartment. The tenant suffered a general paralysis and was unable to fulfill his obligations. Proceedings were begun to evict him from the apartment. By a majority, the Court held that it had inherent power, on equitable grounds, to extend relief to a person who delayed doing what he had been ordered to do under a judgment.

Berinson J.: For us, perhaps more so than for other people, law and justice are synonymous. The idea of just law is deeply rooted in national consciousness. A few examples from the many in Scripture: "Woe unto him that buildeth his house unjustly and his roof-chambers unlawfully" (*Jeremiah* 22:13); "Doth God pervert judgment or doth the Almighty pervert justice?" (*Job* 8:3); "Judges and officers shalt thou make them...and they shall judge the people with righteous judgment" (*Deut.* 16:18). The inherent powers involved in this case are those minimum powers in matters of practice, efficiency and justice that the court requires for carrying out the task for which it exists — the doing of law and justice. These powers are the external expression of the sense of justice which inspires the judge and gives him some release in his daily activity.

Cohn J.: Whenever in the interest of doing justice we deem it proper to ignore English and American case law, I have become accustomed to ascertain first whether there is some tree in the field of Jewish law upon which the matter may be hung. This is not to say that English precedents are binding upon us so long as we find no other precedent in Jewish law, or that there is anything in Jewish civil law to obligate us to decide in accordance therewith. The justice, however, that we must endeavour to do, is more secure and trenchant when it has support in our legal tradition and in the just wisdom of our predecessors.

In the prior hearing, the three of us proceeded on the assumption

that we should not read into the compromise agreement between the parties any implied condition that if the respondent fell ill, the dates of payment would be postponed. In this respect we followed the decided English Common law, as explained in the judgment of Manny J. and upon which this Court has frequently relied in the past. In his submissions in reply to the application for a further hearing, counsel for the respondent repeats the implied condition and tries to restore it to its prime position, whilst counsel for the petitioner jumps at the opportunity thus presented and argues with great learning that if we say that no implied condition arises here we are only deceiving ourselves: by giving the respondent relief and extending the time of payment we have in fact introduced an implied condition into the agreement, since "there is no other way, no other authoritative source, for varying the agreement of the parties than to say that the parties agreed that the Court should be competent to vary the terms they had agreed upon, if in its discretion it thinks it lawful and just to do so" (from the written summation of Counsel).

We have found an implied term such as this as the ground for the Mishnaic rule which exempts a person from fulfilling a vow he has made if, at the time fixed for doing so, circumstances over which he has no control (duress) prevent him from carrying it out. The *Mishnah* defines "vows (made) under pressure" as vows that cannot be duly observed because "he or his son fell sick or a river prevented him" (*M. Nedarim* 3:3). R. Ovadiah miBertinoro explains *ad loc.* that "from the outset he did not think that the vow would apply should duress prevent him. In the appropriate circumstances, a mental reservation has effect." That is, although the person making the vow did not say so expressly, but had it in mind, and generally mental reservations have no effect, we must read into the express vow the implicit condition that the vow should not be binding if something should happen that prevents it. That is precisely what the *Gemara* says: "Although we hold that a mental stipulation is invalid, it is different when (a vow) is made under duress" (*Nedarim* 28a).

There, the matter involved vows (the same applies to oaths and other obligations: see *M.T. Shevuot* 3:1) which were not made in court; but the *Gemara* recounts the case of a person who deposited "documents of rights" in court and, having to return home, declared to the court and to his opponent that if he did not appear within thirty days his rights would be void. He was unavoidably prevented from returning in time. R. Huna said that his rights were void, while Rava held that he was under duress, and in such a case Divine Law exempts him (*Nedarim* 27a). The law is according to Raba... There is good reason for the rule appearing both in Maimonides' Code and in *Tur* and *Shulhan Arukh*, not in the part dealing with ordinary substantive civil law but among the laws

concerning the courts (*M.T. Sanhedrin* 7:10; *Tur* and *Shulhan Arukh, Hoshen Mishpat* 21:1 (laws relating to judges)), to show that what the plaintiff deposited and declared became an act of court, and the duress affecting him may serve the court as sufficient cause to vary its own act.

Likewise, where a person pays part of a debt he owes and deposits with a third party a bond for the entire debt, saying that if he does not pay the balance before a certain date, the bond should be handed over to the creditor (*M. Baba Batra*, 10:5), opinion is divided over whether he is bound to pay. This type of obligation is called *asmakhta*, a promise to do something in the future, given by a person who at that moment really thinks that he will be able to fulfill the condition, but in fact is unavoidably prevented, by duress, from doing so (Rashbam *ad Baba Batra* 168a). The decided *halakhah* is that *asmakhta* is not binding unless made by formal *kinyan* (act of acquisition), without duress and before an authoritative court (*Nedarim* 27b). *Kinyan* is required in order that the obligation should apply "forthwith" and not at some future date; the obligation must be entered into voluntarily and not under pressure. But why an authoritative court? Ran *ad loc.* explains that "since we are concerned with a court, another rule is involved... that a court does not make a mockery of things". The seal of an authoritative court confers upon *asmakhta* the nature and status of a really substantive and serious obligation... *Asmakhta* under these conditions is equivalent to an agreement or undertaking that has received the force of a judgment, and in this respect it is similar to the deposit of documents or rights mentioned above. In both instances, Maimonides holds that if the obligee does not duly carry out his obligation, it is for the court to effect what was agreed upon, unless he was prevented from coming 'by a river or by illness' (*M.T. Mekhirah* 11:13-14; likewise *Hoshen Mishpat* 207:15). Hence the court will not permit or suffer that the outcome which otherwise would ensue from the omission of the obligee to duly abide by his undertaking, should also ensue when the omission is due to duress.

Even if, in the case of one depositing deeds in court on the understanding that they are to be handed over to his opponent if he himself does not appear in time, it might be said—although it is nowhere so stated—that there was a kind of implied condition, a mental reservation, that if failure to appear was due to duress then the opponent would not become entitled, there is no logical possibility of assuming such a fiction, in the case of *asmakhta*. The rule that *asmakhta* is not binding means simply that we do not in the least rely on the mental stipulations of the obligee (the thought that he will be duly to fulfill his obligation); and when we deny validity and relevance to the possible reservation of the very promise and desire to fulfill

what has been undertaken, we deny validity and relevance to a possible reservation concerning a case of pressure . If the promise itself is of no effect, the reservation regarding it equally has no effect. Just as what an obligee has in mind does not bind him, equally it cannot exempt him; and just as an act of court provides *asmakhta* with binding force, so it releases the obligee from duly fulfilling his obligation on account of duress. Thus, the court has the power to extend the obligee's time for performance if performance is prevented by reason of duress, even where there is no place for assuming that he originally bound himself on that condition.

However, Maimonides also states (*M.T. Sanhedrin* 24:6) that "a judge may always declare private property ownerless" (with all manner of consequences) and by virtue of this power a court may take property from one and vest it in another and in this manner do what is just even where a decision according to the strict law might create an adverse situation and injustice. In clarifying the task assigned to the court in upholding an *asmakhta*, Ran also cites the version that the court has power "to confiscate property" (*Nedarim* 27b); and the wide and far-reaching powers of the court to declare property ownerless indeed includes a power not only to render obligations effective, that would otherwise not be valid, but also to give release from obligations or to extend the time for fulfilling them.

We do not possess this power to declare property ownerless and I only cite this ancient rule to show that the *Talmud* considered it very important for a court to possess every power required for doing justice even when the law would require it to decide otherwise.

It follows from all the foregoing that the power of a court to release an obligation or extend the time for its performance because the obligee was ill or for some other reason was prevented from fulfilling it in due time for reasons over which he had no control, can arise from an implied stipulation in the mind of an obligee or even in the absence thereof. If, however, anyone must rely (as apparently counsel for the petitioner did) upon such an implied stipulation upon which to found the powers of the court, I am ready to say that every act of court that imposes an obligation to do something within a given time, and, if not so done, the debtor will suffer in his person or his property or rights, is from the outset based on the implied condition that if the debtor does not fulfill in due course what he imposed upon himself, because of illness or some other reason over which he has no control, the court has power to extend the time for performance. It is unnecessary to add that such an implied term is merely a fiction and is unnecessary according to those who urge that in any event a court has the power, by the very nature of its being, to extend time when that is necessary for doing justice.

2. Gift in the Wake of a Promise of Marriage

C.A. 743/75

RON v. HAZAN

(1977) 31(1) *P.D.* 40, 48-49

The District Court held that the appellant was the father of the daughter of the respondent and was bound to pay damages for breach of promise to marry.

Schereschewsky J.: The learned judge was also justified in requiring the appellant to pay the respondent the sum of IL. 650 which, on her evidence, she gave him in order to buy himself a watch as a gift from her. The fact that the money was given was proven by her and was in fact not controverted by the evidence of the appellant. Althought he testified that he had rejected all the suggestions made by the respondent regarding the kind of watch she had suggested to him in the store, he said nothing about refusing to take money to buy himself a watch, so that the evidence of the respondent in this regard remains uncontradicted. The learned judge did indeed err in holding that the respondent gave the money to the appellant as a loan; she herself said that she gave it as a gift, but that does not release him from returning the gift. The gift was given in connection with the promise to marry and it occurred in the same week that they went to the Rabbinate to register the marriage. In the circumstances, the gift was clearly given on the basic assumption, the implied condition, that the appellant would fulfill his promise. Hence, having broken his promise without reasonable excuse, he must return the gift (see *Even haEzer* 50:3-4; Taz *ad loc.*; *Arukh Hashulhan, Even haEzer* 50:20; secs. 2, 10 and 13 of the Contracts (Remedies for Breach of Contract) Law, 1970). Consequently, although not on the grounds he gave, the decision of the learned judge charging the appellant must be approved.

Chapter Ten

SPECIAL CONTRACTS

1. Dowry

C.A. 405/68
KHALATI v. UZAN
(1968) 22(2) *P.D.* 1003, 1006

The respondent undertook by written contract to marry the appellant's daughter upon payment of a sum of IL. 40,000, half at the signing of the contract and the balance on the wedding day. The marriage took place but the balance was not paid, the appellant claiming that the marriage was not a success.

Cohn J.: Finally, counsel cast her anchor courageously in Jewish law and found support in a statement of A. Gulak, that dowry obligations "give rise to doubts from the legal aspect....Such an obligation is very tenuous under our law since it attaches to a matter without substance" (*Foundations of Jewish Law*, vol. 3, p. 16). There is no need to say that this Court will treat with great respect any statement made by this leading scholar, but we are not dealing with a mere deed of engagement that may possibly be seized by the doubts and hesitations of Gulak, but with a contract made under the laws of the State, which upon the face of it possesses no defect and gives rise to no doubt or hesitations. In such an instance, Maimonides said long ago (*M.T. Ishut* 23:11-12):

> Many practices surround the dowry....The matter as such is effected according to local usage which also determines what is to be included....In all these and like matters local usage is the main element by which we decide the issue.

This contract between the appellant and respondent was made in accordance with local custom and under the law of the State, and we can only implement it as it is. Unlike the Sages of Jewish law who would appraise the mind of the obligee, whether he would not have entered into the obligation

had he known what awaited his daughter, we are commanded to infer the intention of the contracting parties from the terms they employed and those alone, and we do not mend what they themselves mistakenly did. The appellant could easily have contemplated that the marriage of his daughter might not work out and could have provided in the contract for his obligation and the obligation of the respondent in such event. Not having done so, the Court will not make a contract for him.

2. Independent Contractors

C.A. 368/77

ZIKIT... LTD. v. SERIGEI ELDIT LTD.

(1978) 32(3) *P.D.* 487, 493-494, 496-497

The appellant was ordered to pay damages for the defective printing of cloth belonging to the respondent, which was intended for the making of bathing costumes.

Elon J.: *Prima facie* it seems that such is not the law. Where the larger part of the material belongs to the contractor, the contract is one of sale; all the more so where the material entirely belong to him. That is also the position under Jewish law. When construing the laws of sale and contract for services in the legislation of the Knesset, we must resort primarily to the approach taken by Jewish law to the problems that come before us (see sec. 10 of the Contract for Services Law, 1974, regarding the autonomy of the Law and its independence from art. 46 of the Palestine Order in Council).

Contracts for services have been extensively dealt with in Jewish law. The very term "contracts for services" in the sense of the statute is taken from Jewish sources (see *Baba Metzia* 112a and Rashi and Meiri *ad loc.*; *ibid.* 77a and Rashi *ad loc.*; *M.T. Sekhirut* 9:4 and *Maggid Mishneh ad loc.*; *Resp. Maharam miRothenburg*. Prague ed. 477: *Resp. Avnei Nezer, H.M.* 52) but this is not the occasion to expand thereon (see A. Gulak, *Yesodei haMishpat haIvri*, II, pp. 187-88; S. Warhaftig, *Jewish Labour Law*, pp. 365-69). For the present purpose it is sufficient to consider one *responsum* alone... The question was addressed to R. Aaron Sasson (*Resp. Torat Emet* 119):

> Reuben requested a scribe to draw up a *ketubah* [marriage document] for him. The scribe did so but retained the *ketubah*, Reuben having refused to pay for it... Does Reuben transgress (the prohibition of withholding wages) if he does not pay?

According to Jewish law, an employer must pay a workman his wages on completion of the work and he is forbiden to delay payment (*Lev.* 19:13; *Deut.* 24:14-15; *Baba Metzia* 111a; *M.T. Sekhirut* 11:1; *Hoshen Mishpat* 339:1). The prohibition also applies in the case of an artisan (*Baba Metzia* 112a; *M.T. Sekhirut* 11:3; *Hoshen Mishpat* 339:6)—"A contract for services is like the hiring of a workman and (the hirer) must pay in time" (Maimonides, *loc. cit.*). It is different with debts of another character, such as that arising from a sale or loan, where the prohibition of withholding does not apply. The question therefore asked of R. Sasson was whether Reuben in the given circumstances had infringed the prohibition.

At the beginning of his *responsum*, R. Sasson seems to think that the answer is clear in view of the above rule that a contract for services is similar to the hiring of a workman with regard to the prohibition of withholding, but later on he inclines to the view that in the particular case before him it is not so:

> In any event it seems that one must consider the matter carefully. How does the prohibition apply to the scribe? He is not a workman hired by the day; that is simple. Nor does he appear to be an independent contractor since an independent contractor receives an article from the owner and he repairs it (does work on it) but has no property in the substance of the article, for which reason he is called an independent contractor. In the present case, however, the paper and the writing belong to the scribe himself and possibly he is not to be called an independent contractor but a vendor who sells something to his neighbour and, if not paid, a loan (debt) is created, and no law of hiring and contracting is contravened.

From the continuation of his *responsum*, it appears that R. Sasson did indeed incline so to decide. He ends by saying, "If so, in the case of this scribe there has been no infringement of the prohibition, because it is neither hiring nor contracting."

Is the case of the scribe writing a *ketubah* and supplying the material similar to the case of the artist who paints a portrait and supplies the canvas and the paint? *Prima facie* it would appear to be so, and that leads to the conclusion that under Jewish law the latter case would involve not a contract for services but a contract of sale. It is indeed very possible to distinguish between the painter's canvas, which is quite subsidiary and

of no value in comparison to his craft, and the parchment of the scribe which serves a more important function alongside the art of writing, but from the plain meaning of sec. 2 of the Sale Law and sec. 2 of the Contract for Services Law, it seems that if the larger part of the material —and certainly if all the material—belongs to the independent contractor, a contract for sale exists, and that would cover both the writing of a *ketubah* and the painting of a portrait...

Once it is proved that Zikit spoiled what it did and as a result the bathing costumes are worthless, the necessary consequence is that Zikit must compensate Eldit for the loss it has incurred, the cost of the spoiled cloth... "If a person gave something to craftsmen to put in order and they spoiled it, they are bound to pay. How?... If he gave wool to a dyer and the dye burned it, the latter has to pay the value of the wool" (*Baba Kamma* 98b and 100b; *M.T. Sekhirut* 10:4).

Zikit can only be released from the obligation to pay damages if it is proved that Eldit got something for the spoiled cloth and that was in fact shown by evidence... The amount which Eldit received was in fact deducted from the amount of damages awarded against Zikit.

3. Brokers

C.A. 166/77

DADON v. ABRAHAM

(1979) 33(3) *P.D.* 365, 372-373

The appellant refused to pay commissions to the respondent, an estate agent, whom he had asked to find him an apartment to buy and who had drawn up a memorandum of agreement between the appellant and the prospective seller. It turned out, however, that the seller was the owner of only half of the property to be sold.

Elon J.: It should be noted that in Jewish law as well, in which many cases are to be found dealing with middlemen, the right to commissions accrues when the parties reach a binding agreement (see R. Yisrael Grossman, *Resp. Halikhot Yisrael* [Jerusalem 1977]—a treatise devoted entirely to the relevant law — 5-6 and the sources cited there). Special attention is devoted to the rights of the marriage broker, who has an honored

place in Diaspora Jewry, to receive a brokerage fee for bringing together the couple concerned. The observations of R. Yehezkel Landau are particularly illuminating on the distinction between the go-between in a commercial transaction and the marriage broker, in respect of the date when the right to receive commissions first arises. These observations enable one to understand the rationale of the rule regarding the receipt of commissions upon a binding agreement being concluded by the parties:

> An important difference exists between marriage and a commercial transaction. With the latter there are no intermediate matters, the transaction depends only on money, and when the parties are satisfied with the price at which the one wishes to sell and the other wishes to buy, no further details are involved, and since the middleman has gotten them to agree on the price, the matter is concluded and nothing remains to hold things up except *kinyan* [formal act of acquisition].

In the case of marriage contracts, however, there are, as we know, many details, apart from the agreed dowries, that have to be agreed upon, such as the obligation for maintenance, the marital home, clothing and gifts. And it is not unusual that even when the parties are agreed, some small matter may frustrate the marriage. It is for this reason that so long as the marriage broker has not obtained the consensus of the parties, even as to the smallest item, no contract has been concluded (*Resp. Noda biYehudah*, Mehadura Tinyana *Hoshen Mishpat* 36; see also S. Shilo, "The Marriage Broker in Jewish Law" (1972) 4 *Mishpatim* 361).

4. Maintenance

See: BUKHABZA v. BUKHABZA, Part 11, Labour Law, p. 833.

5. Medical Fees

C.A. 244/72

PLANTEX LTD. *et al.* v. THE WELLCOME FOUNDATION LTD.

(1973) 27(2) *P.D.* 29, 61-62

Against an action for infringement of a patent, the appellants argued that the invention claimed in the patent is not a valid patent, that the claim is not fairly based on the discovery as described in the patent, that the invention possesses no "inventive novelty", and that the invention, being a therapeutic process, is not patentable.

Kister J.: I concur in dismissing the appeal on the grounds advanced by my learned colleague, Witkon J., subject to the observations of my learned colleague, Kahan J.

There can be different views regarding the proper policy of the legislature and the courts concerning medical patents — whether to act liberally and give the inventors an opportunity to exploit their invention, or to restrict such opportunity and enable the public to enjoy more widely every new discovery; every approach has its advantages and disadvantages.

Enabling an inventor in the medical field to exploit his invention will indeed encourage doctors and scientists to devote their efforts to search for new remedies or to develop new treatments. On the other hand, it may limit the opportunity of the general public to benefit from these discoveries, especially those who lack means.

Accordingly I do not think that the court should unequivocally adopt one approach or the other, and much depends upon whether scientists are able to get encouragement from public institutions and thus not need to exploit their inventions in order to finance their research.

It is pertinent here to mention the approach of Jewish law and Jewish tradition. I shall cite Nahmanides who lived in Spain seven centuries ago and was both a physician and a leading legal scholar, and who is still recognised as authoritative. He writes in *Torat haAdam*:

> With regard to medical fees, it seems permissible to take a fee for attendance [when the doctor cannot be otherwise employed] and inconvenience, but a fee for teaching is forbidden since loss of life may be involved...and it has been said regarding the Commandments: 'Just as I [the Divinity] act without payment, you must also act without payment'. Hence a fee for knowledge and education is forbidden.

Nevertheless where a doctor agrees with a sick person on a high fee, it must be paid. As Nahmanides says, "If a considerable medical fee has been stipulated, it must be paid to the doctor since he is selling his wisdom and that has no price....The fee of a doctor which is commensurate with his worth must be paid to him as agreed." In the same source Nahmanides explains the halakhic grounds for the validity of agreements on the amount of the fee.

The law is different regarding medications, as Nahmanides says: "A person who takes for the drugs he supplies more than they are worth, because of the distress of the sick person, need only be paid their value." This rule with some variation of language is found in *Tur* and *Shulhan Arukh, Yoreh De'ah* 336:2 and *Hoshen Mishpat* 264:7.

Thus, as we have said, an agreement about a doctor's fees is binding. In view, however, of the principle that medical matters involve the saving of life and that healing the sick is a Commandment directed at the doctor, there are also limits to the said rule. *Resp. Radbaz*, Part 3, 556, states that in a place where there is only one outstanding doctor and he does not wish to give his services except for a very high fee, he is entitled only to the usual fee.

The view that a doctor may not, in principle, receive a fee for his knowledge and teaching has further implications. The Chief Rabbi of Great Britain, Dr. Immanuel Jakobovitz, writes in his *Jewish Medical Ethics* (1967), chapter 18, that these are: the development of a public health system, in which communities engage physicians and pay them a salary, as they do with *dayanim* (judges); and the duty, at least moral, of treating, without charge patients who are poor.

It therefore seems that even today, insofar as public medicine has developed, scientists and doctors receive remuneration or financial support from public institutions, and in this manner obtain encouragement to make medical discoveries. The need for inventors themselves to exploit their inventions has been reduced and they do not have to "sell their knowledge"; the general public can thus enjoy their discoveries. To the extent, however, that the public does not maintain and encourage the medical inventor, his knowledge in a particular area may be of inestimable worth and he is to be given the same possibility of exploiting it as with any other invention.

Chapter Eleven

SERVITUDES

1. Privity and Debt—*Shibuda deRabbi Natan*

See: MENORAH LTD. v. KATZIBOAH, Part 12, Interpretation, p. 892.

C.A. 523/65

ISRAEL v. HASNEH INSURANCE CO. LTD.

(1966) 20(4) *P.D.* 3, 5

Silberg D.P.: It is decided law from early times than an insurance company is generally not a party to a dispute in the case of an employee who has been injured and the insurance policy was made not with him but with the employer, who was the tortfeasor, as happened here. The accepted rule, as has been repeatedly held in this court, is that a person who is not a party to an insurance policy cannot claim thereunder, even if he is the ultimate beneficiary....That does not, however, exclude the operation of "the rule of R. Natan" that if A is indebted to B who is indebted to C, A may be required to pay C what is due from him to B (see *Ketubot* 19a; *M.T. Malveh veLoveh* 2:6; *Hoshen Mishpat* 86:1). This rule does not entail any basic revision of Israeli law, although the occasion to adopt it has not yet arrived, failing a general codification of the law of obligation according to the principle of Jewish law.

Chapter Twelve

GUARANTEES

1. *Asmakhta*—Imperfect Resolve

See: BOHAN INSURANCE CO. LTD. v. ROSENZWEIG, p. 597.

2. Guarantor-Contractor

C.A. 573/73

SHEMEN INDUSTRIES LTD. v. I.S.L. INDUSTRIAL SERVICES LTD.

(1974) 28(2) *P.D.* 737, 747, 748-749

The issue in this appeal was whether the appellant company, assuming it was not liable to pay the manufacturers of certain goods because of breach of contract, was also not liable vis-à-vis the respondent company that had financed the contract.

Cohn J.: I, too, have greatly enjoyed reading the grounds for the Registrar's decision and out of respect for him I venture to add a few words of my own.

The learned Registrar drew attention to the rules of Jewish law (*Baba Batra* 174a; *M.T. Malveh veLoveh* 25:5; *Hoshen Mishpat* 129:17) and wrote that the "guarantor-contractor" (i.e. a guarantor from whom the creditor can claim directly, without first acting against the debtor) "guaranteed to finance the transactions of the merchant against doubts arising about the goods", and that the finance agreement that was before him was "in the language of the halakhah only a guarantee-acceptance agreement".

Although the independent guarantor in Jewish law is not necessarily, or only, a person who guarantees the supply of goods to the purchaser for whom he is the guarantor, I agree that the present respondent can be regarded as a guarantor-contractor within the meaning of Jewish

law. A guarantor-contractor differs from an ordinary guarantor in that he assumes towards the creditor a principal and direct obligation, not depending on the obligation of the debtor and not conditional upon the creditor first suing the debtor. His obligation is created by the formula: "Give him and I shall give you" or "Give him and I shall be contractor" (Rema to *Hoshen Mishpat, loc. cit.* 18, citing Rosh and Rashba), which is construed as an agreement that the creditor will give something to another and the contractor will give the consideration therefore to the creditor, "since by the same term used in telling him to deliver something to the other he undertook to repay, which means that it is as if he himself received the loan at once" (Rashbam *Baba Batra* 174a). What is required for creating *kablanut* (contractorship) is for the guarantor to ask the creditor to give something to the debtor on the strength of the obligation of the contractor to repay the creditor directly without applying to the debtor...

The rule in Jewish law is that "where a borrower says [to the creditor] 'bring in the contractor on my behalf,' then, even though he has not authorised the latter to pay, if the contractor has paid of his own accord, and even if the lender has not yet sued the borrower...he is obliged to repay" (*Hoshen Mishpat* 130:2). This applies when there is no express obligation on the part of the borrower towards the contractor to reimburse him for what he has paid to the creditor; "There is no loan under deed more effective than this" (*ibid.* 130:4).

I have found in Gulak's *Otzar haShetarot* a form of a guarantor-contractorship for the supply of goods to someone and payment of the price by the guarantor-contractor; and, anticipating the kind of argument put by the present appellant, it is stated there that the guarantor-contractor cannot plead fraud or mistake or anything else (at pp. 226-27, from the *Handbook of Deeds* by R. Shmuel Jaffe in the seventeenth century). The finance agreement before us also stipulates that the obligation of the respondent towards the creditor is "irrevocable and unconditional" and similarly the obligation of the appellant towards the respondent is "absolute and irrevocable". These obligations do not bear any interpretation other than that each of them are absolute and do not depend on the quality of the goods delivered to the appellant and are unaffected by any pleas or claims the appellant may have against the suppliers.

It has happened before that a debtor, a borrower, has claims against his creditor which might exempt him from his obligation, but nevertheless the obligation of the guarantor-contractor towards the creditor remained in full effect and therefore also the obligation of the borrower to the guarantor-contractor. When, for example, the creditor held some pledge or other security for the debt and returned it to the debtor (or "has caused the termination of the security given to secure the guaranteed obligation",

in the terms of sec. 6(b) of the Guarantee Law, 1967) the ordinary guarantor is released from his obligation, which is not the case with a guarantor-contractor whose obligation to the creditor is independent of the relations between creditor and debtor, and, as I have said, stands on its own (Rema, as above, citing Rashba). Rashba decided that even when the obligation of the principal debt is annulled because of *asmakhta* (where it depends upon the occurrence of an uncertain event that might only occur in the future), the guarantor's duty to fulfill his obligation persists (Rema, as above), and although this rule is disputed (see *Bayit Hadash* by R. Yoel Sirkis to *Tur*, *Hoshen Mishpat* 129) regarding the ordinary guarantor, it certainly obtains with regard to a guarantor-contractor.

Hence, even if all the submissions of the appellant against the suppliers were proven to be correct, that would not detract from the respondent's obligation towards them or from the appellant's obligation towards the respondent.

3. Right of Guarantor to Argue Against Execution of Obligation

C.A. 255/81
KOT v. KOT *et al.*
(1982) 36(1) *P.D.* 237, 241

Under an agreement for divorce made between the appellant and his wife, the second respondent, the appellant transferred to the wife his share in a joint dwelling whilst the wife undertook to maintain their infant son, the first respondent, apart from a symbolic sum of IL. 50 which the husband was to contribute. The wife also undertook to indemnify him against any sum in excess of IL. 50 for which he might become liable in respect of maintenance; the third respondent guaranteed this obligation. The agreement was approved by the District Court, but not before it was explained to the parties that in the event of the wife not having the means to indemnify the husband, the indemnity would be of no effect. In an action to enforce the indemnity, the District Court ordered that its enforcement should be postponed, and likewise the enforcement of guarantee, until the wife acquired means.

Elon J.: I harbor doubt whether the words, "any plea the debtor may have against the creditor in relation to the obligation" (sec. 7(a) of the Guarantee Law, 1967), includes a plea in connection with the implementation of an obligation, such as postponing payment, and not merely one affecting the obligation as such. It seems to me axiomatic that the defence under sec. 7(a) applies also to pleas that do not affect the obligation as such; that is perhaps suggested by the words, "in relation to the obligation", in contrast to sec. 5(c), for example, which speaks of "any other variation (that) occurs in the guaranteed obligation" which signifies apparently the obligation itself. This understanding of the matter is also required by comparing sec. 7(a) of the Bill of the Law, which reads: "Any plea which a debtor has against the obligation shall also be available to the guarantor, and so long as the debtor is entitled to rescind his obligation, the guarantor is entitled not to fulfill his guarantee"....In place of "a plea against the obligation", which is intended to go to the obligation itself, the Law now speaks of "in relation to the obligation", which may include a plea regarding postponement of implementation of the obligation. The same may be concluded from the position taken in Jewish law — see *M.T. Malveh veLoveh* 26:2; *Hoshen Mishpat* 129:9; *Siftei Cohen ad ibid.* 23, but the present instance is not the occasion to expand thereon.

Chapter Thirteen

AGENCY

1. Duty to Act for Benefit of Principal

C.A. 462/68

REICH *et al.* v. LOCAL COUNCIL OF KIRYAT MOTZKIN *et al.*

(1968) 22(2) *P.D.* 893, 898

The Local Council leased a plot of ground and erected an office building on it. Then, under agreement, it granted the third respondent the right to build a house adjoining this building. An apartment in this house was registered in the name of the appellants by means of a transfer of the lease from the Council to the appellants. The second respondent signed the transfer under a power of attorney the appellants had given him but, in error, an agreement made between the Council and the third respondent reserving the right of the Council to build on the roof of the offices was omitted. The appellants claimed that the signature of the second respondent was invalid.

Cohn J.: Even in Jewish law, where it is accepted that a principal may tell an agent who has erred and adversely affected his rights, that he (the agent) was appointed for the benefit of the principal and not for his detriment, nevertheless a third party who relies on the agency for ostensibly good reason, such as a written power of attorney formulated in general terms, may argue that the principal stipulated with the agent, "whether for his benefit or his detriment", and the burden of proving that the agent was sent only for benefiting the principal and not prejudicing him lies always on the principal (*Hoshen Mishpat* 182:4).

Accordingly, it seems to me that the first respondent could rely on the second respondent who acted as attorney for the appellants, and the learned District Court judge was right in leaving the question open whether in fact the building planned for the roof entailed any damage to the appellants. The time for determining this question will come, if at all, when the appellant claims damages from whoever he can sue, if anyone. The first respondent, at all events, is not their opponent in this matter.

C.A. 242/70

MISHEOL HAKRAKH LTD. *et al.* v. GROVNER *et al.*

(1970) 24(2) *P.D.* 692, 699, 701

The first two respondents bought an apartment from the first appellant. When the contract was being drawn up, the respondents knew that the roof belonged to one of the apartments in the building. Later a special agreement was registered attaching the roof to the apartment, and an addition was made to the agreement providing that the expenses incurred for the common parts should be borne according to floor area, excluding the roof. This addition was registered after the respondents had taken possession of their apartments but before ownership was registered in their names. They brought proceedings to have the addition declared void as contrary to their contract with the appellants.

Cohn J.: The respondents argue that registration of the addition to the special agreement was a breach of contract...

Perhaps it is not superfluous to add in this connection that the action of the appellant is contrary to the basic concepts of the *halakhah*. In Jewish law it is a leading rule that no obligation can be imposed upon a person in his absence (*M. Eruvin* 7:11; *M. Gittin* 1:6 and elsewhere). Whoever regards himself as the agent of another so as to burden him without his knowledge with expenses and payments, "we are witness" to the fact that he is not an agent to prejudice the principal but only to benefit him, not to charge him with some obligation but only to entitle him to some right. Regarding the expenses of a cooperative house, no one is bound to participate in the burden of the expenses "unless he is shown to be satisfied with what his fellowman did" (*M.T. Shekhenim* 5:1), but not if another obligates him without his knowledge.

2. Conflict of Interests

C.C.(T.A.) 430/51

BAR-SHIRAH *et al.* v. VARNIKOV *et al.*

(1960) 23 *P.M.* 379, 397-398

Kister J.: If there were any occasion to apply Jewish law here, the sale would also have to be set aside. It is a principle of Jewish law that a guardian (trustee) may not sell trust property to himself. *Tur, Hoshen Mishpat* 175:30 states that a trustee may sell the trust property to others but not to himself. This rule, it may be observed, is prescribed in relation to the case where a landowner makes an abutting owner his agent for the sale of his land. The halakhic authorities have given two reasons for this rule. First, a person cannot be both vendor and purchaser. Second, it is a matter of the suspicion that surrounds the transaction. If we take as our starting point the first, no sale occurs. If the second, the sale may be set aside. I have emphasised the point about abutting owners and I adopt the observations of Bah to *Tur, ibid.*:

> Even though the principal knows that every abutting owner will normally put off a potential buyer in order to enlarge the area of his own land and that the abutting owner concerned wants to buy the land involved, but still appoints him his agent...the abutting owner may still not buy for himself by reason of the suspicion that arises.

As regards an agent appointed to sell at a given price, some authorities take the view that in certain circumstances the agent may acquire the property (see *Ba'er Hetev* to *Hoshen Mishpat* 185:5, which also cites the contrary opinion that extends the rule to require the agent-purchaser to account for any profit he may make on a subsequent resale or on prices later rising).

If that is the situation with regard to an agent, it is all the more so with regard to a guardian. The very status of guardian, appointed by a court for the benefit of absent people who cannot control his actions, calls for greater precautions. Rema to *Hoshen Mishpat* 290:8 finds only one transaction which a guardian may enter into for himself, i.e. the investment of moneys of a minor:

> There are those who say that just as a guardian can give it to others, he may take the money for himself, as long as he does it before the court, to allay any suspicions.

The difference between a loan and a sale was clearly explained in the *Shulhan Arukh* of R. Schneur Zalman of Lyady (*Hilkhot Mekhirah* 15):

> A guardian is not permitted to sell anything to himself, even if he makes the sale in court, but he is permitted to receive the money of orphans...for in that case, there is no suspicion that he is in a preferred position, because this is not a sale in which there is a suspicion that someone else might have added to the price assessed by the court.

Regarding the sale of a pledge, the holder is not permitted to buy, even when the court has ordered the sale (see *Hoshen Mishpat* 292:19).

C.A. 604/77

MUBERMAN v. SEGAL

(1978) 32(3) *P.D.* 85, 98-99

Under an agreement between the appellant—a grandson and the executor of a deceased person — and the respondent — a beneficiary under the will of the deceased — the respondent waived her rights under the will in consideration of a fixed monthly payment. The validity and interpretation of the agreement were in issue.

Elon J.: The invalidity of a legal transaction because of a conflict of interest has been widely discussed in various fields of Jewish law, for example, the sale of a pledge by the depositee when the pledge is a wasting asset and the depositee is allowed to sell it, or the sale of the subject matter of an agency by the agent and so on. "A person who sells a pledge under court order may sell it to others but not to himself for fear of suspicion" (*Hoshen Mishpat* 292:19). "An agent may not buy for himself even at a price at which the owner authorised him to sell" (*ibid.* 185:2).

In the view of some rabbis, even as concerns an agent the reason is the conflict of interest involved in acting for his principal and in acting for himself (see e.g. Bet Yosef *ad Tur, Hoshen Mishpat* 185; Prisha *ad Hoshen Mishpat* 175:30; Bah *ad loc.*; Sema *ad Hoshen Mishpat* 175:26). Other rabbis take the view that the defect in an agent buying for himself lies in the absence of a transfer of control:

> An agent may not buy for himself even at a price at which the owner authorised him to sell, since he was made an agent to sell the land to the customer. He cannot become entitled and acquire it himself, because no one can sell to himself. Sale is only the taking of a thing from one domain to another and in the case of an agent it does not pass out

of his domain, since he occupies the place of the owner (*Tur, Hoshen Mishpat* 185:3 in the name of Rashba).

Special treatment of the subject is to be found with regard to the executor of an estate (called in Jewish law by the general name of *apotropos*) and his dealings with the estate. All take the view that when an executor engages in dealings with the estate for his own purposes, there is a suspicion that in fixing the price and other conditions relating to the transaction, he places his personal advantage over that of the beneficiaries of the estate. The only dispute is over whether the suspicion can be removed and how.

The rule laid down by Rabad of Posquieres in the twelfth century is as follows: "Just as an executor may give money [of the estate] to a trustworthy person to deal with, he may take it for himself and make a profit as another could, provided he notifies the *Bet Din* [religious court] thereof" (*Tur, Hoshen Mishpat* 290:15).

R. Ya'akov b. Asher, Ba'al haTurim, disagrees with Rabad, and in his opinion, even with permission of the *Bet Din*, an executor may not act in this manner. "It seems to me that it is shameful to take the money to transact business, because of the gossip that this will instigate" (*Tur, loc. cit.*). Most rabbis decide the law in accordance with Rabad (e.g. Ritba *ad Baba Batra* 144b; *Nimukei Yosef* to Rif *ad loc.*). That is also the view of R. Yosef Karo in *Bet Yosef ad Tur, loc. cit.*: "What [Ba'al haTurim] wrote that it is disgraceful...is not comprehensible since he notified the *Bet Din* thereof." Also R. Moshe Isserles, the outstanding glossator of *Shulhan Arukh*, states that "some hold that just as an executor can give (the money) to others, he may take it himself provided he does so in court, so that there be no gossip" (Rema to *Hoshen Mishpat* 290:8).

What follows from the foregoing is that Rabad forbids the executor of an estate to effect any transaction with the assets of the estate even if he notifies the *Bet Din* thereof; even though there is then no cause to fear that because of a conflict of interest the estate will be put at a disadvantage since the *Bet Din* will examine the transaction before approving it, there is still the matter of "gossip", what people will say, and that is "shameful". But in the view of most of the halakhic authorities, including Karo...one must not be excessive in one's fears. If a *Bet Din* approves a transaction effected by an executor on his own behalf with the assets of the estate, he is permitted to proceed. It should indeed be said that all the above sources involve instances in which the executor effects the transaction without obtaining permission from the beneficiaries, but in view of the fact that the central point is the suspicion of a conflict of interests, it makes no difference whether or not the transaction was carried out with their knowledge.

3. Appointment of Agent Not Appropriate to a Passive Act

See: SALIMAN v. ATTORNEY-GENERAL, Part 6, Penal Law, p. 432.

4. Power of Attorney Without Express Indication of Agent

Main. 1584/63

NEUDORFER v. NUSSBAUM

(1964) 39 *P.M.* 30, 34

An action for maintenance was instituted under international convention by an infant living in Germany. Under power of attorney, authenticated by public notary and a judge, the mother appointed "the Receiving Agency in Israel" to act as the claimant's representative, or to appoint another fit person to do so. The Agency appointed the Legal Aid Office in Jerusalem, which in turn nominated a lawyer to act. Two questions arose: Was the power of attorney sufficient to enable the lawyer to proceed, and was the signature of the mother properly authenticated?

Kister J.: People living abroad clearly cannot be required to do more than to define the body that is to act on their behalf, whether such a body constitutes a legal entity or not.

In Jewish law as well, concerning the conditions for drawing up a divorce, it has been held to be a valid authorization when a man says "Let him who hears me, write a *get* [bill of divorce] for my wife" (*Even haEzer* 141:19) or when he says to ten people: "Write a *get* for my wife", in which case one of them writes the *get* for the others, and even when he says, "All of you write the *get*", one of them will write it in their presence (*ibid.* 120:7).

Accordingly I conclude that one should not deal too strictly with a power of attorney when it is obvious to whom and for what purpose it has been given.

5. Worker Engaged to Find Lost Property

Cr.C.(J'lem) 191/76

STATE OF ISRAEL v. AL-FARUK

(1978) 1 *P.M.* 116, 118

The Court was asked by the State to order that coins that had been stolen by the accused from the excavations at the Temple Mount and which were presented as evidence at his trial should be returned to the dealers who had bought them in good faith. The District Attorney had undertaken to return the coins to the dealers, notwithstanding the objections of the Archeological Delegation. The State claimed that the coins had never belonged to the Archeological Delegation, for under the Antiquities Law, no person can own archeological finds before the Director of the Department of Antiquities releases them.

Bazak J.: There is no doubt that a person may, by means of his attorney, take possession of chattels that are ownerless, and acquire ownership of them by taking such possession, for "a person's agent has the same status as that person himself" (sec. 2 of the Agency Law, 1965), and every article which falls into the hands of the agent in the course of his agency is held by the principal's trustee (sec. 10(a)), and the agent's actions, including his knowledge and his intent, bind and entitle, whichever is appropriate, the principal (sec. 2). Jewish law, too, stipulates that in general, something found by a worker in the course of his work belongs to him, but if he was hired "to find lost things", then his findings belong to the employer, "even if he found a purse full of coins" (*M.T. Sekhirut* 9:11).

6. Good Faith

C.A. 366/73

BORNSTEIN v. GADOMSKY

(1976) 30(1) 25P.D. 179, 185

An action for specific performance of a contract to sell land was dismissed on the ground that the lawyers acting for the respondent were not empowered to sign the contract.

Kister J.: The considerations that motivated the lawyer would have been, and in fact were, the same as those of the respondent, i.e., not to sell the plot of land whilst attachment was imminent, and only when he knew how matters would turn out, to sell it at a higher price, sufficient to cover the outstanding claim. So long, however, as the attachment was pending, there was no point in selling the land and letting the proceeds be subject to attachment. This situation was already well understood in Talmudic times: "The custodians... sell beasts, manservants and maidservants, houses, fields and vineyards so that they provide sustenance and not so that they lie idle", and this forms the background to the rule prescribed in *Hoshen Mishpat* 290:11. The only benefit that could ensue from the transaction would be that of the purchaser, and it is not the function of agents of a vendor to be concerned with the purchaser's interest.

7. Donee of Power of Attorney Does Not Acquire Rights Which the Donor Does Not Possess

C.A. 283/67

TRUSTEES IN BANKRUPTCY OF RAFIYAH *et al.* v. STATE OF ISRAEL *et al.*

(1968) 22(1) *P.D.* 124, 137

The issue here was the right to damages in respect of trees uprooted from land held by a bank under an irrevocable power of attorney to assure the payment of a debt.

Kister J.: The decision of the learned judge based on the power of attorney was, with all respect, mistaken. The giving of an irrevocable power of attorney is a matter of indifference since the grant of the power is subsidiary to the transaction itself. It is only a means for implementing or ensuring the implementation of the transaction. According to art. 1521 of the Mejelle, some right must exist in order to render the power irrevocable, and failing such right, the power is not effective. The same obtains under other statutes. In the present case, the lawyer was empowered to act in place of his clients for registering the mortgage, the transfer etc., when they agreed to give the bank security in the form of a mortgage or ownership. Clearly, if the transaction was invalid or if, because of the rights of other creditors, the debtors were not at liberty to carry out what they had agreed upon, i.e. to register the mortgage or to transfer ownership, then neither is their agent.

The rule is that an agent has the status of his principal and possesses no greater rights than his principal. In Talmudic terms: "Would you think that they are our agents and can do something which we cannot?" (*Kiddushin* 23b).

The irrevocability of a power of attorney means only that the principal cannot revoke the agency, and even when he manifests opposition to the agent's acts, the latter may proceed in his place and do everything that he could and was entitled to do.

Chapter Fourteen

BAILEES

1. Definition of Bailee Compared to English Law

Cr.A. 27/56
ZOLBERG v. ATTORNEY-GENERAL
(1956) 10 *P.D.* 636, 638, 642

Silberg J.: What happened here is as follows:

(a) In November-December 1954 the appellant was Second Officer aboard the "Geffen", an Israeli ship sailing between Europe and this country. It was then carrying cargo and passengers from England, among them a tourist, Analisa May.

(b) At one point in the voyage, apparently at a Portuguese port, there were discovered a number of thefts from the passengers' baggage kept in the ship's hold. Bags and trunks, including those of Miss May, were broken into, and scattered around them were many articles, including an English typewriter. The matter was brought to the attention of the First Officer, Reuven Hirsch, by the appellant, and Hirsch told the appellant to put the typewriter back, "if he were successful in finding the trunk" (from which it had been taken). Thereafter, he showed no further interest in the thefts. The appellant was not told what he should do with the typewriter should he be unable to find its proper place, but the procedure followed on the ship was to put the thing "found" in such cases into the purser's office. That was indeed done on the appellant's orders after, as he said, the owner of the typewriter could not be ascertained.

(c) At the end of November 1954 the ship reached Israel and Miss May learned that a number of things were missing from her baggage, including the typewriter. She went to the police, who conducted enquiries among the ship's crew. A month later the typewriter was found in the cabin of one Amos Hecht, who had replaced the appellant as Second Officer. No one disputes that it was the appellant who gave Hecht the typewriter, and the principal question before us and before the Court below is what

preceded the handing over of the typewriter, how and in what circumstances did it take place...

Stephen's (vide infra) definition, which is most casuistic and rather antiquated, is as follows:

> When one person delivers, or causes to be delivered, to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee (Stephen's *Digest of the Criminal Law*, 3rd. ed., p. 215, cited in Stroud's *Judicial Dictionary*, pp. 158-59).

According to this definition, under English law deposit is very similar but not entirely identical to the "bailment" of the four kinds of bailees mentioned in the Pentateuch — the gratuitous bailee, the paid bailee, the hirer and the borrower (*Baba Metzia* 93a). In the passage cited from Stephen, we find not only these prototypes but also — precisely and surprisingly — their derivatives: the lender on a pledge of Jewish law, one who transports a thing from one place to another, and craftsmen, all of whom are treated as bailees, either gratuitours or paid, in the sources of Jewish law (*M. Baba Metzia* 80b; 82b; *Baba Metzia* 81b-83a; *M.T.Sekhirut* 3:2; *id.* 10:1 and 3; *Hoshen Mishpat* 72, 304 and 306).

On the other hand, we do not find in Stephen "the bailee of a lost article" of Jewish law (see *Baba Kamma* 56b), and this is not mere chance or omission. There is good reason for it, since in English law — unlike Jewish law—the rule is that a person is not deemed a "bailee" or "depositee" unless the "deposit" has been delivered into his trust by the depositor.

2. Classification

See: ALI v. SASSON *et al.*, see below.

3. Negligence in Bailment

C.A. 341/80

ALI v. SASSON *et al.*

(1982) 36(3) *P.D.* 281, 289-292

A football pools coupon filled in by the appellant, having subsequently been found to be missing, was reported to the football pool organisers and consequently was not included in the weekly competition. The appellant claimed that his coupon had contained the winning forecast and he was entitled to the first prize. His action was dismissed in the District Court.

Sheinbaum J: The classification of bailees under the Bailees Law, 1967, follows Jewish law, as explained in the Explanatory Notes to the Bill of the Law. See also Z. Tzeltner, "The Law of Contracts in its Development During Twenty Years Since the Establishment of the State" (1975) 29 *haPraklit* 56, 71, and N. Rakover, "The Jewish Law Sources of the Bailees Law, 1967" (1968) 24 *haPraklit*, 208, 211. Since Jewish law was considered by the draftsmen of the Law, we may therefore be assisted by Jewish law in understanding the concepts employed by the statute (although not all its provisions follow the rules of Jewish law).

We learn from the *Mishnah*, *Shevuot* 8:1, that—

> There are four bailees, the unpaid bailee, the borrower, the paid bailee and the hirer. The unpaid bailee takes an oath in all cases, the borrower pays in all cases, the paid bailee and the hirer take an oath in the case of injury, capture or death, but pay for loss or theft.

We also learn from *Baba Metzia* 3:11:

> If a man deposits money with his neighbour who binds it up and slings it over his shoulders or entrusts it to his minor son or daughter and locks the door before them but not properly, he is liable because he

> did not look after it in the manner of bailees. If, however, he looked after it in the manner of bailees, he is exempt.

Thus, in Jewish law the gratuitous bailee is liable only for negligence (*peshiah*). As the obligation of this type of bailee is summed up in *Hoshen Mishpat* 291:1: "An unpaid bailee is not liable for theft or loss and has to pay only for negligence." The same article, in paras, 13 and 14, goes on to explain that looking after a thing in the manner of bailees depends on the nature of the deposit. Where the deposit is kept in a proper place, the bailee is exempt but not otherwise.

It seems that one may discern the common features between the "negligence" (*rashlanut*) of a bailee in the Bailees Law—if we construe it with the help of the Civil Wrongs Ordinance—and between the negligence (*peshiah*) of Jewish law.

A bailee must act in the manner in which a reasonably intelligent bailee would act and place the thing of which he is the bailee in a suitable place under the circumstances. If he does not, he is negligent in his bailment in the sense both of Jewish law and the Bailees Law.

It seems that Rakover was basically right in saying that, notwithstanding the difference in terminology, the legal constituents of negligence in both systems are alike. He points out that R. Herzog translates the Hebrew term *peshiah* as "negligence" (*The Main Institutions of Jewish Law*, vol. II. pp. 176-77).

In this connection it is noteworthy that the idea that a bailee who is negligent in his bailment is close to being a tortfeasor is mentioned in *Resp. Rashba*, Part 5, 166:

> The reason that the *Torah* charges the gratuitous bailee with negligence... is because he has taken upon himself to guard the article and the depositor relies on it being guarded, and if it is lost due to negligence the former is close to being a tortfeasor.

Nowhere is there any firm determination as to what is the proper course of conduct of a bailee who acts in the manner of bailees. It varies in time and place according to the circumstances. That is the view taken by many authorities, following whom R. Yosef Karo decides the law in *Bet Yosef* to *Tur, Hoshen Mishpat* 291, and R. Moses Isserles in his notes to *Hoshen Mishpat* 291:18. The rule is formulated incisively by Isserlein, *Resp. Terumat haDeshen*, Part I, 333: "All depends on local and contemporary usage as to how to act in a bailment".

With regard to negligence under the Civil Wrongs Ordinance, it has been said (G. Tedeski ed., *The Law of Torts*, 2nd ed., p. 86) that it is a "framework" tort, since the legislature did not establish the elements

of liability but left it to the courts to do justice according to the general directives it has given. The court is therefore the norm creator...

This characteristic of a framework tort is also found in the *peshiah* of Jewish law. As we saw above, the outline is given content by case law, and the latter is thus the norm creator based on value grounds. There are occasions when similar conduct is treated differently because of the different motivations for the conduct. Thus the question whether inadvertence constitutes negligence on the part of the inadvertent person or whether he is to be deemed as acting under compulsion has been discussed. Inadvertence due to other preoccupations, regarded as compulsion, is distinguished from inadvertence due to indolence, constituting negligence (*Yam Shel Shlomo* ad *M. Betzah* II, 6).

We also find that conduct is evaluated according to the results proper in the circumstances of the bailment. In *Resp. Shevut Ya'akov* (by R.Y. Reisher) Part 2, *Hoshen Mishpat* 148, the case of a bailee who had forgotten where he had placed the deposit was distinguished from other cases of inadvertence, the former being treated as negligence and the latter as compulsion, because "great care should be taken with deposits to place them in a safe place and to make a note thereof, and a person who does not do so is guilty of utter negligence, which is not the situation where inadvertence is due to compulsion or is at least faultless and does not amount to negligence."

To summarise, judicial determination of what is "the manner of bailees" or of how to act as a "reasonably intelligent bailee" sets the standard by which a bailee should act in any given circumstances, having regard to time and place.

We may examine the conduct of the form holder... in the light of these rules...

It seems to me that one can infer the proper rule for the present case from the well-known instance of the bailee who said that he did not know where he had put the deposited article. This instance is given in *Baba Metzia* 35a (a similar instance appears *ibid.* 42a), where it was decided that "every [plea of] 'I do not know' is negligence; go and pay."

All the later authorities accept this as the law but give different reasons. *Hoshen Mishpat* 291:7 sums it up by saying that "where a person deposits either utensils or money with his neighbour, and then on being asked for their return the latter says he does not know where he put them, that amounts to negligence and he must pay at once." *Me'irat Einayim* to *Hoshen Mishpat* 291:12 explains the rule: "Every bailee must pay attention to where he put the thing and see that it is in a safe place". It is noteworthy that in *Netivot haMishpat, Novellae* (*ibid.* 15) the rule is based on the fact that the negligent bailee is a tortfeasor.

The facts established in the present case show that the respondent did not pay sufficient attention... and place the form in a suitably guarded place. Therefore, he did not act like a reasonably intelligent bailee in the circumstances.

4. The Parameters of Normal Manner of Bailment

See: ALI v. SASSON *et al.*, p. 685.

5. Expenses of the Bailee of Lost Property

C.A. 46/53

SHAPIRA v. POZNANSKI

(1956) 10 *P.D.* 461, 462, 472-473

Silberg J.: This is an appeal against the judgment of the Tel Aviv District Court which decided by a majority to confirm the judgment of the Magistrate's Court and dismiss an action for possession instituted by the appellant against the respondent.

The present case is not unusual. It has a very tragic background and having regard to that we must consider several of the details...

In October 1941, when the appellant was confined in the Kovno ghetto, a plot of land belonging to him in this country was let by one Moshe Shapira to three individuals, one of whom is the respondent before us, who today apparently occupies the plot alone. Moshe Shapira is the brother of the wife of the appellant. "There were taxes and expenses," he testified, and therefore, "I assumed the right as a brother-in-law, without thinking," to let the plot. Over the years the tenancy agreements were renewed, most recently in 1947, less than a fortnight before the appellant came to this country. His brother-in-law, Moshe, managed to get from the respondent a trivial sum as rent for the period ending on 10 February 1950. Thereafter both the brother-in-law and the appellant refused to receive any rent for the plot. The respondent was requested by the appellant to vacate and upon his not doing so an action for possession was commenced in the Magistrate's Court on 6 June 1950 by the appellant.

It would not be superfluous in this context to compare English and Jewish law with regard to "the bailee of lost property". It seems to me that there is more than an ordinary difference between the two systems of law. To restore lost property, as we know, is one of the express commandments of the *Torah* (*Deut.* 22:1-4) and it is clear that were a finder's claim for his expenses not regulated—in English law, no one would be very eager to pick up lost things but would "close his eyes" to them (as Rashi puts it, *ad loc.*) and transgress "thou mayest not hide thyself". Jewish law therefore prescribes clear provisions in regard both to the actual handling of lost property by a finder and to his claim for his expenses from the owner, especially when the lost property is an animal.

> Everything which does and eats [i.e., works for its keep: Rashi *ad loc.*] must earn its keep, but a thing which does not do and eat is to be sold, for it is said 'Thou shalt return it unto him' (*Deut.* 22:2) i.e., consider how to return it to him (*M. Baba Metzia* 28b).

As the *Gemara* explains:

> Any creature which earns its keep, such as a cow or an ass, must be taken care of for twelve months. Afterwards [if the owner has still not been found] it is sold and the money is laid by; calves and foals must be looked after for three months and thereafter sold and the money laid by.

Maimonides is more explicit in his explanation:

> Where a person finds a living thing which needs to be fed, if it works for its keep, such as cow or ass, he should look after it for twelve months from the day he found it, hire it out and feed it with the hire money, and if the hire money exceeds the cost of feeding it, the balance belongs to the owner (*M.T. Gezelah veAvedah* 13:15). Throughout the time he looks after it before sale by court, if he feeds it out of his own money, he receives his money back from the owner (*ibid.* 19).

Regarding this last rule, Maggid Mishneh observes *ad loc.* very briefly: "This is obvious", i.e., no precedent is needed for that.

Regarding ordinary lost property which does not "eat" and by its nature does not entail out-of-pocket expenses for the finder, the finder is generally not entitled to receive remuneration for looking after it; he must "restore it without charge" and only in rare cases is the owner required to compensate him "as an unemployed labourer", if his time is taken up and he is prevented from doing his usual work (*Baba Metzia* 31b; *Baba Metzia* at 30b and the discussion that follows there; *M.T. Gezelah veAvedah* 12:3; *Hoshen Mishpat* 267).

Chapter Fifteen

EQUITY — THE VOLUNTEER

1. Payment of Debt Without Knowledge of Debtor

See: SHAPIRA v. POZNANSKI, p. 688.

2. "One Enjoys a Benefit and the Other Suffers No Loss"

C.A. 538/80
DARHI v. KORESH *et al.*
(1982) 36(3) *P.D.* 498, 502

The respondents sued for an injunction to prevent the appellant, a neighbour, from extending her apartment by building upon part of the courtyard which was common property and in fact was partitioned off for their use. The extension necessitated their forgoing the use of their garden and increased the distance to their apartment. The Magistrate's Court refused the application but was reversed on appeal to the District Court.

Sheinbaum J.: It also seems that this consideration of the judge is open to criticism. As will be recalled, he regarded the acts of the respondents as being in the nature of "neither you nor I", what is called *middat Sedom* (infamous conduct). Although according to the *Talmud* a person may be compelled not to act in this manner (*Ketubot* 103a and elsewhere) where one gains and the other does not lose anything, here the respondents lost their enjoyment of the garden and the shorter path. As for the appellant's need to extend her apartment because her family had grown, that is certainly important but cannot be the basis for a refusal to grant the relief.

3. Duty to Restore Entitlement

C.A. 280/73

PLYIMPORT LTD. v. ZIVA-GEIGI LTD. *et al.*

(1975) 29(1) *P.D.* 597, 608-609, 611-613

These proceedings involved a breach of patent, and an injunction which the respondent obtained against the appellant in the District Court which was later set aside by the Supreme Court. The appellant then claimed restitution of the profits made unlawfully by the respondent during the time the injunction was in effect.

Cohn J.: The problem of reparation for the loss suffered by a party in consequence of the implementation of an erroneous court judgment has exercised legal theorists since ancient times. The Mishnaic rule is that whoever, not being a court expert, takes upon himself to judge a case and declares the guilty innocent or vice versa, "his decision stands but he must make reparation out of his own money" for any loss thereby suffered (*M. Bekhorot* 4:4). This liability in tort arises from the fact that since he was not adept in judging the case he should have refrained from doing so (R. Ovadiah miBertinoro *ad loc.*). Some authorities only impose liability in tort where the injury was actually done by the tortfeasor and not where he "caused" it; a judge will not be made liable unless he personally executied judgment by his own hand, taking from one and giving to the other (*Bekhorot* 28b).

Where, however, judgment was erroneously given by a proper court or expert, who are not liable to make reparation out of their own money in such an event, the judgment is reversed (*Sanhedrin* 33a) and the status quo restored. As Maimonides formulates it, "judgment is reversed and the situation restored to what it was, and the matter is tried according to the law" (*M.T. Sanhedrin* 6:1). The situation is restored to what it was before the erroneous judgment. Sometimes that is not possible, "as where the one who received the money unlawfully went overseas" (*ibid.*); even if the judgment is otherwise reversible, the status quo cannot be restored, and without restoring the status quo, the judgment is not to be reversed. In such an event, the judge may be made to pay out of his own pocket, even if he is an expert, if he has not obtained authority from the court and the parties have not accepted him (*ibid.* 3). Sometimes where the judge is not an expert and could be made personally liable, but the judgment is reversible because the error was over a Mishnaic rule and not merely a

matter of discretion, the one whose plea was successful in the original trial can be compelled to make restitution (*Resp. Rosh* 56:3).

The same applies to acts of court found to be defective because some prior formal requirement has not been complied with; for example, when property of orphans is sold without prior public notice, which is treated as an error involving a Mishnaic rule, judgment is reversed, the sale is set aside, notice is given and a new sale is conducted (*Ketubot* 100b; *M.T. Malveh veLoveh* 12:10; *Hoshen Mishpat* 109:3).

What is important for the present purpose is that the obligation to repay what was obtained under the erroneous or defective judgment is not a liability in tort; the party compelled to make restitution did not intend to cause the harm occasioned (*M.T. Sanhedrin* 6:1) and is therefore not liable in tort even according to those who urge that "causing" alone will involve liability. The harm done to the party with the entitlement is in any event requited, either by the judge who gave the erroneous judgment or by the party liable in restitution for everything he has received or that he enjoyed under such judgment. "When the judge is exempt from paying, the Sages said that the judgment is to be reversed because of the loss of the party" (Sema *ad Hoshen Mishpat* 25:14) so that he does not sustain any loss. Hence the error made by the court does not entail denying the lawful rights of the innocent party. It may be that the error may entitle a party to something that is not due him, where the damages are met by the judge because of his liability in tort and the "guilty" party is not bound to make restoration, but such entitlement, as if it were from *hefker* (ownerless property), does not prejudice justice. Only where the court's error entails denying the innocent party what is due him will justice be prejudiced.

Nevertheless, it was only in the thirteenth century that R. Mordekhai b. Hillel Hacohen protested against the liability of judges to pay out of their own pockets. Even were such liability appropriate for volunteer judges, who can only blame themselves if they are caught by their errors, "today when judges are compelled against their will to hear cases, they should not pay if they err, for what else can they do?" They therefore reverse the judgment and only when someone refuses to make restitution are they required to pay (Mordekhai *ad Sanhedrin* 1:677, cited also in *Bet Yosef* to *Tur, Hoshen Mishpat* 25 and *Rema* to *Hoshen Mishpat* 25:3).

Kister J.: I concur in what my learned friend, the Deputy President, has said, but because of the novel problems that have arisen in this appeal, I deem it proper to set down the approach taken by Jewish law in actions of enrichment of the kind dealt with here.

The main difficulty in interpreting the law in this case is that on the one hand the appellant has suffered damages, at least according to her

own version, and on the other, the respondent is not to be regarded as responsible for these damages according to the principles of tort law in this country. At one stage the respondent and appellant had support in the judgment which was set aside only on appeal, and the rule is, as the Deputy President said, *actus legis nemini facit iniuriam*. In view of this rule, the appellant has no cause of action in tort with respect to the acts of the respondents since these acts do not constitute a civil wrong.

The rule in Jewish law, as set out in the *Mishnah*, is that even when a tortfeasor is not liable for his neighbour's loss, he must pay the equivalent of the benefit he has obtained. I am referring to the *Mishnah* in *Baba Kamma* (2:2) that deals with injury done by animals. As we know, the rules relating to torts are largely derived from the rules governing injury done by animals. The *Mishnah* states: "An animal is *mu'ad* ["cautioned", i.e. the owner will always pay full damages in this case] regarding consumption of fruits and vegetables...but in the public domain it is exempt; if, however, it derives some benefit, payment is made for what it enjoyed....How is payment made for the benefit derived? If it consumed [food] in the market, payment is made for what it benefitted; if in the sideways of the market, payment is made for the damage it did; if at the entrance of a shop, payment is made for the benefit it enjoyed; inside a shop, payment is made for the damage it did."

The explanation of these rules is that no duty is imposed upon a person to guard his animals from eating fruit found where animals are accustomed to pass, in the public domain, and it is for the owner of the fruit not to put it where animals are known to pass. On the other hand, a person is required to prevent his animals from entering upon a private domain and consuming things there. However, even where a person is under no duty to guard his animals and there is no negligence on his part to constitute a cause of action in tort, since his animal had enjoyed the fruit he must pay for it. The *Gemara* (*ibid.* 19b) discusses what is meant by "it enjoyed", as well as other instances of a person enjoying the property of another and the rule "he benefitted and the other sustained no loss", where no liability arises. The present, however, is not the occasion to enlarge upon these questions and I shall content myself with one example given in the *Gemara* of the idea of "it enjoyed". When an animal consumes costly fruit or vegetables lying in the public domain, its owner is not liable to pay the owner of the produce the value thereof...but only the value of the straw or fodder suitable for animals. I shall not cite Maimonides, *Shulhan Arukh* and the other leading authorities but only one of the more recent, *Arukh haShulhan, Hoshen Mishpat* (391:8): "Everything by which a person obtains a monetary gain from others, although he need not pay for the damage...he must pay for the benefit he obtained."

I shall also cite *Resp. Noda biYehudah* (Mehadurah Tinyana) *Hoshen Mishpat* 24: "I say that the rule relating to whoever enjoys a benefit from work done by his neighbour applies to Reuven who pleads that Shimon must pay him for the benefit he derived from the work expended on the prayerbook which he has paid for."

With regard to the present case, it may be said that Jewish law also recognises the effort made by a person engaged in trade and industry to acquire a group of customers, termed in the language of the *responsa ma'arufia* (clientele). Thus Maharam of Rotenburg, in the thirteenth century, when asked about work that may be done on the intermediate days of a Festival, writes that such work may indeed be done for one's *ma'arufia* so that they do not go elsewhere (*Tashbetz Katan* 166).

The *Talmud* at the end of chapter 4 of *Baba Metzia* discusses the kind of competitive acts that may be carried out, and those that may not (being fraudulent practices). Apart from this, certain restrictions on competition exist that are based on trespass or interference with another person's livelihood or encroachment on another's business. Likewise, townspeople may make regulations for controlling competition by traders from outside. This subject is an extensive one and has been widely dealt with in the *Talmud* and by the later authorities (see in particular *Baba Batra*, chapter 2) and examples are to be found in the judgments of the rabbinical courts in this country (see 1 R.P.D. 276; 3 *ibid.* 336; 4 *ibid.* 9 and 239). The principle that emerges is that a person is entitled to take steps to protect his business so that his customers are not unlawfully drawn away from him.

I have not gone into the question of whether these rights are to be regarded as legal property, since we are not deciding the present matter in accordance with Jewish law, but it seems to me that under Jewish law, and in view of what is common in modern commerce, it constitutes property. This emerges from *Arukh haShulhan* (*Hoshen Mishpat* 201:3) in relation to the disputed question whether things "without substance" are property that can be aquired in contemplation of the law, and the decision is that "wherever in law [acquisition] has no effect, such as a non-existent thing or a thing without substance, or not under one's control...if common practice is that it accords a benefit...then that is the principle of the law." In any event where a person derives benefit from the work of a neighbour without having a right thereto and as a result the neighbor suffers a loss, it seems unnecessary to examine the question; it is clear that the beneficiary must pay for the value of the benefit, as appears from the observations of *Noda biYehudah* quoted above.

The present case is quite simple. The appellant had the right to trade in and distribute his products in this country. It was successful, according

to the evidence it produced, in acquiring a circle of customers until the respondents, who traded in a similar or identical product, were successful in obtaining judgment forbidding the appellant to trade in the same product. Over a period the appellant could not sell the product, until the judgment was set aside by the Supreme Court which held that the appellants had the right to distribute the product in this country all this time. Although under the judgment obtained by the respondents, the latter are not to be treated as tortfeasors, according to the principles I have invoked the respondents are bound to pay the appellants for what they enjoyed during the period in question when the appellant was excluded from the market and the respondents were the only ones marketing an article similar to or identical with that of the appellant.

It is indeed difficult to establish how much the respondents benefitted from the *ma'arufia* of the appellant but the fact that it is difficult to prove the amount of the benefit reaped by the respondents is no reason for dismissing the appellant's claim.

C.A.(T.A.) 237/80

PERLMUTTER *et al.* v. LAND APPRECIATION TAX

(1982) 1 *P.M.* 309, 325

This appeal arose out of a claim by the appellants for interest on an excess of tax paid by them on the sale of certain property for the period between the judgment in their favour regarding such excess payment and the actual reimbursement thereof by the authorities.

Talgam J.: I also think, like my colleague Ilan J., that the suggestion of the learned President yields a desirable and just result which in my humble opinion conforms to the law.

The rules of restitution, which this country has drawn from the English law of quasi-contract dealing with unjust enrichment, fully empower the court to grant just relief when a contract or an apparently lawful situation offends our sense of justice. All this derives from the rules of equity which have no closed boundaries.

Kahan J. agreed and emphasized that in law the way is open to extend the boundaries of this kind of (quasi-contractual) action, and the learned judges, Cohn J. and Kister J., have shown in detail that this is also the approach of Jewish law: that although a party who collects what is due him under a judgment, later set aside, does not come within the definition

of a tortfeasor and is not to be made liable for damages (consequent upon the judgment he obtained and before it was annulled), he must nevertheless repay what he has received ("judgment is reversed... because a party has suffered a loss"). Kister J. cites from *Arukh haShulhan, Hoshen Mishpat* 391:8 the following comprehensive formulation: "Whenever a person gains a financial benefit from others and is enriched, although he does not have to pay for the damage, as in the case of 'tooth' in the public domain, he must nevertheless repay the benefit he has derived."

4. Indemnity of Volunteer

C.A. 260/57

PADUA *et al.* v. FRIEDMAN *et al.*

(1960) 14 *P.D.* 427, 433

The parties entered into an agreement to set up the Kaiser-Freezer (Israel) Co. Ltd. An option to buy fifteen percent of the Company's shares "within a year" and a directorship in the Company was offered in place of commission. The option was to begin from the time of the agreement, not from the opening of the plant. The Company owners denied the option; and no money was forthcoming for the purchase of the shares. This is a claim for compensation for breach of contract, or suitable payment to be made in lieu of carrying out the agreement; and involved the rights of an "intermediary" in civil law (the need for a specific invitation to act as an intermediary, absence of any agreement with respect to payment, and the question of liability when the intermediary is "a person who is likely to provide a service in exchange for payment").

Silberg J.: And now, let us examine the legal basis for such a claim. Sec. 563 of the *Mejelle* states as follows:

> A person who did some work at the request of another individual, and there is no contract between them, then the worker is to be paid a suitable wage if he is one who works for wages. If he is not such a person, then he is not paid anything.

This provision of the *Mejelle* is without doubt aimed at preventing unjust enrichment, or, to use Cheshin J.'s felicitous phrase, "creating wealth without any concern for justice." There are legal systems which recognize the institution of *negotiorum gestio* and oblige the recipients

of an intermediary's efforts to compensate him for any improvements made to their property as a result of his efforts. This is certainly the case in Jewish law (*Baba Metzia* 101a; *M.T. Gezelah ve'Avedah* 10:4; *Hoshen Mishpat* 375:1, 3-4, and many other citations: see especially *Tosafot Ketubot* 107b). It is also the position — in certain circumstances — under Roman law; see Jolowicz, *Historical Introduction to Roman Law*, Cambridge, 1932, p. 308... Similar institutions exist, in one form or another, in French law (sec. 1375 of the Civil Code) and German law (sec. 683 of the B.G.B.).

5. Invitation to Dine or Lodge

C.A. 328/72

LANGEL v. LANGEL

(1973) 27(2) *P.D.* 470, 475-476

The District Court rejected the women's claim for payment for continuous support from her sister. It also rejected her claim for accommodation expenses on the grounds that she was living with her sister and had not yet rented her own apartment.

Kister J.: Concerning accommodation and help in the past, the question is whether or not it is possible to establish that the sister did, in fact, intend to receive payment for board and lodging.

In Jewish law, we do make this type of assessment. If a person says to his fellow: "Come and eat [i.e. stay] with me", then, in the absence of any proof to the contrary — even if it is only of a circumstantial nature — "he must pay him and we do not say he was making a casual offer" (Rema, *Hoshen Mishpat* no. 246:17, and commentaries *ad loc.*). In the present case, there is no doubt that payments for board and lodging were made to Johanna in order to compensate her for the expenses incurred in looking after her sister. There were no grounds for suggesting that she undertook these duties on a voluntary basis.

Johanna also made it quite clear to the defendant's stepfather that she expected to be paid for looking after her sister during the latter's hospitalization. This is borne out by her statement on p. 33 of the Protocol: "I did indeed ask the defendant's stepfather to pay my expenses for the time during which my sister was in hospital, and he agreed to pay me one

hundred lirot per week. At that time the cook was still working for us..."

The respondent also knew that Johanna expected to be paid for taking care of her sister. I would like to add that under the circumstances, even without a specific request for the payment of expenses, it would still have been assumed that compensation ought to be paid to Johanna. She is, after all, a working woman, and there is no basis whatever for assuming that she would work on her sister's behalf—thereby decreasing her own earning potential—without receiving compensation. In these circumstances, it is not even necessary to use the above-mentioned presumption found in Rema, *Hoshen Mishpat* 246:4.

Thus, as long as the appellant lacks the means for paying her sister, the situation is analogous to a case in which a woman receives credit for purposes of her own maintenance and the rule that the husband is required to cover his wife's loan applies.

The situation is different, however, with respect to lodging. Johanna's house is a small one. Now, if she were in the business of letting out rooms or taking in lodgers, there may be grounds for assuming that she intended being paid for her sister's stay *ab initio*. Since this is not the case, it is difficult to claim that she had such an intention without specific evidence to that effect. It is noteworthy that Rema in *Hoshen Mishpat* 363:10 makes the following comment, which supports this conclusion:

> One who says to his fellow: 'Live in my courtyard', he does not need to pay for his lodgings.

Shakh, however, observes that if there are circumstances which point to a different intention on the part of the owner of the courtyard, then the invitee's presumption regarding payment would also have to be assessed in the light of those circumstances.

These assessments are based upon experience and may be rebutted both by direct evidence to the contrary and by specific circumstances which point to a different conclusion. Since they are based on experience and logic, they may be applied in situations which are not covered by Jewish law, provided that there are no relevant provisions in general law. They may, therefore, be applied to the present case.

Part Nine

PROPERTY — PHYSICAL AND INTELLECTUAL

CONTENTS

Chapter One

MODES OF ACQUISITION

1. *Agav*

See: CONRADS *et al.* v. EXECUTORS OF THE WILL OF ZIGMUND LEVI dcd. *et al.*, p. 709.

2. Possession Without Cause

C.A. 213/76

GILBERG v. PANOSS

(1977) 31(2) *P.D.* 272, 279-280

This appeal involved prescription of an action for possession of land.

Schereschewsky J.: I concur in dismissing this appeal on the grounds advanced by my learned friend, Berinson J. Non-adverse possession means an admission of the right of ownership of the plaintiff. It therefore does not cause the prescriptive period to begin running, since it did not create any cause of action (sec. 6 of the Prescription Law, 1958).

The result is also in conformity with Jewish law which states:

> Possession not supported by a plea (of right) is not (adverse) possession. For instance, if a person says to another, "What are you doing on my property?" and the other replies "No one has ever said a word to me about it," there is no (adverse) possession. If the other says "You sold it to me" or "You gave it to me as a gift"...(adverse) possession exists (*M. Baba Batra* 41a).

So also *Hoshen Mishpat* 146:9, which gives the following examples:

> ...where one has enjoyed the produce of land for several years and the complainant asks him, "How did you obtain the land, it is mine?" and the first replies, "I do not know to whom it belongs, and since nobody said anything to me, I entered on the land," this is not adverse possession since the first did not plead that he took the land or that any one gave it to him or that he had inherited it. Yet he is not dispossessed until the claimant adduces evidence that the land belongs to him; once he does so, the land is restored to him and the produce consumed by the first is recoverable.

However, with respect to a case in which, according to sec. 9 of the Prescription Law, the defendant claims prescription...the defendant will have no defence in Jewish law. If, in countering the plaintiff's action, the defendant claims that he does not deny the plaintiff's ownership, but he has been in possession of the property for many years after acquiring it from another, and throughout all those years he did not know that it belonged to the plaintiff and for that reason he is claiming "possession", i.e. prescription, this defence will not be recognized by Jewish law. The reason is that he did not claim that the person who sold him the property bought it from the plaintiff, and he therefore has no argument *vis-a-vis* the plaintiff to support him (see *Hoshen Mishpat* 146:13). The variance with the provisions of the Prescription Law is explained by the fact that according to Jewish law, the defendant denies the proprietary right of the plaintiff and claims that he has title and not the plaintiff, but he cannot prove his claim and he cannot be asked to prove it because many years have already passed in which he possessed the property with no protest from the plaintiff. Therefore, his possession ought to be viewed as proof of his entitlement. According to the Prescription Law, the defendant denies the plaintiff's right of action, rather than his proprietary right (see sec. 2 of the Law), and although the claim of possession will not avail him unless it has cause in the above sense, he will have a defence against the action even if he does not deny the plaintiff's real right, on the condition that he argues that the period of prescription had lapsed and that throughout that period he was in adverse possession with no protest from the plaintiff, i.e. possession with cause in the above sense, such as that he bought the property from another and was informed of the plaintiff's right only after the period of prescription had lapsed.

3. Acquisition by Means of Processing

Cr.A. 141/59

TREIBISH *et al.* v. ATTORNEY-GENERAL

(1959) 13 *P.D.* 1793, 1821-1822

This appeal involved the theft of meat deposited with the appellant for the purpose of processing.

Silberg J.: Jewish law too, autonomously and without Roman or other influence, recognises the legal institution of the acquisition of ownership (in chattels) by processing. Such acquisition is termed *kinyan beshinui*:

> A person who misappropriates wood and makes utensils out of it or wool and makes garments out of it must pay for (the wood or wool) according to the value thereof at the time of the misappropriation (*Baba Kamma* 93b) and does not have to restore the wood or wool since he acquired title thereto by processing (Rashi *ad loc.*).
>
> A misappropriated thing which has not been changed and remains as it was...must be restored to the owner. If it has been changed by the person misappropriating it...he has acquired title by the change he has made and pays its value as at the date of misappropriation (*M.T. Gezelah veAvedah* 2:1).
>
> A person who misappropriates earth and makes bricks out of it does not acquire title since if the bricks are crushed they become earth as they were originally. If he misappropriated an ingot of metal and made coins from it, he acquires no title since if the coins are melted down the metal ingot is restored....If, however he misappropriates wood and cuts and planes it...or wool and dyes it...or thread and makes a garment...or coins and melts them down, he has processed them, since even if he makes other coins, they have a new appearance (*ibid.* 11, 12).
>
> Where the thing misappropriated is changed...there is no need to give it back but only its value at the date of the misappropriation, so long as the change is not such that the material can be restored to its original condition (*Hoshen Mishpat* 360:5).

Thus far regarding a thief. As regards a craftsman, the *Talmud* discusses whether a "craftsman acquires title to the increase in value" effected by his

work (*Baba Kamma* 98b-99b; *Baba Metzia* 112a; *Kiddushin* 48b). The final rule is still uncertain (cf. *M.T. Sekhirut* 10:4; *Hoshen Mishpat* 306:2 with Rema to *Even haEzer* 28:5, citing *Tur*). If, however, he does acquire title to the increase, "...when he returns the article for his fixed remuneration, it is as if he sold the increase" (Rashi to *Kiddushin, loc. cit.* and *Baba Metzia loc. cit.*). As far as I know, only one of the later authorities holds the view that the acquisition of title by a craftsman is partial, as with a pledge. In the discussion of this question, other related matters are elucidated, and it is as well to cite at some length the passage in question since it exhibits outstanding juridical understanding, almost modern in its expression and thinking.

> *Resp. Moharash Halevi, Hoshen Mishpat* 4 considers the question of whether a craftsman...acquires title to the increase in value but not to the object itself or whether we say that by the increase in value he becomes entitled to the object since he changed the raw material into the form he gave it, and he arrives at the view that the craftsman acquires the object itself....He has, however, clearly overlooked *Terumat haDeshen* 309, from which it is apparent that the craftsman acquires title to the increase in value of the object, which means in that alone and not to the object itself....One should consider whether the craftsman's acquisition of title [in the increase] is substantive and belongs to him — what interest does the owner have in the increase and what is the position where the increase is worth more than the craftsman's remuneration or where the owner pays him less? Does the owner acquire the increase by having already agreed on the remuneration although non-existent at that time [and therefore not acquirable]? And how can an owner acquire title to the increase where the craftsman does not wish to give him the increase for his remuneration? It therefore seems to me after considering the matter that the increase certainly belongs to the owner and the craftsman's acquisition of title thereto is not complete title to make it really his but is only partial acquisition (*Ketzot haHoshen, Hoshen Mishpat* 306:4).

The importance of "acquisition of title" to the increased value lies in its juridical construction. It also extends to many of the several rules relating to religious prescriptions, but the present is not the occasion to dwell on these.

4. *Odita* — False Admission by Litigant as Alternative to Acquisition

See: KUTIK v. WOLFSON, Part 5, Evidence, p. 379.

See: CONRADS *et al.* v. EXECUTORS OF THE WILL OF ZIGMUND LEVI dcd. *et al.*, p. 709.

C.A. 459/59

FINKELSTEIN *et al.* v. FREUSTEIER *et al.*

(1960) 14 *P.D.* 2327, 2330, 2334, 2336

This was an appeal against a judgment dismissing the balance of a claim in respect of a loan of IL. 8,500 less a sum of IL. 1,000 already paid...

Silberg J.: At this stage of the hearings, I proceed on the assumption that everything is as it should be and that the last two lines [of the Statement of Claim] constitute an acknowledgment by the deceased that he owed the Finkelstein family a total sum of IL. 8,500. The question that arises is what law is to be applied to this acknowledgment, the *Mejelle* or English Common law.

I find it necessary to enlarge on this question since it goes to the very root of the Ottoman "admission" dealt with in Book XIII of the *Mejelle*. I shall preface the conclusion to the evidence and say that the admission of the *Mejelle* imports not "a trust" but "acquisition of title" exactly like the *odita* (confession) of Jewish law. In logical order and in order to assist in understanding the matter, I shall commence with *odita* in which the idea of "acquisition of title" is more evident, and then I shall indicate some articles of the *Mejelle* that display similarity between *odita* and the admission of the *Mejelle*.

Odita is "a false admission" that can in certain circumstances have legal effect identical with the content of the admission. If Reuben says to Simeon, "This property is yours," the property itself passes into the ownership of Simeon even though everyone knows that it is not his. If he says, "I owe you a *maneh*," an obligation to pay attaches at that very moment even though it is well known and agreed that before he said so there had been no transactions between them. The classic example is the famous acknowledgment of Issur (*Baba Batra* 149a). A proselyte Issur had 12,000 zuzim deposited with Rava and was dying. He wished to vest the money in R. Mari the son of Rahel — his "illegitimate" son by a captive Jewess, "conceived not in holiness" but "born in holiness" after

Issur had embraced Judaism. The question arose in the school of Rava as to how Issur could vest the money in his son before his death. All the various forms of *kinyan* (acquisition) were discussed and the conclusion was reached that he could not do so, either by way of inheritance or by way of gift, either by "drawing" or by exchange, or as "an adjunct to land" or "in the presence of the three parties concerned." Then one student asked, "Why not? Let Issur acknowledge that the money belongs to R. Mari and it will vest by virtue of his *odita*." The idea reached the ears of Issur and at once "an *odita* came from the house of Issur," acknowledging that the money was R. Mari's, thus lawfully taking it out of the possession of Rava the depositee.

Odita earned its place in Jewish law and served as an easy and convenient alternative for effecting acquisition of title. Generally an obligation requires *kinyan* (formal act of acquisition) in Jewish law, *a fortiori* when an actual transfer of ownership is involved. When it is effected in the form of *odita*—an abstract acknowledgment which does not disclose the ground therefore—it serves as *kinyan* itself and by mere words gives rise to a right, obligatory or proprietary, which the person making the acknowledgment attributes to his neighbour in the body of the acknowledgment. (For the various forms of acknowledgment, see my judgment in *Kutik* v. *Wolfson* 5 *P.D.* 1341, 1346-47, where I note that with regard to "false acknowledgment," abstract as distinct from causal, it is undoubtedly a matter of "acquisition" and not "trust"). One must indeed bear in mind that *odita* also has many limitations and restrictions. It must be effected before two witnesses or by deed, otherwise the "seriousness" of the acknowledgment has not been proved and the person making it may claim the next day that he was jesting (cf. *Sanhedrin* 29a; *M.T. To'en veNitan* 6:6; *Hoshen Mishpat* 81:1; *Sefer haShetarot* by Yehudah haBarceloni, 22).

The following is an example of *odita* as described by one of the great authorities:

> A person who binds himself unconditionally to pay another a sum of money, although he does not owe the other anything, is bound. Thus if he says before two people, 'Be witness to the fact that I owe A a *maneh*' or signs a deed that he owes A a *maneh* even without witnesses, or says before witnesses 'I owe A a *maneh* under deed' although he does not ask them to act as witnesses, he is bound to pay notwithstanding that both parties admit and the witnesses know that he owed A nothing, because he made himself liable just as a guarantor does (*Hoshen Mishpat* 40:1).

This rule is copied almost verbatim from *M.T. Mekhirah* 11:15)...

The reason is given by Kesef Mishneh *ad loc.*, which was written

by Karo himself, the author of *Shulhan Arukh*: "This is derived from Chapter 9 (*Baba Batra* 149a), from the story of Issur vesting money in R. Mari by means of *odita*." One of the later and most incisive authorities, an outstanding jurist who introduced the most modern of categories into the concepts of Jewish law, writes (*Ketzot haHoshen*, *Hoshen Mishpat* 40:1) "The reason of Maimonides [with reference to the foregoing rule] is because it was *odita* which is capable of vesting even an article....This is a valid vesting even though both parties and the witnesses know that the article...is not the other's: *odita* vests just as 'drawing' (*meshikhah*) and money vest....Kesef Mishneh well apprehended the truth of the matter...and it is also Maimonides' view that vesting by *odita* is effective."

To summarise briefly, *odita* is not a matter of trust but of acquisition and *eo ipso* creates the obligation or right contained therein.

5. Inability to Vest What is Not Under One's Control

C.A. 168/55

CONRADS *et al.* v. EXECUTORS OF THE WILL OF ZIGMUND LEVI dcd.

(1956) 10 *P.D.* 1310, 1314-1315

Silberg, J.: Regarding the first group of arguments, counsel for the appellants submits: (a) A person cannot acquire a non-existent thing and therefore the testator could not make any directions as to "the immediate and subsequent and eventual income" as stated in clause 3 of the will; (b) In respect of the debts owing to the deceased, no transfer "adjunctive to land" was effected—here, apparently, a slip of the tongue or a scribal error occurred, and what was certainly meant was that even had such a vesting taken place, it would be ineffective as regards the debts. And insofar as the moneys mentioned in clause 3 fall under "deposit", an adjunct transfer was required since that is the *halakhah*:

> The only way a person may become entitled to money not in his possession is by adjunction to land....The money must be in existence, —deposited in some place, for example. Where Reuven is owed a debt by Shimon and transfers land to Levi with the debt adjunct thereto, the debt, it seems to me, is not vested (*M.T. Mekhirah* 6:7; so also *Hoshen*

Mishpat 203:9. Cf. however, Tosafot to *Baba Batra* 148a; see also *Resp. Ribash* 345);

(c) The direction at the end of clause 13 is not effective to validate the will with regard to a non-existent thing or the debts, since the testator did not acknowledge the existence of a definitive debt of an actual sum.

I am not prepared to accept these submissions. Without going into all the interesting questions raised by the learned judge [in the lower court] regarding each of these "blemishes", it seems to me that there is one conclusive answer to all these submissions. The testator acknowledged that "all the matters mentioned above have been arranged...in the most effective manner...each matter according to its mode of transfer." The admission of a party possesses the weight of a hundred witnesses and binds the court to render judgment accordingly, as if there were indeed proof that it was so. Since under Jewish law it is possible to convey even a non-existent thing when it comes into being by attaching the thing itself to its fruits — "and this is not the conveyance of a non-existent thing, since the thing itself exists, and is transferred for the yield" (*M.T. loc. cit.* 23:1) —and since a debt can also be conveyed, though not by *kinyan sudar* (one mode of formal acquisition of property) or by *kinyan agav* (another mode of acquisition—see above) but in the presence of the three parties concerned or by signing and delivering a deed, (*ibid.* 22:9; *Hoshen Mishpat* 203:9 and 66 and 126), and in fact there is nothing that cannot be vested in some manner or other under Jewish law, hence the mere statement in the said clause — that the testator had conveyed the things mentioned in the will, "each matter according to its mode of vesting" — has created a kind of estoppel that prevents the heirs from proving that no valid vesting had been effected at the date of the will or prior thereto. The force of an admission under Jewish law is so great that in the opinion of one of the leading Tosafists a person who owns no land at all can vest any chattels by the adjunctive mode of vesting by virtue of the very admission that he owns land.

> It appears to Rabbenu Tam that the reason why a person who possesses no land can employ *kinyan agav* is that he acknowledges that he has land, this admission being against his interests, since he is conveying as an adjunct to land, and even when there are several witnesses who controvert him, the admission of a party is equivalent to the testimony of a hundred witnesses, and we have no apprehension of this creating the appearance of a falsehood, as we learned from the case of the proselyte Issur and his false acknowledgement (Tosafot to *Baba Batra* 44b).

Even those who do not admit this extreme rule and think that an admission

cannot create *ex nihilo*—for instance, Rema to *Hoshen Mishpat* 202:7; Bet Yosef to *Tur*, *Hoshen Mishpat* 202:1 reported in the name of Rashba —do not dispute that an admission against interest which effects a valid conveyance is equivalent to the testimony of a hundred witnesses and cannot be withdrawn. (Consider the observations of Rema *loc. cit.*; Be'er Hetev to *Hoshen Mishpat* 202:11; *Hoshen Mishpat* 113:4.)

It follows from the foregoing that the instant will in its original form was valid.

C.A. 682/74

YEKUTIEL v. BERGMAN *et al.*

(1975) 29(2)*P.D.* 757, 764-765, 774-775

The issue in this appeal was the validity of a purported transfer by an expectant heir of his share in the estate of one who was then still living.

Cohn, J.: Out of respect for the learned judge [of the lower court] I...shall ascertain whether in fact "public policy" requires the memorandum of agreement before us to be invalidated.

I have already suggested...that "the tradition that has proved itself" and creates "a healthy basic viewpoint" among our population is primarily the tradition of Jewish law.

The rule in Jewish law is that when a person says, "What I am to inherit from my father is sold to you...he has said nothing" (*Baba Metzia* 16a; *T. Nedarim* 6:7 and *Baba Metzia* 3:10) because just as one cannot transfer a non-existent thing (*Yevamot* 93a; *M.T. Mekhirah* 22:1) one cannot transfer something he does not possess, for that is like something that does not exist (*ibid.*, 5). The question, of whether or not a non-existent thing can be transferred is, however, disputed in the *Talmud* (*Yevamot loc. cit.*) and, according to those who hold that a non-existent thing can also be transferred, a thing that is not in possession but may come into possession upon the death of a testator can also be transferred as well. In any event, it is not a matter of public policy to debar such a transfer. Furthermore, what is involved is a vesting of property, a situation entailing obligations is not necessarily the same. In respect of the latter it is said that the obligator "must keep his word because it is written, 'Everything that issues from your mouth you shall keep' " (*M.T. op. cit. loc. cit.*, 15).

It is pertinent to note that Rabbenu Tam, the leading Tosafist, saw fit to restrict the rule that an expectancy cannot be transferred, to an

entire estate alone, excluding a case involving some particular asset of the estate, which can be vested even before it falls into possession. (Tosafot to *Ketubot* 9b, cited in *Piskei haRosh*, *Ketubot* 6:6, in *Tur*, *Hoshen Mishpat* 211:1 and in Rema to *Hoshen Mishpat* 211:1) Although this view of Rabbenu Tam is based on an actual event (reported in *Ketubot* 91a), the idea behind it may be a consideration in support of setting aside the transfer of an entire estate (the "right" of succession) but not necessarily annulling the sale of a particular asset of the property that will fall to the vendor by succession.

It seems to me that "public policy" under Jewish law regarding a voluntary agreement, even if it cannot be implemented because of the formal requirements of the law, rests firmly on the dictum, "He who punished the generation of the Flood and the generation of the Dispersal will punish him who does not stand by his word" (*M. Baba Metzia* 4:2). In point of public policy under Jewish law, every statutory provision that exempts a contractual party from fulfilling his obligation is only a legislative decree and whoever wishes to "improve" the world (public policy) will stand by his obligation beyond the strict letter of the law. There can be no "public policy" in breaching any kind of promise in civil law...

Kister, J.: Before dealing with the Israeli Succession Law, I shall spend some time on the approach taken by Jewish law. I have already mentioned above that I have never heard that a sale of an inheritance by a son in the lifetime of his father will be considered a slight on the latter's honour.

My learned friend, Cohn J., has cited the Talmudic discussion whether a person can transfer a non-existent thing or one not in possession. The prevailing rule as expressed in *Hoshen Mishpat* 211:1, is as follows:

> "A thing not in the possession of the transferor is not acquirable, and it is like a non-existent thing. For example, one who says 'What I am to inherit from my father (or any other deceased person) is sold to you' has said nothing." And Rema in his gloss writes that "this is only where it is general in terms but where he particularises the thing it holds good."

The reason that a person cannot transfer a non-existent thing or what is not in possession, is largely because at the time of the transfer the act has nothing to which to attach. There is a further reason emphasized with regard to the sale of a thing not in possession: in general a purchaser does not rely on what the vendor says. Regarding the sale of things not in possession or non-existent, the question can also arise whether it does not entail a transgression of the prohibition of taking interest.

Nevertheless there is an exception to the ineffectiveness of the transfer, which is set out in *Hoshen Mishpat* 211:2 (based on *Baba Metzia* 16a):

> Where the testator is dying...and wishes to sell some of his property to provide money for his burial because his son is poor, and if one waits until after death to sell, the burial will be delayed, causing disrespect to the deceased, the Rabbis provided that if a person sells something he is to inherit from his father the sale is valid.

I shall not go into the details but shall confine myself to two matters. (a) The authorities distinguish between the sale of a particular asset of the estate and the sale of the entire estate: it is to be presumed that in the former case the purchaser was satisfied with the transaction. (b) In certain cases the Rabbis instituted that the heir can make a valid sale of the entire estate coming to him, the reason being that that is out of respect for and for the benefit of the testator.

It must, however, be added that all the foregoing applies when a person intends that the thing not in his possession should vest immediately in the purchaser, and not where an obligation to sell is involved, regarding which *Hoshen Mishpat* 60:6 states, "A person who binds himself in respect to a non-existent thing or a thing not in his possession is bound, although generally no one can transfer a non-existent thing." An undertaking to sell is binding if made properly in accordance with the law and is not defective; the main question that arises here is what is the rule when the property involved does not come into the seller's possession or he cannot obtain it. (See the commentaries to *ibid.* and *Hukat haMishpat* by R.B. Rabinowitz Te'omim, *Hilkhot Mekhirah* ch. 30, 6.)

We can see from this that from the Jewish viewpoint there is no moral defect in the actual sale of a succession, although the sale does not always take effect and we do not always find *gemirut da'at* (full intention), and that the purchaser is relying on the undertaking.

As regards waiver of a succession in Jewish law, a person may at a given time prior to his marriage renounce his right to succeed to his wife's estate, as stated in *Even haEzer* 92; but other heirs cannot waive their right to succession in the testator's lifetime.

6. Things that are not in Existence

C.A. 27/49

LEVANON v. ELMALEH

(1950) 3 *P.D.* 68, 81-82

At issue was the dismissal of a petition for an order declaring a religious trust established in the Sharia Court and confirmed in the religious court of the Sephardi community to be null and void.

Silberg J.: Counsel for the appellant claims that even if we assume that the Sephardi court was competent to legally validate the religious trust that was established, nevertheless, Rav Papo was not entitled to do so, in view of the well-known rule that "there is no court with less than three [members]."

We do not agree with this, for the above rule is subject to a reservation, when the judge is an "accepted authority", i.e. he is known and accepted by the majority as a brilliant scholar (see: *Hoshen Mishpat* 3:2). In the present case, R. Ya'akov Baruch testified that Rav Papo was Deputy Chief Rabbi in Baghdad, and that he was a well-known rabbi. Since counsel for the appellant brought no testimony to contradict the evidence, I am not able to annul, by virtue of this argument, the above judgment.

...And with this, we come to the final argument of counsel for the appellant. Sec. 53 (iii) gives the rabbinical courts authority in all that concerns the establishment of religious trusts set up before them by virtue of the *laws of Israel*. This last detail—so argues counsel for the appellant—is a precondition for the competence of the rabbinical court. In the present case, the Sharia trust deed stated that "they [the Mugrabi community] would benefit only from the income thereof." Household income is something which has not yet materialized, the conditions of the trust are not in keeping with the laws of Israel, and if this is so, then Rav Papo was not authorized to handle the establishment of the trust.

I do not accept this argument, for two reasons: (a) it is very doubtful whether we can review the legal/religious validity of the trust after the highest religious authority in the land, the Chief Rabbinate of Palestine, deemed the trust to be valid, and approved it "with all its conditions"... (b) from the point of view of Israeli law itself, the trust can most certainly be validated, since, according to Rambam (*M.T. Mekhirah* 22:15, 16) and *Hoshen Mishpat* 212:7..."the law of trusts and the law applying to

the poor is not like lay law...and therefore, if a person made a bequest while on the verge of death and said, 'all my household income will be for the poor', then the poor had the benefit" (see *Meirat Eyna'im, Hoshen Mishpat, ad loc.* subsec. 12). And if these authorities were referring to a dying person, whereas the person establishing the present trust is absolutely healthy, then although, as we learn from the later authorities, this may be significant with respect to the formalities for establishing the trust, i.e.. whether or not it may be done orally, it has absolutely no bearing on the question of whether the endowment of "household income" to the poor constitutes something "which has not yet materialized" (as emerges from the discussion in *Resp. Rema* 48, and the *Responsa* of R. Eiger 146, but cf. *Be'er haGola* in the name of Bah, *Hoshen Mishpat ad loc.*, subsec. 70). The fact that the chief rabbis certified the trust is sufficient proof that in practice, they decided in favour of those who allowed it, and there is no longer room to say that the trust was not made in accordance with the laws of Israel in the sense of sec. 53 (iii).

See: CONRADS *et al.* v. EXECUTORS OF THE WILL OF ZIGMUND LEVI dcd. *et al.*, p. 709.

7. Gifts of a Minor

G. 23/62/L

ESTATE OF S. REICHMAN dcd.

(1962) 30 *P.D.* 252, 256-257

This was an application that directions be given to the natural guardian of a minor that a sum of IL. 6,000 saved by the father in a savings account in the name of the minor should be transferred to the estate of the deceased for division among the legal heirs of the deceased, who included the minor.

Kister, J.: It may be noted that in Jewish law there is a view, though not unanimous, that the gift of chattels by a minor possessing some understanding will subsist, even when he has a guardian (Rabbenu Hananel and Rosh to *Ketubot* ch. 6 at end). The theory is that in the case of a

sale a minor might be influenced and misled by the fact that he receives money in return and does not properly value the article sold, whereas in the case of a gift a person does not easily give up an article he owns unless that is congenial to him.

Although there is no room here to invoke Jewish law, certainly not according to the authorities who think as above, the rationale may nevertheless be utilized in respect of the evidence of the minor who is sufficiently discerning and self-assured so as not to give false evidence against his interest.

Chapter Two

HIRE

1. Nature

C.A. 208/51

HACKER *et al.* v. BROSH *et al.*

(1954) 8 *P.D.* 566, 569, 577-581, 583-584

Silberg J.: In this appeal it has turned out to be our duty and privilege to express an opinion on a question relating to the very essence of the legal nature of tenancy agreements. Surprisingly, such a basic question has not yet found its full solution and even today one can be of two minds about it...

Very briefly, the question is whether a hire agreement, and especially one relating to land, vests in the hirer a right *in rem* in the subject matter or only *in personam*, giving rise to personal rights and obligations of the parties. The question, counsel argues, will affect our decision on the actual problem confronting us, whether the tenants here are entitled to assign the tenancy agreement to the third appellant.

Let us first look at the position under Jewish law. There, hire, whether of land or of chattels, is a transaction *in rem*. We recall immediately the phrase coined by the Sages: "A hiring is for its day a sale" (*Baba Metzia* 56b), a concise and elegant expression in common use that emphasises very clearly the *rem* notion. Although art. 405 of the *Mejelle* speaks also of "a sale of a benefit for a given consideration", what is stressed is the benefit, whereas in Jewish law, hire is the "right" in the thing itself. "Precisely in the case of a borrower and hirer, since they use the thing itself, it is like 'a sale for its day'...for they become entitled to the thing itself" (*Nimukei Yosef* to Rif, *Baba Metzia*, 124a). "Since Shimon rented the house, the transaction is like a complete sale and he is bound to pay whether or not he lives there" (*Resp. Rashba* 1055, cited in *Resp. Rashdam, Hoshen Mishpat* 415).

It is only from this point of view that one can understand the rule (of

overreaching) in connection with which the above dictum appears in the *Talmud*. The remarks of Maimonides (*M.T. Mekhirah* 23:1) are, in my view, not inconsistent: the hirer sells to the hiree a right in the thing hired but certainly not the thing itself.

A hiring "vests" in the very same manner as ownership vests in respect of the property concerned; in the case of land—by payment of money, by deed and by possession (*hazakah*)—and in the case of chattels—by such mode of acquisition as is effective with regard to the particular type of chattels (*Baba Kamma* 79a-b; *Baba Metzia* 99a-b; cf. as regards chattels *Hoshen Mishpat* 37:2). Thus hiring is like ownership and constitutes a right *in rem* in the thing acquired.

Further proof is as follows: The following issue is still in dispute, without resolution among the leading authorities: Can Reuven who lets his house to Shimon for a year rent it to Levi, during that year, for the year following? (*Resp. Maharit Tzahalon* 89; *Resp. Mabit*, I, 346; *Bet Ya'akov* 90; *Bigdei Kehunah* 3 and elsewhere; cf. *Mishneh laMelekh* to *M.T. Mekhirah* 1:8). The doubt—at least among several of the authorities—revolves around whether Reuven has at the relevant time anything to let, and whether he is not conveying to the second tenant a non-existent thing. Evidently the doubt would not, and could not, arise were the letting of property merely an obligation *in personam* assumed by the owner as "a personal encumbrance" without vesting a right *in rem* in the property. The "person" of the owner is certainly his own; it is already existent even before the term of the first tenancy has expired. (Consider carefully Tosafot to *Ketubot* 54b.) One may well rely on the rule that the first tenancy does not prevent the owner from letting the property for a subsequent period even though the former is a right *in rem*, since the subject matter of the thing let—so it can be and is contended—is always vested in the owner, in spite of the limited *in rem* rights of the tenant adjoined to it. We, however, cannot imagine even remotely that the first tenancy prevents the owner from so acting if we assume that tenancy is not in any way a right *in rem*. The very doubts that beset the authorities on the said problem clearly attest to the right *in rem* of the tenant.

One final proof conclusive of the *rem* nature of tenancy is the rule that renunciation is not effective to annul a tenancy, just as it is not effective to set aside a sale (Be'er haGolah to *Hoshen Mishpat* 366:1, cited in the name of *Resp. Ribash* 510; Rema to *Hoshen Mishpat* 189:1). In other words, just as when an article is sold and both parties go back on the sale, the purchaser cannot "renounce" the sale and rid himself of it by mere words but must reconvey the article to the vendor by the appropriate mode of acquisition, so also a tenant cannot renounce his tenancy prematurely but must reconvey it to the owner. That, to my

mind, clearly demonstrates the *in rem* nature of tenancy, since were it only an "obligation" of the owner to the tenant, renunciation would take effect as with any other debts, since renunciation as we know does not require a conveyance.

Jewish law also holds that sale does not cancel hire. When a person lets his house to another and then sells it to a third person, the tenant can say to the purchaser that he is not in a better position than the person from whom he derives title and must wait until the term of the tenancy has expired and possession accordingly yielded up (*Baba Metzia* 101b; *Hoshen Mishpat* 312:13 and Be'er haGolah *ad. loc.*). The grounds given in the *Talmud*, that the purchaser is in no better position than the vendor, is applicable to all kinds of hiring and the fact that the question is dealt with in the *Talmud* (including the *Yerushalmi* at the end of ch. 8 of *Baba Metzia*), as well as the later authorities, in connection with tenancies involving houses does not, it seems to me, confine the rule to this kind of hiring, although one obviously cannot deny that from a practical point of view, this defence is most pertinent to such tenancies.

On the other hand, there is another matter of the utmost importance where the authorities explicitly distinguish between tenancies involving houses and other hirings. What I have in mind are subtenancies or subhirings. Generally, a hiree may not subhire or a borrower lend the object concerned to another; in the case of tenancies involving houses the position is different.

> Hence I hold that where a person rents a house to another for a fixed term and the tenant wishes to let it to a third person until the end of the term, he may do so provided the family of the third person is of the same size as his own but not if it is larger. When the Sages said that a hirer may not subhire, they had in mind chattels only, since the owner may say 'I do not wish my property to be deposited with another', but in the case of land or a ship, the owner of which is present thereon, he may not say so (*M.T. Sekhirut* 5:5).

The phrase "the owner of which is present thereon" is not an essential condition; the meaning is that land and a ship are unlike chattels which may be hidden away, in that they always remain under the control of the owner (*Prisha* to *Tur, Hoshen Mishpat* 316). Even if the owner does not actually live in the house, the tenant may sublet, since land can never be stolen, as emerges from the comments of Mordekhai to *Baba Metzia*, ch. 6....See for the decided law *Hoshen Mishpat* 316:1...

Can a lessee also assign the lease to another? It seems to me that he cannot, witness the observations of Derishah to *Tur, Hoshen Mishpat* 316, dealing with the rule in Maimonides as above that is inconsistent with

another rule of his (*M.T. Mekhirah* 23:5) from which it would appear that in the case of a field, no subtenacy is permitted. Derishah writes:

> The difference between a house and a field is that although a house can be despoiled just as a field can, and more, it can nevertheless be stipulated that the tenant return it in good repair and condition, and it is of no consequence whether he or another actually dwells there. It is otherwise with a field which can be rendered infertile by being improperly cultivated without the owner becoming aware until after some delay.

It is thus very clear to me that when we speak of a tenant being allowed to let the property, what we have in mind is a subtenancy, where the principal tenant remains responsible to the owner by virtue of the principal tenancy that continues to subsist; we are not referring to a transfer of the tenancy which, if permitted, releases the original tenant from all his obligations towards the owner and replaces him by the transferee. It is inconceivable that Jewish law here wished to gloss over a form of transfer, like the English assignment of a lease, in which the lessee, notwithstanding the transfer, remains liable to carry out the obligations deriving from the lease.

Such a construction is indeed possible under Jewish law as well...but if that were intended, it would have been specifically mentioned in the abundant *responsa* dealing practically with matters of tenancy, and as far as I have been able to ascertain that is not the case.

Furthermore, if any doubt exists at all, it is in connection with land. In the case of chattels, a hiree may obviously not subhire nor, *a fortiori*, transfer. Hence as regards the *in rem* nature of hiring, there is no difference in Jewish law between the leasing of land and the hiring of chattels.

To sum up, in Jewish law (a) leasing or hiring is *in rem*; (b) sale does not displace a prior leasing or hiring; (c) the lessee of a house may sublet the house for the term of his lease provided that the number of occupants remains the same; (d) the lessee may not transfer the lease to another.

The reason that under English Law a person who assigns a lease is not released from his obligations towards the owner by virtue of "express contract" between them has its source in a very nice and complex distinction, of ancient lineage, between privity of contract and privity of estate (*Walker's Case* (1587) 76 *E.R.* 676, 680, 681: *March* v. *Brace* (1614) 80 *E.R.* 1025, 1027; see Cheshire, *Modern Real Property*, 6th ed. 202). The first is contractual, personal, and subsists between the original parties, the lessee and the lessor, alone; the second attaches to the property and may pass from one person to another with the transfer of the right *in rem* thereof. This distinction suggests, by way of association, the distinction which Jewish

law makes between "personal encumbrance" attaching to a borrower in favour of the lender alone, which the latter cannot sell, and "property encumbrance" which attaches to the property of the borrower and passes — upon a sale of the deed of debt — from the lender to the purchaser of the deed (see the discussion in *Ketubot* 85b; Ran to Rif *ad loc.*; Sema to *Hoshen Mishpat* 66:23(55); and particularly Ketzot haHoshen, *ibid.*, 27). This distinction has, however, no basis in the legal system of the *Mejelle*. If the *Mejelle* does not — as indeed it does not — allow for a "total" transfer of hiring, that means that it does not permit or recognise it at all.

2. Sub-hire and Conditional Hiring

C.A. 90/51

ENGELMEIR v. LINDERMAN

(1952) 6 *P.D.* 426, 427, 429

This was an appeal against a majority decision granting an application against the appellant for possession of an apartment of two rooms and a garden that was let to him by the respondent for two years. The tenancy agreement contained the usual condition forbidding the tenant to sublet the apartment or any part thereof without the written consent of the owner. About one month after entering the apartment, the appellant had let one room to a subtenant.

Assaf J.: It therefore clearly follows that the tenant may not increase the number of occupants beyond that stipulated between him and the owner. It is also clear that there is a difference if many or few make use of it. Thus art. 1081 of the *Mejelle* provides: "Habitation of a house is not changed by a change of persons dwelling therein....If the members of a person's household are numerous, however, their dwelling in the house is of such a nature as to change it by reason thereof." Although the article deals with the relationship between joint owners, it is equally applicable to the relationship between tenant and owner. *Hoshen Mishpat* 316 also lays down that where "a person lets a house to another for a fixed term and the tenant wishes to let it to a third person, he may do so until the end of the term provided the family of the third person is of the same size as his own."

All the foregoing is said on the assumption, made also by counsel for the appellant, that art. 428 of the *Mejelle* denies the right of the owner to restrict the use of the property let, even if expressly stipulated. Whether, however, that is the intention of the article still requires examination. It does not say "No stipulation is effective..." but "No restriction is effective..." and the restriction arises because it is orally stipulated or set out in the tenancy contract that the owner is letting *the tenant* a house for a dwelling. The restriction does not deny the tenant the right to allow another person to live there. Although a borrower may not lend the thing borrowed to another, a tenant may sublet unless it has been expressly stipulated that he may not do so. Just as a sale may incorporate a condition for the benefit of one of the parties (see art. 189, *Mejelle*) so also may a letting....In a sale, a sanction prohibiting resale to another has no effect, since it is not for the benefit of the vendor, for what can it matter to him, after he has given up ownership, to whom the purchaser may later sell the property; it does, however, matter very much to a lessor who will reside in his property.... Indeed Jewish law provides that in letting, a person may stipulate any condition, just as he might in a sale (*Hoshen Mishpat* 315), and does not even require the condition to be for the benefit of one of the parties. Accordingly, art. 488 does not deny the owner the right to stipulate with the tenant not to let the property to another. So indeed did the Supreme Court hold in Mandatory times in *C.A.* 384/43 *Shmayewitz* v. *Habouba* (1944) *P.C.R.* Vol. 11, 283.

3. Right of Partner in Jointly Hired Property

C.A. 64/50

MASHTZANSKY v. MIKHAELITZ

(1953) 7 *P.D.* 324, 325, 328-329

Assaf J.: This is an appeal by leave against a majority judgment in the Tel-Aviv District Court...affirming a judgment of the Magistrate's Court ordering the appellant to vacate one room in the apartment of the respondent...

The magistrate had pointed out the undesirable practical consequences that might ensue if the owner were to get back the room vacated by the

death of the joint owner as well as, obviously, the right to common use of the corridor, the kitchen and the services. Where two people together rent an apartment it is presumed that they and their families know one another and think they can do their cooking on one oven and in one kitchen and generally live together as good neighbours (although their expectations are not always fulfilled), since their respective ways of life are more or less the same....But where the owner of the apartment himself takes over a vacated room or lets it to a new tenant, the remaining tenant may suffer greatly, if they cannot get on with each other or if a large family takes the place of the outgoing tenant.

For this reason *Hoshen Mishpat* 316:2 decides that "Where two people have rented a dwelling jointly to live together, one of them cannot install another in his place even if with less occupants, since his fellow can say that he was prepared to accept him but not another." This rule is based on *Resp. Rosh* 1:2 cited in *Tur*, *Hoshen Mishpat* 316:2. Rosh adds:

> It is well known that an apartment may not suit everyone equally. There are some who may feel inadequate because of the importance of the co-tenant and some who are ashamed to live with another because of his shortcomings, some who are quarrelsome and some who are not trustworthy. Hence a person wishing to live jointly with another is very careful who his co-tenant is and the latter cannot install another in his own place.

And so, Rosh concludes, the person remaining may say to the outgoing co-tenant that he is prepared to pay him for his part of the apartment such an amount as the court deems proper instead of putting in others.

It seems to me that it will not be excessive to conclude that where two people jointly rent an apartment, each of them rents it on condition that the owner does not introduce another in place of the one of them who leaves, without the knowledge and consent of the remaining one. For this reason the one who remains may always take over the part that has been vacated.

4. Frustration by Reason of National Disaster

C.A. 2/48

ALBARANES *v.* SCHMETERLING

(1949) I *P.M.* 72, 82-83

Halevi J.: The subject of this appeal is a judgment of the Jerusalem Magistrate's Court....The appellant brought an action against the respondent for IL. 25 owing under a promissory note signed by the respondent to the order of the appellant's wife and transferred by her to the appellant...

The *Mejelle* is much closer to Jewish law than to English law since in general, Moslem law has been nurtured from Jewish sources. On reading the commentary of Ali Hedar on art. 478, based on Moslem sources, the similarity to the rules of the *Mishnah* are conspicuous. Thus Ali Hedar writes:

> If a person hires a field watered by rain (*sde ba'al*) and the rains stop and it is impossible to sow the field, or if a field is dependent on irrigation and the water stops and it is impossible to sow it, no rent is payable.

Compare *M. Baba Metzia* 9:2:

> If one leases a field which is dependent on irrigation or is planted with trees, and the spring dries up or the trees are felled, the rent is not reduced. But if he says 'Lease me this field which requires irrigation' or 'this field which is planted with trees' and the spring dries up or the trees are felled, the rent is reduced.

Likewise Ali Hedar writes:

> If a person hires a field and after it has been sown, locusts consume the seed and it is impossible to sow it again during the period of the hiring with seed similar to that with which it had been sown or inferior seed, the hirer is not liable for the rent for the period after the locusts ate the seeds but is liable proportionately for the rent for the preceding period.

Compare *M. Baba Metzia* 9:6:

> If one leases a field...and it is eaten by grasshoppers or burned, if it was a local mishap, a deduction is made from the rent and if it was not a local mishap, no deduction of the rent is made. R. Yehudah said,

if he leased it at a money rental, in neither case is a deduction made from the rent.

"Local mishap" — when most of the fields in the area are blighted or consumed by grasshoppers or the like — is an important element in Jewish law in cases of this kind. If the disaster is general, the tenant may deduct from his rent; if not, he may not, because the owner can say that it was his bad luck (*Baba Metzia* 105b and Rashi *ad loc.*).

Likewise *Hoshen Mishpat* 312:17 stipulates:

> Where a person lets a house to another...and the house collapses of its own, if he had said 'This house I am letting to you'...it is calculated how much use he had of it and the balance of the rent is repayable.—Gloss: a house that burns down is treated like a house that has collapsed...If the whole town was burned down, then it is a local mishap and deduction is made from the rent for the period the tenant did not occupy the house, whether the rent was prepaid or not.

Be'er Hetev notes *ad loc.*, "was burned" — see Sema who wrote: The observations of Rema require amendment: a house that burns down is treated like a house that has collapsed and some say that the entire rent must be repaid, if the entire town has been burned down.

5. Tenancy

C.A. 687/69

ABU GAZALAH *et al.* v. ABU TA'AH *et al.*

(1970) 24(2) *P.D.* 460, 461, 478

The original tenancy agreement between the parties, residents of East Jerusalem, was governed by Jordanian law which gave the tenant protection from dispossession at the end of the lease. Israeli law, applied to East Jerusalem by Government Order on 28 June 1967, continues such protection and in addition imposes control of rents. The District Court dismissed an application by the tenants to determine the rent and accepted the owners' submission that the property fell within the exemption to the Tenants' Protection (New Buildings) Law, 1955.

Kister J.: In the given area on 28 June 1967, provisions regarding the protection of tenants were operative, and if these were replaced by

regulations which improve the position of tenants, there is nothing wrong with that. It is noteworthy that in Jewish law too we find the following rule (*M. Baba Metzia*, 8:6): "If one lets a house to a neighbour in the rainy season, he cannot evict him from the Feast of Tabernacles until Passover," the reason being, according to the authorities, not to cast him out into the street when it is difficult to obtain accommodation (*M.T. Sekhirut* 6:7; *Hoshen Mishpat* 312:10).

C.A. 439/73

RAMAT HOLON LTD. *et al.* v. BINYAMINI

(1974) 28(2) *P.D.* 549, 555

An action for possession against a tenant was based on two matters—non-payment of rent and the making of alterations in the tenanted property in breach of the conditions of the tenancy. These matters were proved but the lower Court granted the tenant equitable relief.

Kister J.: ...As to the property, no one disputes that the courts treat a tenant of residential property more leniently than a tenant of business property. In the latter case, in order to grant equitable relief, the tenant is required to be more zealous in fulfilling his obligations than in the former case. It seems to me that in view of the purpose of the Tenant Protection Law, which is intended to give relief to those of limited means so that they are not evicted and cast out into the street (in the words of *M.T. Sekhirut* 6:7), the legislature had in mind to give greater protection to small apartments, the owners of which are presumably people of limited means. Although this approach is manifested in the Law with regard to the amount of rent, when the court comes to consider whether to extend equitable relief, it may take into account the size of the apartment and income of the tenant. In the present case the apartment consists of one-and-a-half rooms and the tenant's income is low.

See: VILOZNI v. SUPREME RABBINICAL COURT, JERUSALEM *et al.*, **Part 2, General Principles, p. 103.**

Chapter Three

PROPRIETARY RIGHTS

1. Extent in Land

C.A. 403/73
BEZAL'EL v. SIMANTOV
(1975) 29(1) *P.D.* 41, 43

The appellants obtained an injunction against the respondents, preventing them from extending their apartment which lay above that of the respondents, on the ground which was upheld in the lower court that the extension would invade the justified rights of the respondents.

Cohn J.: Lengthy and painful litigation between neighbours has ensued —and both are right: one side wishes to enlarge the apartment it occupies in order to provide very necessary living space for four children, the other side protests against what may deprive their lower apartment of light and air. B. Cohen J. said rightly at the end of his judgment that "each of the parties is justified and worthy of sympathy. To decide between them is like cutting living flesh, however the decision goes."...

I cannot agree that the extent of a right of possession in land depends on the circumstances, and in particular that the special circumstances of given land or of the occupier can determine whether occupation extends upwards and downwards. Perhaps B. Cohen J. contended as he did under the influence (if only subconscious) of Jewish law. There the rule is that for land to extend *ad coelum et ad infernos* the conveyance must state this expressly (*Baba Batra* 63b; *M.T. Mekhirah* 24:15). Special circumstances may, however, exist in which land is deemed to embrace "the heights" although not explicitly stated, as, for example, where a person buys land to erect a very high building (*Tur*, *Hoshen Mishpat* 214:5 in the name of Rashba). Only in connection with the laws relating to the Sabbath does a private domain extend *ad coelum* (*Shabbat* 7a: *M.T. Shabbat* 14:3).

2. Benefit

C.C. 392/82

STATE OF ISRAEL v. AMIR

(1983) 2 *P.M.* 82, 88

The defendant forged a document in order to mislead a coroner investigating the death of a young boy and to remove suspicion that she had been responsible for the death by reason of negligence and so avoid the coroner's drawing up an indictment against her. The defence was that the coroner was not a judicial authority within the meaning of sec. 238 of the Penal Law, 1977, and that the provisions regarding "aggravating circumstances" in sec. 418 do not apply to the first part of the section dealing with ordinary forgery, and also that the "thing" which the accused is claimed to have sought by the forgery, i.e. removal of suspicion of negligence, is not a "thing" within the meaning of sec. 415 of the Penal Law.

Tal J.: I am not certain that to remove criminal suspicion is not "a right" in the wide sense. If a person leaves the coroner's court free from suspicion, it may be said that it is his right. Certainly a benefit arises here. The argument of defence counsel that "to obtain anything" in the section relates only to something of proprietary value is not consistent with the plain meaning of "benefit" nor with the case law. (Incidentally, in our sources the Rabbis discuss whether "benefit" is pecuniary or not, but the import of the debate is clearly not whether there can be a benefit that is not pecuniary; obviously such a benefit can exist. The question is whether the benefit can be translated into monetary terms. For example, a person must tithe his produce and give it *gratis* to the priest, but he may choose the priest. This freedom of choice is called in the *Talmud* a "benefit." It is not itself a proprietary right since a priest must not give any consideration to obtain the tithe. Those who regard the benefit as pecuniary, however, do so because it is possible that a person may receive indirectly some consideration from a third person, not being a priest, in order to give the tithe to a particular priest, such as the son of his daughter who is not a priest (*Pesahim* 46b).)

3. Expropriation

See: SARVI v. ISRAEL LANDS AUTHORITY, JERUSALEM, Part 3, Social and Administrative Regulation, p. 195.

See: TEL AVIV-JAFFA MUNICIPALITY v. ABU-DAYAH, Part 3, Social and Administrative Regulation, p. 196.

4. Rights to Improvements

C.A. 557/76

BISHOR LTD. v. TAUBEH *et al.*

(1978) 32(3) *P.D.* 713, 715, 719-721

Cohn J.: The relevant facts are not in dispute. They are as follows:

(a) Initially, the plot was registered in the name of Hevrat Hakhsharat haYishuv which sold it as early as 1928 to one Lazar Taubeh who was then living in Germany. In 1935 the plot was registered in his name in the Land Registry. Lazar Taubeh has since died and the appellants are his heirs.

(b) In 1953 one Taubeh Lazar purported to sell the plot to Moshe Ben-Yehudah (who was one of the defendants in the District Court, and whose trustee in bankruptcy appears as an appellant). Ben-Yehudah was registered as the owner and put up a building (which the learned judge called "a dwelling house of some dimension" and which later became part of a hotel).

(c) The amounts invested in putting up the building exceeded at the time the value of the plot and have always exceeded such value.

(d) In 1961, Ben-Yehudah sold the plot and the building to the respondent which was registered as the owner and has ever since occupied the plot.

(e) When the decedent Lazar Taubeh discovered that the plot had been stolen from him and had already passed through several hands he brought proceedings in the District Court in 1964 and obtained judgment ordering the intervening registrations to be removed and cancelled; the plot was reregistered in his name...

The rule in Jewish law is that land cannot be stolen (*Sukkah* 31a and elsewhere) and therefore land cannot vest in the thief but remains in the

domain of the owner. Even if it is sold a thousand times over and the owner gives up hope of getting it back, it will revert to him (*M.T. Gezelah veAvedah* 8:14; *Hoshen Mishpat* 371:1). Already in the first generation of *Amora'im* the question arose, what is the rule where "a person sells a field to a neighbour and it is found not to belong to him?" Even then, a distinction was drawn between a purchaser in good faith, not suspecting that the land was stolen, and a purchaser who knew that the land did not belong to the vendor but still took it (*Baba Metzia* 14b, 15b). Views were divided as to whether any improvement made by the thief or a subsequent purchaser from him in the stolen land belonged to the one who had made the improvement or to the person from whom the land was stolen. The rule finally arrived at was as follows:

> Where a person stole land and improved it, the improvement is assessed and he is at a disadvantage: if the improvement exceeds the expenses, he gets only such expenses from the owner; if the expenses are in excess of the improvement, he gets only the amount of the improvement. Where a person steals land and sells it to another who makes improvements, if the improvements exceed the expenses, he takes his expenses from the owner and the capital sum and the other improvements he takes from the thief....If, however, he knew the land was stolen when he took it over, he takes from the thief only the capital and loses the excess of the improvements over the expenses. Where the expenses exceeded the improvements, whether or not he knew that the land had been stolen, he will only get the improvements from the owner and the capital from the thief (*M.T. loc. cit.*: 9:5-7; *Hoshen Mishpat* 373:1).

Thus Jewish law attaches importance to the good faith of the purchaser, but only as regards his rights against the thief: where the latter defrauded him and he unknowingly purchased the stolen thing, the thief must compensate him for all the damage sustained; where the thief did not defraud him and he knew that the thing had been stolen, the thief is not bound to compensate him for all the loss but must only return the amount he paid. From the owner's viewpoint, it is immaterial whether or not the ultimate purchaser knew that the land had been stolen; in any event the owner is not entitled to the improvements unless he bears the expenses invested in the improvements, whether these were made by the thief or by the ultimate purchaser. This shows that the owner cannot be enriched even at the expense of the thief and *a fortiori* at the expense of a purchaser in good faith—since the rule is that "the thing stolen must be restored" (*Lev.* 5:23) from which it follows that the owner is only entitled to the return of the stolen thing (Sifra *ad loc.*). "The general principle is that all

thieves have to pay in accordance with (the value of the stolen thing at) the time of the stealing" (*M. Baba Kamma* 9:1).

On the other hand, the Sages ruled that a thief does not have to bear losses beyond the value of the article stolen.

> R. Yohanan b. Gudgada testified that if a beam is stolen and used in erecting a building, the thief is not bound to take down the building in order to restore the beam to its owner but must pay its value so as not to put obstacles in the way of penitents (*M. Gittin* 5:5).

"R. Shimon b. Eleazar laid down the rule that in respect of any improvement made by a thief, he has the advantage: if he wishes he may take the improvement or he may say to the owner 'Here take your own' " (*Baba Kamma*, 94a).

This rule also was made in order not to put obstacles in the way of penitents (M.T. *loc. cit.* 2:2)....The main thing is that the law is not strictly applied (according to Bet Shammai: "He must demolish the entire building and restore the beam" *Gittin* 55a) but some mode of restitution is found so as not to place any obstacles in the way of the penitent (which is the view of Bet Hillel *ibid.*). Rava said likewise that where a thief makes an improvement in the stolen article and then sells it, he has truly sold the improvement (*Baba Kamma* 96a). He immediately asks what would be the position if the purchaser made the improvement: the thief is entitled to any improvement he makes and is allowed to sell it in order not to place any obstacle in the way of his penitence, but this has nothing to do with the purchaser who knows nothing of the theft and has no need of repentance. The law as finally decided is that a purchaser is also entitled to the improvement he makes, not because what is fitting for the thief is *a fortiori* fitting for an innocent purchaser, but because what the former sells to the latter are all the rights that might subsequently arise (*ibid.* and see Rosh to *Baba Kamma* 9:3). Here we meet an implied term in the earliest of our sources, that every right available to a thief passes to a purchaser as part of the sale. (As regards the contradiction between this rule and the one cited above that neither the thief nor the purchaser are entitled to the improvement but only to the expenses of the improvement, it appears that the former rule applies to chattels and the latter to land: *Tosafot* to *Baba Kamma* 96a; Shakh to *Hoshen Mishpat* 373:7; as regards the rights which the thief sells to a purchaser, however, there is no difference between land and chattels.)

According to Jewish law, the appellants would be entitled to the structure erected on the plot after paying the respondent all the expenses invested therein, and the respondent would need to be reimbursed for the rest of the damages from its vendor. The appellants cannot, however, become entitled

to the structure as if it were *hefker* (ownerless property); they must first pay for it all the money expended by those who erected it.

Cr. A. 877/84

GALI v. STATE OF ISRAEL

(1986) 40(4) *P.D.* 169, 198-199

The main problem under discussion in this appeal was the definition of the term, "act of violence", which is required in order to establish an act of robbery and which distinguishes it from regular theft. The background was the snatching of an item from the hands of the victim of the crime.

Elon J.: The term violence [*"alimut"*] denotes aggression, use of force (Even Shushan, *The New Dictionary*), and its origin lies in the word *"alim"* in Aramaic...

This conclusion has another virtue, namely, that it is compatible with the approach of Jewish law on this matter. The learned judge in the District Court did well, in his opinion as quoted in *Patromilio v. State of Israel* (1984) 38(4) *P.D.* 821, in finding support in Jewish law for his conclusion... and I praise learned counsel for invoking Jewish law in support of her position. It is validated by virtue of the Foundations of Law Act, 1980.

The laws of robbery and theft in Jewish law are many and varied, and a great number of them are remarkable and unique to this legal system. Concerning the question before us, the position of Jewish law is concise and well defined. Let us look at the lucid words of Rambam in his *Mishneh Torah:*

> Who is a thief? One who takes money from a person in secret without the knowledge of the owners, such as a person picking the pocket of another and taking money without the owner seeing... but if he took openly, and in public, by force — this is not theft but robbery (*M.T. Genevah* 1:3).

Rambam repeats and adds elsewhere:

> Who is a robber? He who takes the money of another by force, for example, by snatching items from his hands (*M.T. Gezelah veAvedah* 1:3).

Rambam's words, which represent a summary of the position of Jewish law as it emerges from the talmudic sources (see *Baba Kamma* 57a; 79b)

and as it was later formulated in the Codes (see *Hoshen Mishpat* 348:3; 359:7), define the act of robbery as theft which contains an element of use of force — with force, by force of hand — and which is done openly, i.e. the victim—from whom the items are taken—is aware of the act taking place.

5. Tenant Protection and Jewish Law

See: VILOZNI v. SUPREME RABBINICAL COURT, JERUSALEM *et al.*, Part 2, General Principles, p. 103.

Chapter Four

SERVITUDES

1. Distinction Between Servitudes of Person and Property

See: HACKER *et al.* v. BROSH *et al.*, p.

2. Hypothecation of Chattels

C.A. 689/68

MEGADLEI PRI-ZEH LTD. v. TRUSTEE IN BANKRUPTCY OF PAUL STRAUSS

(1969) 23(1) *P.D.* 715, 720-721

By a notarial deed made before implementation of the Pledges Law, 1967, the debtor charged his assets, his stock and his tenancy of a warehouse to the appellant. Upon his being declared bankrupt, the appellant claimed under this deed the proceeds of the sale of the stock and the tenancy.

Kister J.: How is a charge created? How can we know for certain that some article is security for a debt? What happens if the debtor sells or transfers the article to a third person? How are other creditors to be treated when they obtain possession of the article through the courts before the secured creditor obtains possession?

The considerations for resolving these problems are in the main as follows:

(a) The legislature, particularly the modern legislator, tries to enable a person to charge his property whilst retaining use thereof and to overcome the difficulties presented by the charge.

(b) The right of people who acquire the property which the law treats

as pledged is to be protected, particularly when the purchaser has acted in good faith.

(c) Account is taken of the fact that people who enter into negotiations with the debtor rely upon the property being his, and in the absence of any knowledge that part or all of it is charged to another they are likely to sink their money into a dubious venture without being negligent; hence the registration of charges in registers open to public inspection or the marking of the charged property, or both.

(d) In finding a solution to each of these problems, care is also taken to avoid the danger of collusion between the debtor and one of his creditors at the expense of his other creditors, or the danger of fictitious transactions.

All this is illustrated in Jewish law by the *apoteki* on movables, this being a charge without delivery of possession, which is, however, of no great potency. *Hoshen Mishpat* 117:3 states:

> Where an *apoteki* is placed upon a cow and it is then sold, a creditor cannot levy his debt on it, and so also with other movables, since the *apoteki* has no "voice", even if made by deed and even if the purchaser knew of it. On this there is no dispute among the Rabbis.

And in the next paragraph:

> Likewise as regards priorities: if an *apoteki* is placed on movables, even by express deed in favour of one creditor, and a subsequent creditor levies his debt on the property, the latter becomes entitled, but only if the property was not charged adjunct to land, for then he does not become entitled.

It may be noted that even an *apoteki* adjunct to land is not very effective because of market overt. See *Hoshen Mishpat* 113:1 and 60:1 and Shakh *ad loc.* who mentions the debate of the authorities over the rights of a later creditor to movables charged in this manner (particularly in those periods when deeds of charge regularly made reference to "adjunct to land"). Shakh cites the views of Mabit and Rashdam who think—and he himself tends in the same direction—that market overt requires that the interest of those creditors not aware of the *apoteki* should also be taken into account, and consequently the holder of the *apoteki* should not be given preference. *Resp. Rashdam, Hoshen Mishpat* 71 notes that not to do so might make the borrowing of money more difficult, if a creditor needed to suspect the existence of an *apoteki* on movables held by the borrower.

It should also be observed that market overt does not obtain in respect of immovable property since it is assumed that the deed creating a charge on land would have a "voice", i.e., be widely known.

3. Charge of Debtor's Property

App. 178/70

BOKER *et al.* v. ANGLO-ISRAELI MANAGEMENT...LTD. *et al.*

(1971) 25(2) *P.D.* 121, 122, 125-126

The applicants contracted to acquire an apartment; they paid part of the purchase price and obtained possession of the apartment without registering it in their names in the Land Registry. Subsequently the apartment was attached by creditors of the vendor. The applicants sought to have the attachment removed.

Kister J.: In Jewish law the position, as indicated in *M. Baba Batra* 10:8 and *M. Gittin* 5:2, is as follows:

> If a person lent (money) to another under deed, he may levy (the debt) from encumbered property. If (the loan was made) in the presence of witnesses, he may levy from free property. If a handwritten note is produced showing that he is indebted, levy is made on free property. Payment is not made from mortgaged property where there is free property.

Here I shall deal with the significance of these rules and then consider the basis of the law as presented in the *Talmud* and the Talmudic literature. "Deed" does not mean a deed in handwriting, but a deed made by witnesses according to the requirements of Jewish law. "Encumbered property" refers to property sold by the borrower after receiving the loan. I should note that the deed involved here does not impose any liability on the property for the loan (no pledge, charge or even explicit indication that the property is liable).

In the *Talmud* (*Baba Batra* 175b) the basis of these rules is considered. According to one view which was apparently widespread, the charge is a *shibuda de'oraita*: where a person borrows or generally assumes an obligation to pay, even without any bond, his property (here I deal only with immovable property) is liable for and charged with the debt under Biblical law. Accordingly, the creditor would be able to levy his debt on property that the debtor had subsequently sold. However, because of the loss that purchasers might suffer, it was decided that a creditor can only seize encumbered property when the loan was made by deed, since a deed made by witnesses has "a voice" and would come to the attention of a wide circle of people, whereas an oral debt or one under the debtor's

handwritten note or in the presence of witnesses without a deed has no sufficient "voice" and purchasers would not know to bear it in mind, in which event it would not be right for them to lose the price they had paid. It may be added, as stated in the *M. Gittin* quoted above, that even when a creditor is able to levy his debt from the property that has been sold, he should first try to levy it upon the debtor personally and on such property as he has available on which levy can be made.

According to the view that "*shibuda lo-de'oraita*" (there is no charge on property unless expressly and duly charged under law), the rule was laid down that a creditor under deed may levy from encumbered property in order not to make the lending of money difficult, or in other words, to facilitate the granting of credit, but the right to levy was not extended to property which the debtor had sold, for debts not under deed, since these have no "voice", and it would be unjust to levy on purchasers who generally were unaware of the debts.

This is not the occasion to elucidate the details of the rules, and whether these differ if we adopt one or the other view as above; much has been written on this in the halakhic literature, even in English in R. Herzog's *The Main Institutions of Jewish Law* (1965) vol. I, 345. Here I am content to set out the sources for the main rules as determined by *Hoshen Mishpat* 39:1; 104:1 and 111:5. I might add that in fact, a deed did not always have a sufficient "voice" and there were places where it was customary to make a public announcement of the intention to sell immovable property so that creditors could give notice of the debts due to them (*ibid.* 104:2 and the commentators *ad loc.*, and more particularly *Resp. Rashba* 1:893-94).

4. Charged and Free Property

See: LEVI *et al.* v. SCHEFFER, p. 738.

5. Collection of Debt from Medium Quality Property

See: SHMUEL v. ISRAEL, Part 8, Obligations, p. 600.

C.A.(T.A.) 862/79

LEVI *et al.* v. SCHEFFER

(1981) 1 *P. M.* 368, 373-374

The appellants wished to have an attachment on their shares in certain companies for a money claim changed into one on specified land. The registrar dismissed the application, mainly on the ground that they had not set out in their affidavit the damage they would suffer if the attachment on the shares continued.

Harish J.: Since there are, at the moment at least, no decided cases on how to proceed in the present matter, we must seek assistance from our own sources. *M.T. Malveh veLoveh* 19:1 (based on *Gittin* 48a) states that "when the court turns to the property of a borrower to levy a debt, collection is only made from land of medium quality." (Three types of land exist — best quality, medium quality and poorest quality.) "When the creditor levies the debt, the biblical law is that he does so out of the poorest quality, since it is written 'Thou shalt stand without and the man for whom thou does lend shall bring forth the pledge unto thee' (*Deut.* 24:11). What will a man normally bring forth? The least valuable of his goods. But the Rabbis ordained medium quality, so that the lending of money should not be impeded." Again, "Payment is not made out of encumbered property where free property exists, even when the latter is of poorest quality and the encumbered property is of medium or best quality, whether it was sold or given away. Where the free property has been inundated, the encumbered property is seized since the former is deemed not to exist."

These rules of the *halakhah* give us a guiding rule of practice, that where an option exists for paying a lender either by taking the best of the debtor's assets or the worst or medium assets, leaving the best with him, we incline to favour the debtor. A creditor has no vested right both to be repaid to his satisfaction and to make things difficult for — and all the more, to injure — the debtor. To make things difficult for and injure the debtor is inconsistent with doing right and good (*Deut.* 6:18) which every Jew is commanded. If Scripture so holds, *a fortiori* does it apply to interim

attachment on a mere claim where the likelihood of a decision in favour of the plaintiff is actually doubtful.

6. Pledge not Equal in Value to Debt

C.A. 131/71

BAMAIOR v. COMEDY THEATRE *et al.*

(1971) 25(2) *P.D.* 744, 755

Under a contract with the respondents the appellant was under obligation to finance presentations at a theatre managed by the respondents and to bear the risk of losses. The appellant agreed to "advance" money required for discharging the debts of a previous impressario, such money to be repaid out of the theatre's share in the profits. No provision was made in the event of no profits being made. The venture was unsuccessful and a loss was suffered. The appellant, however, claimed repayment of the money he had advanced as a loan. The respondents argued that the money was an investment or at the most a loan repayable out of the special fund set aside for that, i.e. out of profits.

Kister J.: After consideration, I have reached the conclusion that the appeal should be granted.

It is accepted that where a person takes a security or where a debtor ensures him a convenient way of collecting his debt, he does not put his trust entirely in the security and if he is unable to collect his debt by means of the security or in the manner promised, he is not to be deemed to have foregone his debt or the balance thereof. Thus, where a person accepts bills for payment of a debt, the bills are treated as conditional payment unless it is expressly stipulated that they constitute a complete discharge. Similarly where a person takes a pledge or charge, the debt is not deemed to be discharged thereby unless the whole debt is completely collected; otherwise he may collect the balance of the debt from the debtor in the ordinary way.

These things are not novel. In Jewish law as well, where a person takes a pledge of lesser value than the debt and the pledge is lost or the sale of the pledge does not yield the amount of the debt, the creditor does not lose the balance unless he has expressly stated that he accepts the pledge for his debt and that upon the pledge being lost he will lose his debt (*Hoshen Mishpat* 72:2).

7. Right to Redeem Land Assigned to Creditor

C.A. 138/62

CUSTODIAN OF ABSENTEE PROPERTY v. UBEID *et al.*

(1962) 16 *P.D.* 2649, 2655

In the process of a certain land settlement, the respondents claimed that they or their father had purchased certain plots which they had occupied and worked ever since, whilst the appellant denied that the absentee owner had sold the plots but claimed that he had given them to the respondents as security for a debt. A written contract transferring one of the plots to the respondents was ambiguous. On the basis of oral evidence, the District Court ordered the land to be registered in the names of the respondents.

Cohn J.: It should be noted incidentally that what the English courts of equity do to moderate the strict law of mortgage was done by Talmudic law for the same reasons and in the same manner. As Maimonides puts it:

> Where the court has made an assessment on behalf of a creditor, whether regarding the assets of the borrower or as regards the assets charged which are in the hands of a purchaser, and subsequently the borrower...acquires the means to discharge the debt, the creditor is removed from the land and it reverts to the owner (*M.T. Malveh veLoveh* 22:16).

This applies where the holder of the "mortgage" has proved his debt and the court has delivered the land up to him for non-payment. One would have thought it to be so *a fortiori* if no court proceedings were yet pending and the creditor held the land by virtue of its delivery to him by the debtor. But on this point the *Amora'im* R. Aha and Rabina differ: one says that where the land was given by the debtor himself to the creditor, "it is not returnable" and the creditor cannot be removed from the land when the debtor acquires enough to pay the debt. There is good reason for this view, since the delivery of the land in such as case is treated like a delivery under sale, in both instances the delivery being voluntary. The other says that the land is returnable, since the failure to institute proceedings is only to be regarded as being due to a reasonable apprehension of shame (*Baba Metzia* 35b).

C.A. 555/71

AMSTERDAMMER v. MOSCOWITZ

(1972) 26(1) *P.D.* 793, 805

In the course of execution proceedings to realize a mortgage, an auction was held, and the highest offer—that of the first respondent—was accepted. The appellant, who is the wife of the debtor, did not participate in the auction, but asked that it be cancelled, and in the second auction held by virtue of the decision of the head of the Execution Office, the appellant bid successfully for the property. The District Court overturned the decision of the head of the Execution Office to hold a second auction, and the appeal turned on the question of whether the head of the Execution Office was authorised to cancel his decision proclaiming the purchaser, by virtue of reg. 55(b) of the Execution Regulations, 1968, and to reopen the auction in the event that after the decision was made, a higher price was offered than that offered by the highest bidder at the auction. Alternatively, the appellant claims that once she paid off the mortgage debt, the sale should not proceed.

H. Cohn J.: However, concerning the right of the debtor to repay a mortgage debt even after the repayment date, we have no need to turn for inspiration to the English laws of equity: the Sages of Jewish law pre-empted the English equity judges by more than a thousand years in determining that "a valuation is always returnable", for it says (*Deut.* 6:18) "And thou shalt do that which is right and good" (*Baba Metzia* 35a). And the rule is this: "When a court has made a valuation [i.e. realized a mortgage] for the creditor, whether from the property of the borrower or attached property in the hands of another, and later, the borrower...gets the money and brings it to his creditor, [the creditor] is removed from the land, for a valuation always returns to the owner" (*M.T. Malveh veLoveh* 22:16). The *Shulhan Arukh* adds that this rule applies "even if the creditor had the land for several years" (*Hoshen Mishpat* 103:9). However, if the creditor sold the land to another, and the latter acquired legal title therein, then the land does not go back to the debtor (*M.T. Malveh veLoveh* 22:17; *Hoshen Mishpat* 103:10).

(It is interesting to note, incidentally, that according to the scholars of Nehardea, the right of the debtor to repay the debt and regain the land for himself from the creditor ought to be limited to a period of twelve years (*Baba Metzia, op. cit.*). The law was not, however, settled this way, but in England, the debtor's right to repay the debt and regain the land for himself from a creditor who acquired it from realization of a mortgage is limited to such a period of twelve years (Real Property Limitation Act, 1874, sec. 7).)

We can plainly see that by virtue of both the Hebrew laws of equity and the English laws of equity, the right to repay the mortgage remains vested in the debtor until a purchaser (who is not the creditor) purchases the mortgaged property in good faith and by legal title; and the Israeli legislator did not disappoint those sources from whence he drew...

Chapter Five

CONCEALMENT OF ASSETS

1. Ostensible Assignment of Property

C.A. 22/55

SHEFI *et al.* v. SHPITZ

(1955) 9 *P.D.* 1077, 1080-1085

This appeal involved a widow's right to maintenance out of a deceased's estate, a right which does not materialize if the heirs do not receive any assets by way of succession. A genuine gift by the deceased inter vivos *is not included in such assets.*

Goitein J.: Even after the establishment of the State, the Supreme Court has had an opportunity to express its opinion about the obligation to maintain the widow. Assaf J. has said in *C.A.* 100/49 *Miller* v. *Miller* (1951) 5 *P.D.* 1301, 1313 as follows:

> The law as decided by Maimonides and *Shulhan Arukh* is that even when a person directs at his death that his widow shall not be provided for out of his property, he is not listened to. The obligation to maintain the widow is not a new obligation created by the death of the husband, and it has nothing in common with the right of succession that adheres in an heir upon death: it is an obligation created on the occasion of marriage, although it does not become actual until the death of the husband. That is explicit in the observations of *Even haEzer* 69.
>
> When a man marries a woman he assumes obligations regarding ten matters, and becomes entitled to four things, even without any writing. The ten matters are her maintenance, clothing, cohabitation and the essential part of the *ketubah* [marriage settlement]...and to be provided for out of his property and to dwell in his house after his death during her widowhood...
>
> The reason for the obligation to maintain the widow is therefore the marriage and the point in time when the obligation attaches is at the

time of the marriage, but the obligation is discharged on the husband's death, like the essential part of the *ketubah* which also obtains during the marriage but its payment becomes due on divorce or widowhood. For this reason if the husband wants to be released from the obligation he must so stipulate upon marriage. The maintenance of the widow is to be regarded as a continuation of the maintenance she received during the husband's lifetime and there is no interval of time between them.

Should it be asked why Maimonides and *Shulhan Arukh* number them separately as if they were disparate obligations, the answer is that the wife's maintenance, according to Maimonides, is scriptural, whereas the widow's maintenance is rabbinical, one of the conditions of the *ketubah*, and they are therefore differentiated. In the words of Maimonides, "Of the ten, three are scriptural — food, clothing and cohabitation—...and seven are rabbinical conditions imposed by the *bet din* [religious court]—one of them is the essential part of the *ketubah* and the remainder are called conditions of the *ketubah*, namely to provide medical attention...to be supported out of his property and to dwell in his house after his death during widowhood..."

There are two aspects of the *halakhah* which are concerned with the concealment of property. Different rules apply when the husband and when the wife does the concealing. A woman may wish to remarry and does not want her future husband to enjoy her property and therefore writes over her property to the children of her previous marriage or to someone else. The deed of gift is named "a deed of concealment" and the rule relating thereto is summed up by Maimonides in the following terms:

A woman who wishes to marry and gives all her property by gift to her children or some other person and thereafter gets married and is divorced or her husband dies, the gift is void since she only wrote over her property to conceal it from her husband and to prevent him from succeeding thereto but when necessary to revert to her. Hence if she dies in her husband's lifetime the donee acquires it entirely (*M.T. Zekhiyah uMatanah* 6:12).

This rule is based upon the section of the *Talmud* (*Ketubot* 78b-79a) dealing with the case of a woman wishing to remarry who assigned all her property to her daughter. After she remarried and was subsequently divorced, she claimed the return of the property from her daughter, who refused. When the parties came before R. Nahman, he tore up the deed and declared the gift void because no one is presumed to deprive himself of his property and give it away to another. Hence the whole purpose

of assigning the property to her daughter was to conceal it from her future husband so that he should not enjoy it, but not to vest it in her daughter absolutely. The donee did not acquire any right in the property because of the absence of any intention to vest an absolute gift, though *prima facie* the assignment by deed seems to be complete. The obverse is where a man is about to remarry and desires to guard his property so that his wife would be unable to collect her *ketubah* or maintenance out of it. The difficulties of implementation, if possible at all, are immediately apparent, since as we have already said, citing Assaf J., the rule is that the husband must maintain his wife from the moment of marriage and the obligation passes to his estate upon his death, and he cannot be released therefrom except by so stipulating at the time of the marriage; and in this respect there is no difference between a first and second wife.

Over the centuries the authorities disagreed over whether a husband can conceal his property from his wife and render her unable to extract from the property her maintenance or her *ketubah* by transferring it to a third person. Today, however, the decided law is that he certainly cannot do so.

The view of Rabbenu Tam, representative of the minority, is that a man can conceal his property from his wife by giving it to another, as set out briefly in *Tosafot* to *Baba Batra* 79a. A person wished to borrow money but not to charge his property to a creditor or for his wife's *ketubah*. He drew up a concealing deed and Rabbenu Tam declared that the deed was effective. The majority view was in the reverse, having regard to the principle that "whoever wishes to evade a rabbinic regulation by fraud or stratagem, and all the more to steal from his neighbour, the rabbis must frustrate his intention even though there is no evidence but only well-founded supposition" (*Resp. Rosh* 78:3). This principle is clearly expressed in *Hoshen Mishpat* 99:6: "Where a person is indebted to a neighbour and gives all of his possessions away to others in order to evade his debt, his deceit will not avail and the creditor may collect his debt...from the donee." Likewise, *Resp. Rosh* 78:1: "Where a person buys land and directs that it be vested in his brother instead of himself and the deed is drawn up in the brother's name in order to evade his wife's charge, my master R. Meir decided that the wife may levy thereon since he intended to defraud and evade a rabbinical regulation but to no avail."

The purpose of this rule was not to deny owners the right to deal with their property as they wish and thereby interfere with the proper management of their affairs. Where an owner honestly wished to convert his immovables into cash or to give away his property as a gift, he might do so without hindrance. But where a transaction is made with the intention to defraud, to deny a creditor his rights, the court will intervene to enable the creditor or the wife to effectuate his or her rights and be

paid out of the property "transferred", without regard for the transaction entered into.

The *halakhah* in this area may be summarised in the following manner: If the intention of the donor is to vest in the donee complete ownership without any thought of fraud, the transfer is fully valid even though the consequences involve the denial of the rights of the creditors, including the wife. If, however, the donor's intention was indeed to vest full title in the donee but was accompanied by the thought of defrauding and denying creditors their rights and the intention is not, in fact, discernible —i.e. it is not a proven supposition—the accompanying thought is merely an unexpressed one which, it is well-known, cannot set aside the act of transfer. If, however, the intention to defraud is apparent in the act and is a well-founded supposition, then in spite of the true intention to vest full title in the donee, the transfer will not take effect because the fraudulent intention becomes a proven supposition. R. Ya'ir Hayim Bachrach gives two clear examples in *Havot Ya'ir* 4 that illustrate the difference between the validity and invalidity of transfers:

> A widower married a widow but before the marriage drew up a promissory note in favour of his daughter for a sum of money, payable one hour before his death. On his death the widow came to collect her *ketubah*, but the daughter produced the note to take [for herself] the house he had left, to the exclusion of the widow....The fraud was clear as day, that he had fixed the time of payment at one hour before his death at the same time as the payment of the wife's *ketubah* to give the daughter priority...without any loss to himself since throughout his lifetime the note could not be claimed and it was certainly a concealing deed.

As against this:

> Had he made the payment of the promissory note to be at the end of ten years, which might have been in his lifetime, although he trusted the daughter not to claim payment during his lifetime but only on his death, that would not be a case of fraudulent intention voiding the act.

A not inconsiderable number of the authorities contend that no distinction is to be made between a gift given to children and a gift given to a third person. As Maharam (cited in *Yam Shel Shlomo*, *Ketubot* 4:28) writes:

> Even though a gift overrides the *ketubah* or maintenance, the gift which a person makes to a child or heir, even if genuine, does not....Ultimately a gift to heirs is like a general succession...and it would appear that such a gift is not more effective than a scriptural succession to displace the charge of the *ketubah* in respect of movables and maintenance.

Having summarized the *halakhah* regarding the present matter, let us see how the learned judge in the lower Court decided. Clearly, so long as counsel for the appellants was unable to show us that the learned judge had erred in his interpretation of the *halakhah* there would be no occasion for us to interfere.

The learned judge stressed, and rightly, the difference between a transfer a person makes to his child and a transfer to another. The reason for the rule that a widow may not levy her maintenance from property transferred to another is "public policy." As the *Mishnah* says (*M. Gittin* 5:3): "Payment for maintenance of wife and daughters is not recovered from mortgaged property for reasons of public policy." The learned judge quoted the interpretation of a commentary on the *Mishnah*, *Tiferet Yisrael*, for the meaning of "public policy"—"All these things have no limit and purchasers do not know to be careful over how much is left free to the vendor, on which levy can be made." And the *halakhah* is then summed up in the following words:

> The *halakhah* is therefore that in general a woman will not be paid her maintenance out of property which her husband transferred in his lifetime, even by way of gift, and ownership is registered in the name of the donee in the deceased's lifetime.

He asks whether she cannot levy when the transfer was made, fraudulently or fictitiously, in order to defeat the right to maintenance. After examining the sources, he writes:

> Among the suppositions mentioned by Rosh, according to the *Talmud*, one answer...is that we presume that a person will not give away all his money to others and be left to go begging. If a person transfers all his property, even to his child, the supposition is that he intended fraud and concealment of his possessions rather than a real transfer. When a question of concealment arises (according to *Ketubot* 79b), it appears that if he left something for himself but only very little, the supposition remains that he intended to conceal his possessions (See *Be'er Hetev* to *Hoshen Mishpat* 99 and Shakh and Ketzot haHoshen *ad loc.*). It seems to me that this supposition is consistent also with the rules of circumstantial evidence of modern law.

The learned judge turned to the facts mentioned above and reached the conclusion that is determinative of the present appeal: here there was an intention to defraud and conceal property and the gift was not absolute.

In my opinion the learned judge was right in reaching the unavoidable conclusion that emerged from the facts I have mentioned. The father did not succeed in transferring the property to his son in his lifetime as an

absolute gift and the son did not receive an absolute gift. Hence, although the son obtained the property as a gift in his lifetime according to civil law, the property is considered under Jewish law to have passed by way of succession, subject to the incumbrance of payment of maintenance to the widow and the obligation to allow her to continue living in the house where she had dwelt with her husband whilst he was alive.

In view of the foregoing, we dismiss the appeal and affirm the judgment of the District Court.

Chapter Six

MARKET OVERT

1. Purchase of Stolen Property

C.A. 8/59

GOLDMAN v. GOLDMAN

(1959) 13 *P.D.* 1085, 1088-1089

In the course of divorce proceedings the wife petitioned for the eviction of the husband from their residence which was in her sole ownership, on the ground that he was a mere licensee and the licence had expired.

Silberg J.: It is of interest to test whether the rule in *Bennett* v. *Bennett* (1958) 12 *P.D.* 565 is correct. On the face of it one objection exists which may undermine the whole structure of the rule, and that is sec. 38 of the Civil Wrongs Ordinance, which provides:

> In any action brought in respect of the conversion of any movable property, it shall be a defence that the defendant purchased such property in good faith—
>
> (a) in any open market, from some person usually dealing in that market in the kind of property of which the property alleged to have been converted consists, or
>
> (b) in any shop where the kind of property of which the property alleged to have been converted consists is usually sold, from the proprietor thereof or his agent.

This defence is known as market overt, in Hebrew *takkanat hashuk*, as it is known in Jewish law, according to which a purchaser of stolen goods is not (generally) required to return them to the owner unless the latter pays him the price he gave for them (*Baba Kamma* 114b-115a; *M.T. Genevah* 5:2; *Hoshen Mishpat* and Rema 356:2-3; Sema *ibid.* 5:

"Because of *takkanat hashuk*, i.e. because he purchased the goods openly in the market, if the purchase price is not returned, the result will be that no person will buy anything from another for fear that it might have been stolen and will be taken from him without payment").

C.A. 448/74

AUTO BELAH PARTNERSHIP *et al.* v. LUCKY DRIVE LTD. *et al.*

(1976) 30(2) *P.D.* 207, 215, 216

The first respondent, a car hire firm, rented a car to one Yitzhak Spiegler who sold it to the appellants, motor car dealers, who in turn sold it to the third respondent. The District Court charged the appellants with theft, after holding that they had acted not merely as middlemen and that the third respondent had bought the car for consideration and in good faith and was protected.

Schereschewsky J.: Nor is the submission of counsel for the appellants to be accepted that the learned judge erred in dismissing the action against the third respondent under sec. 53 of the above Law in association with sec. 34 of the Sale Law, which speaks of market overt, i.e. the defence of a person who buys in good faith in special circumstances. *Takkanat hashuk* is known in Jewish law: in special circumstances, a person who buys movables from someone who is not the owner, without knowing that they were stolen and without the vendor being known as a thief, is protected against a claim by the owners for the return of the property, or in any event is not bound to return it without the claimant paying him the purchase price. This defence is available to a purchaser as market overt, since he bought the property in open market, and if he is not reimbursed for the purchase price, the result will be that no one will buy anything from another for fear that it was stolen and will be taken from him without payment (see *Baba Kamma* 115a and Rashi *ad loc.*; *M.T. Genevah* 5:2-3; *Hoshen Mishpat* 356:2 and Sema *ibid.* 5; see also Silberg J. in *Goldman* v. *Goldman* (1959) 13 *P.D.* 1085, at 1089). According to sec. 34 the defence of a purchaser in good faith is therefore similar in its essentials to the defence in Jewish law...

The concept of "good faith" is not defined in the Sale Law, and appellant's counsel tried to argue that there can be no good faith in the case of a purchaser unless it can be shown that even with the utmost care he was unable to discover that the purchased article did not belong to the vendor, i.e. in the present case it was up to the third respondent to find out from the Licensing Authority who was the registered owner of the vehicle and,

not having done so, she had not proved that she bought in good faith in the sense of sec. 34. This argument is unacceptable. It is not surprising that the Law does not contain a detailed definition of good faith, since the concept is known to us from ancient times. We read in *Gen.* 20, that when Abimelekh took Sarah and God accused him of the transgression of taking another man's wife, Abimelekh defended himself by arguing that he had taken steps, reasonable in the circumstances (he had asked both Sarah and Abraham), to clarify the situation and there was no reason for him to think that he had committed adultery. He therefore pleaded, "in good faith and with innocent hands have I done this" (verse 5 and Rashi *ad loc.*), that is, there was no occasion to require him to make sure that Sarah and Abraham were speaking the truth. And this plea was accepted, as verse 6 says, "and God said unto him...I also know that thou hast done this in good faith" etc. In other words, the only care that may be demanded is that which in view of the circumstances, the person raising this plea was entitled subjectively to regard as reasonable for determining his situation. Failure to investigate the full facts does not negate the existence of good faith if such failure is not, in the circumstances, the result of indifference...

Chapter Seven

COURT SALES

1. Protection of Purchaser in Good Faith

Misc.(T.A.) 362/59
HIRSHBERG v. SCHMERLING *et al.*
(1960) 22 *P.M.* 58, 59, 62

Kister J.: On 10 November 1949, the Custodian-General had made an application (A.220/49) under sec. 35 of the Custodian-General Ordinance, 144...stating that one Mr. Hayim Hirshberg, known to be abroad, owned property in the country, including a plot of land registered in the Land Registry as Parcel 7151 Plot 103, and there was no one responsible for dealing with it. The Custodian-General therefore asked the Court for an order enabling him to take over all the property of Hirshberg in Israel and deal with it in accordance with the directions of the Court.

At first sight, the position of the applicant must indeed be supported. Not only in 1949 but ten years before then and ten years afterwards, Hirshberg was not abroad nor was he legally incompetent. How then could anyone have the power to sell and transfer his property? Although a court order was made, that was done apparently in error. The approach of Jewish law is that an act done in error is a nullity. Another question, however, arises, i.e. assurance of people who have disbursed money and entered into contracts in reliance on a court order, as in the present case. If there was no apparent defect, how far can they be protected when they act in good faith? Jewish law recognises the defence of good faith when a purchase is made from the court via a public tender which has been precisely complied with and upon notice that anyone not appearing would lose all his rights (see Ritba to *Ketubot* 100b; *Resp. Rosh* 18:16; *Hoshen Mishpat* 109:3; Sema *ibid.* 6; *ibid.* 107:2 and Pithei Teshuvah *ad loc.*).

2. Rescission of Sale of Orphan Property on Error in Evaluation

C.A. 217/75
LEVI v. NAHOL *et al.*
(1975) 29(2) *P.D.* 309, 318

The Nazareth District Court gave its approval in advance, as required by sec. 20(2) of the Capacity and Guardianship Law, 1962, to a transaction in real property effected by the respondent in the name of her minor children, and the appellants. The appellants, for their part, fulfilled all the conditions imposed by the Court in order that the approval be forthcoming, but the respondent now requests the approval given by the District Court be withdrawn, on the grounds that new facts have been discovered or the circumstances have changed, as specified in sec. 74 of the Capacity and Guardianship Law.

Kahan J.: I would like to make it clear that in my opinion, the Court may use its power under sec. 74 only in special cases and then with great care. This power should not be used in order that a ward should have an advantage that was not coming to him under an earlier decision, or in a case where the difference in price is not great. However, in the present case, where the difference between the appropriate price and that which was agreed is a matter of several hundred percent, the intervention of the court for the benefit of the minors is justified. On this matter, we may learn from Jewish law, according to which "a court which sold the property of orphans in error, whether it be movables or immovables —if the mistake was less than a sixth, then it is forgiven...if the mistake was more than a sixth, the deal is void" (*M.T. Mekhirah* 13:10). This is the rule, with respect to the property of orphans, even though in general, the law relating to deception does not extend to land. I am not proposing that we adopt the criterion of a mistake of one-sixth of the value as being justification for cancellation of the transaction, but as we have said, the value of the land here exceeds the agreed price five-fold, and I believe it would be difficult to find a more suitable case for the exercise of the power of the Court than this.

Chapter Eight

DECEIT

1. Duty to Inform of any Defect or Claim

C.A. 338/73

LOT 677 BLOCK 6133 CO. LTD. *et al.* v. COHEN *et al.*

(1975) 29(1) *P.D.* 365, 371

Concerning a dispute between the purchasers of apartments in a cooperative house and the contractors, the District Court found in favour of the purchasers, and ordered the contractors to demolish the office that was erected between the pillars of the building.

Kister J.: Counsel for the appellants is also trying to find support in a provision in the contracts whereby the contractor is entitled "to attach parts of the joint property to particular units in the cooperative house." From this he wishes to argue, *a fortiori*, that if the contractors are entitled to attach part of the cooperative house to the residential units, they may also erect a separate unit. But this argument has no substance. There is no doubt that under the Sale Law, the right of attachment may only be used in good faith and in the accepted fashion, i.e. the contractors are entitled to attach parking places, or porches and such like to particular housing units, but under no circumstances may they take joint property for themselves. Even according to English case-law, "common honesty" must be followed, and this condition may not be read as granting any sort of right to the seller that does not fall within his authority to act for the purpose of executing the sale, and he must act in a trustworthy manner and attach what requires attachment according to the contracts and for the registration of the cooperative house accordingly. These were the requirements of English case law concerning the interpretation of contracts, and today, the law, too, requires good faith, and no express clause or construction of an implied clause in the regular sense is necessary. If we should ask, what obligation does the seller have to act in good faith, it is appropriate to quote Jewish law

(*M.T. Mekhirah* 18:1): "It is prohibited to deceive people in transactions or to mislead them." One of the examples of this rule is a person who sells an object which was defective, and does not tell the purchaser: this is misleading...and it is even forbidden to sell something when the seller knows that there are claims on it, and he does not inform the purchaser (*op. cit.* 19:1). How much more so is it misleading when the seller intends to reduce the benefit of the sale and to take for himself property which appears to be joint property without informing the purchasers of the apartments.

2. Deceit and Overreaching

See also: Part 6, Penal Law, p. 421 and Part 8, Obligations, p. 587.

C.C. 749/56

RISHON LE-ZION AND ZIKHRON YAAKOV VINTNERS COOPERATIVE v. YEKEV HAGALIL

(1960) 22 *P.M.* 71,74, 75, 76-77

Kister J.: The plaintiff is a company that produces wines and spirits, and for over fifty years it has used the symbol of the two spies bearing a large cluster of grapes and the words "Carmel Mizrahi". It is superfluous to add that the scale of production and marketing of the plaintiff is relatively very large in comparison with any other producer of wines and spirits in this country. It may be said that the symbol with the above words is very well recognised, and there is no dispute about that...

The plaintiff has now begun to order large quantities of bottles engraved with the symbol, but a large proportion of the bottles that come to market bearing the plaintiff's symbol have emanated from other producers who fill them with their own product...

Since ancient times, the tendency among the Jewish people has been to maintain fair standards in business, based on (i) the prohibition of *ona'ah* (fraud), (ii) protection against another exploiting one's efforts and (iii) proper modes of competition to prevent interloping...

As for *ona'ah*, the prohibition applies to a seller, not to mislead others

and to refrain from any action and any form of trading by reason of which a purchaser may err; for example, the prohibition on a farmer against mixing his own grain with that of others, since a person buying from him thinks he is purchasing his produce alone (*M. Baba Metzia* 4:12).

As an example of exploiting the labours of another, I cite a *responsum* from *Resp. Noda biYehudah* (Mehadurah Tinyana, 24) of two centuries ago, which tells of an author who ordered two sets of the *Mishnah* to be printed with the usual commentaries along with one of his own, at a fixed price per page. It was the usual practice of printers to break up the type after printing a batch of pages and then reset it for the next batch. The printer here, however, had an abundance of fount and did not break up the type as indicated but kept some of it intact. After finishing the work for the author, he removed the latter's commentary and printed on his own account two sets of the *Mishnah* with the very same type. The author asked the printer to pay him for the benefit derived from using the type set on behalf of the author. *Noda biYehudah* gave it as his opinion that the author may prevent the printer from proceeding because that would involve the author in losses, since the publication of the sets of the *Mishnah* without the author's commentary at a much lower price would reduce the possibility of selling the author's edition. *Noda biYehudah* decided to order the printer to pay the author the amount by which he had benefited, since no one may benefit *gratis* from the work of his fellowman (see also *Divrei Malkhi'el*, 3:157).

C.A. 417/67

FELDMAR v. STEIN

(1968) 22(2) *P.D.* 210, 224

The respondents claimed the return of a deposit they had paid under a contract for the purchase of an apartment, claiming that they needed the money to support themselves. By verbal agreement the matter was submitted to arbitration in accordance with Jewish law. The arbitrators ordered the appellant to return the deposit, which he did. A subsequent claim by him for damages for the losses he had incurred was dismissed on the grounds of res judicata, *resulting from the arbitration.*

Kister J.: The Statement of Claim states that it became apparent to the appellant that the respondents' story about their economic situation was entirely incorrect and that they bought another and dearer apartment and therefore desired to be rid of their obligations under the contract.

If that was the situation, the statement of the respondents—or the first respondent who acted in the matter—to the appellant and the arbitrators fell within what Jewish law defines as deceit, which is forbidden even when no financial loss is involved, and the prohibition of *ona'ah* (fraud) which is treated as theft (see *M.T. Mekhirah* 12:1 and 18:1, *Tur Hoshen Mishpat* 227 and 228:5; *Hoshen Mishpat* 227:1; Sema *ad loc.* 1; *ibid.*, 228:6).

According to the appellant, he later returned to the same arbitrators and asked them to summon the respondents to another *din Torah* (hearing before a Jewish court in accordance with Jewish law), but the respondents refused to appear. It is clear that the renewed request of the appellant to litigate in front of the arbitrators was because of the overreaching and the deceit.

Here too, in court, the appellant is entitled to claim and prove that the act of the respondents constituted deceit according to sec. 34 of the Civil Wrongs Ordinance, and assuredly, this is a valid claim in court and should not have been dismissed *in limine*.

It is therefore decided that the result will be as specified in the judgment of the President. The respondents will pay the appellant his costs...

See: BEN-NATAN v. NEGBI, Part 8, Obligations, p. 617.

Chapter Nine

PATENTS

1. Protection

See: RISHON LE-ZION AND ZIKHRON YAAKOV VINTNERS COOPERATIVE v. YEKEV HAGALIL, p. 755.

2. Payment in Excess of Treatment and Medicaments

See: PLANTEX *et al.* v. THE WELLCOME FOUNDATION LTD., p. 667.

Chapter Ten

LOST PROPERTY

1. Acquisition by Presence on One's Property

C.A. 546/78

KUPAT AM BANK LTD. v. HENDELES *et al.*

(1980) 34(3)*P.D.* 57, 66-69, 80-84

A number of bearer bonds were found by the first respondent in the safe-deposit room of the Bank. The District Court held that the first respondent was the owner of the bonds.

Barak J.: (a) The lower court devoted part of its judgment to the rules of Jewish law concerning the restoration of lost property. The Court said:

> In the present case, Israeli law is involved, enacted by the Knesset, and the phrases that concern us, such as 'in another person's domain' and 'owner' in sec. 3 of the Law are, as I have said, known to us from the *halakhah*. There is good reason, therefore, to examine what the *halakhah* says on the subject and learn what we can from it.

According to Jewish law the bonds found in the safe-deposit room are the property of the finder and the owner of the place has no right to them, the room being treated as an unguarded area like public property which does not "acquire" on behalf of the owner. The Court learned *inter alia* about Jewish law from the opinions of three distinguished modern authorities who had given an opinion on the question put to them by the counsel for the respondent, the facts of which are identical with those in the present case. I wish to make a number of observations with respect to the court's addressing itself to Jewish law.

(b) To turn to Jewish law as aforesaid for interpreting the phrases "in another person's domain" and "owner" is certainly permissible. Yet it would be desirable to set limits to that course. Doing so is, in the first

place, not obligatory but only optional. Secondly, it is not an appeal to a normative system from which to derive a directive, but to a treasury of legal thought from which inspiration is sought. It is an appeal to "law" in the broad sense and not in the normative sense. In the present case we may not turn to Jewish law to receive the law relating to lost property but to obtain inspiration for finding out what the law is. Thirdly, having discovered the meaning of some phrase in our cultural treasury, we must inquire whether this meaning—alongside other possible meanings—reflects the statutory intent. I have already dwelt upon the fact that with regard to the meaning of "in another person's domain"—and only in this regard may we, *inter alia*, turn to Jewish law—that is not the end of the matter, but only the beginning. The interpreter's task is to select the proper interpretation out of those possible. The selection is not a technical process but a creative one, effected in accordance with the rules laid down by our law, the important one being that which prescribes that statutory provisions are to be interpreted in line with the legislative purpose.

(c) The appeal to Jewish law at the end of the passage cited above differs in nature from that at the beginning of the passage. Whilst the latter is concerned with the interpretation of phrases, the former engages in comparative law. Indeed, before deciding the content and scope of a legal institution found in his own system, a judge will often address himself to other systems for the sake of comparison, the purpose of which is to gain inspiration. A vital condition for such inspiration is that the legal interpretations to be compared are comparable, are based on common fundamental assumptions and are intended to embody common purposes. In the present case, it is doubtful whether any reason exists for comparison with Jewish law—and it is equally doubtful whether we can obtain inspiration from it. The reason is the distinction which Jewish law makes between guarded and unguarded premises, which rests on the fundamental assumption that the finder or owner of the place becomes at once the owner of the lost property, and the only question is which of them it is. By contrast, the legislature's distinction between property found in another person's domain and that which is not so found rests on the fundamental assumption that at the time of the loss the owner of the lost property remained its owner, and the question is who should guard it and as a reward become entitled to its ownership. Accordingly, as between "in another person's domain" in the Restoration of Lost Property Law and the Jewish law relating to guarded premises, no sufficient common conceptual basis exists for fruitful comparison of law.

(d) In analyzing Jewish law, the lower Court had recourse to three halakhic opinions requested by respondent's counsel. He put to three well-known authorities a series of facts similar to those in the present case

and obtained answers as to the situation under Jewish law. The answers were put in by counsel in the lower Court. Appellant's counsel expressed reservations about that but the lower Court saw no occasion not to adopt them. The Court said: "It is a daily occurrence for a court to resort to and be assisted by the *Responsa* literature in resolving a problem that occupies it. Why is this course invalid when contemporary authorities are involved?" With all respect for the lower Court, the *responsa* which form part of the system of Jewish law are unlike a specific answer to a specific question in a matter pending in court. In the present case Jewish law is not "the law" applicable in Israel: the applicable law is the Restoration of Lost Property Law. Nor is Jewish law some foreign system of law according to which judgment is given, the contents of which are to be proved as a fact by means of an opinion. Jewish law, in the present case, is a legal system that serves as judicial inspiration by way of comparative law. We learn of it through freely available texts. It does not seem to me proper in these circumstances to have recourse to a request for opinion that directly affects the matter here in issue, which was tendered for the purpose of this case, or to the answer that was given in consequence...

Elon J.: I have read and considered the judgment of my friend, Barak J., and I do not concur in it...

As Barak J. said, the purpose of the Restoration of Lost Property Law is certainly, as its name indicates, the return of lost property to the owner. The main and primary object contemplated by the legislature was to make provisions and give directives that would most induce a finder to return the lost property to the owner, whether he was the owner or was only entitled to possession (sec. 1). This basic purpose is not only implied by the very name of the Law and the contents of its provisions, about which more will be said below, but it may, it seems to me, be presumed to be in the forefront of the mind of any legislature wishing to regulate the matter. That is certain, for example, in Jewish law, where a long passage in *Deut.* 22:1-3 is devoted to the subject. It may reasonably be assumed that the idea embodied in these verses served as a source of inspiration for the Israeli legislature as well and it naturally quotes them widely in the Explanatory Notes to the Bill of the Law. It is noteworthy that the name of the Law in the Bill was "The Treatment of Lost Property Law" but was changed to its present name during debate in the Knesset. The change was explained by the member...who presented the Bill for its second and third reading as follows: "The expression 'restoration of lost property' is known to us from Jewish law and it also indicates more precisely the purpose of the Law" (67 *D.K.* 3596)...

Last but not least, this understanding of the expression "in another

person's domain" and of the aim of sec. 3 is to be found in Jewish law. The Restoration of Lost Property Law is one chapter in independent Israeli legislation dealing with civil law, and in everything touching upon such independent codification a leading role is assigned to Jewish law for interpretative purposes. I have already dealt in detail with this weighty subject in *Roth* v. *Yeshufeh...Ltd.* (1971) 33(1) *P.D.* 617, 632-33, and those who are interested can consult that opinion. The general observations of Barak J. on this question do not appear to me sufficiently embracing. Clearly, there is no need to say that to interpret this independent legislation according to Jewish law is out of place, when it is obvious from the contents of the particular enactment under discussion that it takes a position contrary to that taken by Jewish law in the matter. It is not for the judge to "force" on an enactment or one of its sections. an interpretation that is opposed to its provisions and *a fortiori* not to mingle unlike things. When, however, the situation is otherwise and doubts arise which cannot be resolved from within the Law itself, we must have recourse primarily to the principles of Jewish law as the major source, which, although not binding, may lead us to a solution of the problem confronting us.

Doubt having arisen in the present case regarding the impact of sec. 3 of the Law and the meaning of "in another person's domain", and no answer being available from within the Law itself, we may properly turn to Jewish law for a solution, and this is surely so when the Restoration of Lost Property Law of the Knesset and the rules of Jewish law are found to possess one common central purpose: the return of lost property to its owner. I dwelt on this matter at the beginning of my judgment. We saw that during the second and third reading of the Law, the Knesset found it right to change the name of the Law to its present name because that is what the group of rules in Jewish law is called. Moreover, concern over finding the owner goes so far in Jewish law that where there is reason to assume that the owner has not given up hope of recovery, the property does not pass to the finder, but is left instead to await "the coming of Elijah" or until its owner will be found (*Baba Metzia* 30a; *M.T. Gezelah veAvedah* 13:10; *Hoshen Mishpat* 267:15). When Jewish law assumes that the owner has abandoned hope, the finder may take the property for himself. At the end of the tenth century...it was held that if the owner then turns up and claims the property, the finder must return it to him (*Resp. Rabbenu Gershom Me'or haGolah* (ed. Eidelberg 154-58); *Resp. haGeonim Sha'arei Tzedek*, part 4, 1:20; see M. Elon, *Jewish Law*, Part 2, 564-6 and note 32, i).

Along with this basic trend and in addition thereto, Jewish law regulates the special problem which is the subject of the present proceedings...regarding money found on the premises of the bank, the

money-changer of earlier times. Thus we read in *M. Baba Metzia* 2:4: "Where a person finds (money) in a shop, it belongs to (the finder); between the counter and the shopkeeper, to the shopkeeper." (According to Rashi (*Baba Metzia* 26b) this is because the shopkeeper always sits in front of the counter and puts the money away so that anything falling down would have fallen out of the hands of the shopkeeper.) "Where he finds it in front of a money-changer, it belongs to the finder [it being presumed that the money was dropped by one who had come to change the money] and if between the chair and the money-changer, it belongs to the money-changer..."

The *Talmud* (*Baba Metzia* 26b) states that even if money is found *on* the money-changer's table, it belongs to the finder, and in the view of most authorities the same applies if it is found *on* a shopkeeper's counter. (*M.T. loc. cit.* 16:4; *Hoshen Mishpat* 260:5). Ba'al haTurim (*Tur, Hoshen Mishpat* 260:5) distinguishes the two cases for an interesting reason. "Where a person finds a thing in a shop between the counter and the shopkeeper, the thing belongs to the shopkeeper; in the rest of the shop, to the finder. Where it is found between the chair and the money-changer, it belongs to the money-changer; but if found on the table, it belongs to the finder, and this goes without saying (if it is found) on the front of the table on the outside. Maimonides wrote that in a shop as well, if it is found on the counter, it belongs to the finder. But this does not seem to me to be so according to the *Gemara*, but rather, it belongs to the shopkeeper, for the reason that people who come to change money put it on the table, but in a shop they do not put their things on the counter..."

So much for property found in a private domain at a place where it is presumed that it is the owner's and belongs to him. The authorities ask why the property belongs to the finder, even when it is found in that part of a shop where it may be assumed that it was not dropped by the shopkeeper but by frequenters from outside. Was it not found in the private domain of the shopkeeper or money-changer which "acquired" the item for him before the finder came upon it? Maimonides (*op. cit.* 16:4) gives the following answer: "Because the premises are unguarded." A person's domain will only "acquire" property for him when it is under his control and supervision. In the words of Rashba (cited in *Shitah Mekubetzet to Baba Metzia* 26b), "Unguarded premises are a public place, for the shopkeeper wishes the public to enter and buy from him."

Rosh, a contemporary of Rashba, explains the matter well (*Piskei haRosh* to *Baba Metzia* 2:10):

> His premises do not acquire for him since he did not think of that, because the public throng there; and even if the shopkeeper is in the

> shop, this is insufficient unless he is able to keep watch and stop others from picking things up. But in the present case, he does not acquire because he did not know that any property had been lost there and the public enters the premises.

This principle of a person's domain entitling him only when it is guarded, under his control and supervision, has been treated at length by the authorities (see *Otzar Mefarshei haTalmud* to *Baba Metzia*, Part 2, 188) and this is not the occasion to elaborate. Let me merely cite the observations of Shakh (to *Hoshen Mishpat* 260:18) setting out a further rule attributed to Ra'aban, one of the early Tosafists in the twelfth century:

> He wrote, rightly it seems to me, that in houses such as ours where the public frequently assemble, lost property belongs to the finder, for the situation is similar to that of a shop, and we have learned, 'where a person finds something in a shop, it belongs to him because the public throng there and the shop does not acquire.'

I have been unable to clarify what is meant by "houses such as ours where the public frequently assembles": it may refer to the forecourts open to the public. In any event, this is another example of how the application of the principle has developed.

In construing sec. 3, the learned District Court judge resorted *inter alia* to Jewish law. He did well in taking this course, as I have explained above. To elucidate the position of Jewish law in the present matter, respondent's counsel submitted opinions from three contemporary authorities in which the pertinent Jewish law sources are cited. In this connection the District Court judgment says:

> In the course of the hearings Mr. Schereschewsky put in the opinions of three notable authorities of high standing today, regarding the halakhic situation on the subject....Counsel for the Bank...opposed their being submitted but I could not quite understand her. It is a daily occurrence for a court to resort to and be assisted by the *Responsa* literature in resolving a problem that occupies it. Why is this course invalid when contemporary authorities are involved?

My learned friend Barak J. had reservations about the view taken by the District Court:

> We learn of (Jewish law) through freely available texts. It does not seem to me proper in these circumstances to have recourse to a request for opinion that directly effects the matter here in issue, which was tendered for the purpose of this case, or to the answer that was given in consequence.

With all respect, the reservation of Barak J. is unacceptable to me. Mr. Schereschewsky explained that the opinions were put in to clarify the position of Jewish law and its sources regarding the main question before us. The learned judge went on to say that "the material obviously is to be received as non-binding legal material and theoretical research." Not only is there nothing exceptional or defective in doing so, but it may advance and render easier the consideration of Jewish law by Israeli judges. That, as we know, involves tiring effort, so why not ease the task of the judge by the submission of opinions from Jewish law experts that elucidate the position of Jewish law on a given matter? One may say that all who discourse on Jewish law at length, who describe and explain it, are to be praised. These opinions will assist Israeli judges in understanding and deciding the law, as indeed was the case here.

To sum up, the crux of the Restoration of Lost Property Law lies in sec. 2, the provisions of which apply to property found in a public place or in a private place open to the public. Regarding such property, the sole legal problem that necessarily demands resolution is how to encourage its return to the owner. Sec. 3 is intended to complete the general provisions of sec. 2: In those cases where the owner of the place in which the property was found argues that when property is found in the domain of another person, over which he has control and supervision, and the premises are in the nature of guarded premises, sec. 3 lays down that the owner of the domain is to be notified and the property yielded up to him on his request, since if the owner of the lost property is not discovered, the lost property belongs to the owner of the domain either by virtue of it having come into the "possession" of the domain under his control and supervision or because he may have lost it himself. As I have said, this is a problem which every enactment dealing with the restoration of lost property must regulate and that is what our legislature has done.

It is noteworthy that the interest of the legislature in resolving legal problems that arise in the regulation of the restoration of lost property may be learnt from the special formulation—adopted in the second and third readings—of sec. 4 of the Law. Subsec 4(a) provides that "where the finder complies with the provisions of sec. 2 and the owner of the lost property is not ascertained within four months," he shall be deemed to have given up the property and the finder shall become the owner thereof. (The same appears in subsec (b)). The formula "shall be deemed to have given up the property" is not found in the Bill. As was explained during the second reading—

> ...most members of the Committee decided to add to this section the legal ground for entitlement to lost property by an irrebutable presumption

> that after the period provided for by the Law, the owner of the lost property is to be deemed to have abandoned it, whereupon the finder or the State becomes entitled. Abandonment of lost property is a principle which Jewish law also regards sufficient for taking ownership away from the previous owner and vesting it in the new owner, the finder.

This special formula, just as it is instructive of the interest of the legislature in regulating the legal problems arising under its provisions with regard to lost property, also draws attention to the relationship of the enactment with Jewish law. I may add that the link between "domain" and the idea of control and supervision of such domain is accepted in Jewish law and in the Hebrew language. Thus, for instance, we learn (*Baba Kamma* 70a): "If a thief has seized property and the owner has not abandoned hope of recovering it, neither of them can consecrate it, [the thief] because it is not his, [the owner] because it is not in his domain, not under his control." So also is the term understood in everyday speech, for example, "a man stands in his own domain [is in control of himself]."

See: HENDELES v. KUPAT AM BANK LTD., Part 1, Jewish Law in the State of Israel, p. 10.

2. Costs of a Person Guarding Lost Property

See: SHAPIRA v. POZNANSKI, Part 8, Obligations, p. 688.

3. Worker Engaged to Find Lost Property

See: STATE OF ISRAEL v. AL-FARUK, Part 8, Obligations, p. 680.

4. Finding Stolen Property

See: RUTGER v. STATE OF ISRAEL, Part 1, Jewish Law in the State of Israel, p. 66.

Part Ten

COMMERCIAL LAW

CONTENTS

Chapter One

PARTNERSHIP

1. Equal Sharing Implied

C.C.(T.A.) 430/51
BAR-SHIRAH *et al.* v. VARNIKOV *et al.*
(1960) 23 *P.M.* 379, 382, 418

Kister J.: This action concerns the estate of one Abraham Warnikov deceased who died on 20 September 1947 in Tel Aviv...

The deceased left no issue. He had married the first defendant in 1921 and apart from her was survived by brothers and sisters living abroad—one brother in the U.S.A. and the others in Russia.

The deceased was the registered owner of one share in Abraham and Esther Warnikov Ltd. which owned a house at 68 Allenby Street. This company had a registered share capital of IL. 1000 divided into one thousand shares of one lira each. At his death one share was also registered in the name of the first defendant, the widow. After his death she delivered to the company's auditor a document signed by her, which purported to be a resolution by the company directors allotting her a further nine hundred and ninety-eight shares on a date eight days before the deceased's death. This allotment is one of the matters involved in the action: is the capital of the company to be regarded as equally divided between the deceased and the first defendant, each holding one share, or is the claim of the first defendant to be accepted that the allotment was effected and that she is the holder of nine hundred and ninety-nine shares whilst the deceased was the holder of only one share in the company?

Apart from that, the further question arises whether the business that bore the name-plate of "Warnikov" belonged to Abraham Warnikov, as counsel for the plaintiffs urges, or to the first defendant, as she claims,

and that she dissolved it herself and transferred the assets and cash into a safe deposit box rented by her in her own name or into her account. This was also done with the cash remaining at the business on date of death, in the home and bank or hidden away...

As regards the share of each of the spouses, there is a principle in Jewish law regarding general partners that so long as it is not otherwise explicitly stipulated, they are to be treated as sharing equally in the profits and losses even where one of them has contributed a larger sum than the other (see *Hoshen Mishpat* 170:5, based on *Ketubot* 93a-b). The reason behind this, as the commentators explain, is that were it not for the lesser contribution of the partner who provided the smaller amount, no profit at all might have been made. Moreover, there is a point made by *Tosefot Rid ad loc.*: "Perhaps because of his affection (for his wife) he was not unduly concerned."

C.A. 253/65

BRICKER v. BRICKER

(1966) 20(1) *P.D.* 589, 615-616

In an action commenced by both the parties, who were spouses living apart, the District Court ruled that the consideration already received and still to be received for a warehouse which the wife had contracted to rent to a certain company belonged to them equally and that the consideration received on the sale of a plot of land in Holon, registered in the name of the husband, also belonged to them equally, since they had agreed that their property would be owned jointly. They each appealed. The wife claimed that the warehouse belonged to her alone and was acquired from money she had received as severance pay, whilst the husband claimed that the plot of land had been bought mainly out of money he had before the marriage, only a very small sum being paid out of joint funds.

Kister J.: The rule in partnership is that, generally speaking, each partner has an equal share unless otherwise stipulated by them. This rule obtains both in Jewish law and in English law.

As regards Jewish law, the rule, laid down in *Hoshen Mishpat* 176:5 is as follows:

> Partners who have contributed to a common fund, one 100 units of currency, another 200 and a third 300, and all traded with the money generally, making a profit or a loss, the profit or loss is shared among them equally according to their number and not according to the amount they contributed, unless the partners stipulate otherwise.

...And if they stipulated otherwise, according thereto.

The reason for this rule, as I once explained in *Bar-Shirah* v. *Warnikov*, (1960) 23 *P.M.* 379, is that, according to the commentators, were it not for the lesser contribution of the partner who provided a smaller amount, it is possible that no profit at all might have been made. In addition, there is the further point made by *Tosafot Rid* to *Ketubot* 93b—"Perhaps because of his affection he was not unduly concerned." This point is very apt in the case of a partnership between spouses...

The husband here argues that in fact his efforts were greater: he had endangered his life in the *Haganah* and as recompense for that received the plot. But I have already dwelt on the rules regarding property of a partnership and I have said that in such matters one does not inquire into who is cleverer and the like. Apart from that, if the husband so pleads, he must remember that the approach of Jewish tradition is that "as is the share of him that goeth down to the battle, so shall the share of him that tarrieth by the baggage; together they shall share alike" (*I. Sam.* 30:24).

2. Sharing of "Rights" in Jointly-Owned Land

C.C. (Misc.) 255/82, *M.* (Misc.) 357/82

LAHAV v. LAHAV

(1983) I *P.M.* 39, 42, 44

The parties, a married couple, together acquired an apartment under a long-term lease, but the title was not registered in the Land Registry. Domestic disputes broke out between them and the husband-partner began an action in the District Court for severance of the joint ownership of the apartment and an interim injunction to prevent the wife from entering onto the property. The proceedings turned on the question of the competent court — the District Court or the Magistrate's Court. The plaintiff contended that since unregistered immovable property was involved, it should be treated as movable property, the apportionment of which lay within the jurisdiction of the District Court.

Banai J.: In his written submissions, counsel for the plaintiff relies also on *Valensi* v. *Valensi* 1978(1) *P.M.* 307, and in fact that case is similar

to the one before me. There, an action was commenced in the Jerusalem Magistrate's Court for an order to sever the joint ownership of spouses in an apartment acquired by them, which was not registered in their names in the Land Registry. The judge held that "the spouses are not joint owners of the apartment within the meaning of sec. 37(a) of the Land Law, 1969, but rather in the obligation to effect a transaction in immovable property, as set out in sec. 7(b) of that Law," and he therefore decided that no right arose to claim severance of the joint ownership. On appeal by the wife, the District Court affirmed this holding of the Magistrate's Court, but came to the opposite conclusion, i.e. that in fact, dissolution of the spouses' co-ownership was available under sec. 10 of the Movable Property Law, 1971. The District Court, relying on sec. 13(a) of that Law —"The provisions of this Law shall, as far as appropriate to the matter and *mutatis mutandis*, apply also to rights"— pointed out (at 308) that "there is no foundation for limiting the term 'rights' in the said section, as suggested by defendant's counsel. 'Rights' is used and not 'rights in movable property', and had it been the intention of the legislature to restrict the term 'rights' to movables there is no reason why it did not say that clearly..."

The course taken by the Jerusalem District Court which invoked the term "rights" in the Movable Property Law in order to overcome this difficulty was, in my view, a matter of necessity so as to accord a party the appropriate remedy.

The lacuna may perhaps be overcome by relying on the Foundations of Law Act of 1980 and appealing to the principles of Jewish law that recognise the right to severance of jointly-owned land (see A. Gulak, *The Foundations of Jewish Law*, 135 and the authorities cited there).

3. Option to Buy or be Bought Out

C.A. 209/67

KLEIN v. FREEDMAN

(1967) 21(2) *P.D.* 576, 577, 579

Kister J.: The two parties are business partners. Mutual confidence having broken down, the appellant wrote the respondent a letter dated 28 January

1966 (Exhibit No. 1) proposing that he buy the appellant's share in the business, the value of which he assessed at IL. 50,000, and that if the proposal was not taken up, the appellant was prepared to buy the respondent's share on the same terms as were suggested to the respondent. An answer was requested by 1 February 1966 and a proviso was added that if no answer was received from the respondent by that date agreeing to the proposal, it would thereupon be withdrawn and, according to their original agreement, the matter would go to arbitration.

The parties did not reach any agreement and the matter went to arbitration by one arbitrator...

We must first decide whether the letter, Exhibit No.1, constitutes evidence of the true value of the business at the time. To answer this question we should enlarge upon the actual proposal to dissolve the partnership in the manner suggested in the letter. This mode of dividing partnership property is customary in Jewish law with regard to those assets which cannot be shared out in specie and is termed *gohd o agohd* ("buy my share or sell me your share"). In such cases, the price proposed may be higher than the true value of the property because the one making the proposal wishes to purchase the share of the other; such a valuation of the price of the property is called *ilui damim* (over-pricing). The prevailing rule is that an increase in price is generally permissible (see *Tur* and *Shulhan Arukh*, *Hoshen Mishpat* 171:6). Thus, the proposal of a partner by way of *gohd o agohd* is not proof of the true value of an asset, but the proposer is, according to Jewish law, bound by his proposal as long as he wishes to dissolve, unless the circumstances under which the dissolution is requested have changed.

In the present case, on the one hand, it cannot be said that the proposal was binding, since the appellant stated in his letter that if no answer was received by a given date he retracted it. On the other hand, the letter contains some admission as to the value of the business at the date the letter was written and, but for that, we would say the situation was one of *ilui damim*. Since there was a quasi-admission as to the value of the business, there is seemingly no occasion to set aside the decision of the arbitrator.

C.A. 199/69

MELAMED v. HOWARD

(1969) 23(2) *P.D.* 210, 218

In an action for partition brought by the respondent against the appellant, the Magistrate's Court decided that the property involved should be sold by public auction at the highest price, thus setting aside its earlier decision for an "internal" sale to a partner.

Silberg J.: It may be noted here that the above-mentioned legislative concept is also found, in sharper form, in Jewish law. There, even if the joint property is indivisible, one partner cannot compel the other to sell the property to a third party (who is prepared to pay higher price) and to divide the proceeds. All he can do is to say *gohd o agohd*—you sell me your share at (a given price) or buy my share at that price (*Baba Batra* 13a: *M.T. Shekhenim* 1:2). The Tosafists dispute strongly whether the seller can raise the price of his share as he wishes, for he is also prepared to buy at that price the other's share, or whether he is bound by the normal price of the partnership property (see *Tosafot to Baba Batra* 13a *s.v. eit*). In any event, in this country the clear tendency of the legislature is to allow joint property to remain, if not in the hands of all partners, at least in the hands of one of them and not to sell it to any one else. That, as I said, above, is also the tendency of the Ottoman legislator.

See: VILOZNI v. SUPREME RABBINICAL COURT, JERUSALEM, *et al.*, Part 2, General Principles, p. 103.

4. Sharing on Dissolution of Partnership

M. 309/59

In re PARTNERSHIP OF THE BROTHERS LITVINSKY

(1959) 18 *P.M.* 65, 66, 67-68

Lamm J.: In an order I issued in the liquidation of the partnership assets of the Brothers Litwinski on 15 March 1957, I directed that...the receivers

should be assisted by a qualified appraiser and that he be asked to propose an appropriate plan for dividing the partnership property. I appointed the appraiser and he produced a plan under which most of the assets were divided into three parts. The parties do not claim that this division is defective or that the shares suggested by the appraiser are not completely equal. The dispute between the parties is simply over whether the shares are to be transferred to the parties by lot or whether one or the other of them should be given a right to choose...

The question that arises is whether in a country like Israel it would be just to leave it to blind fate to prevent a person who has worked in an enterprise from using the property he desires. It is as well, therefore, to inquire into Jewish law in the present matter and see if that law makes it possible to adjudge the matter without drawing lots.

The sources are as follows:

Baba Batra 12b:

> A certain man bought land contiguous to the estate of his father-in-law. When (the latter's estate) came to be divided, he said 'Give me my share adjoining my land.' Raba said, 'this is a case where a person may be compelled not to act in the manner of Sodom' [i.e. that one should not refuse to give a benefit that costs him nothing]. R. Yosef strongly objected (because) the brothers-in-law can say, 'We reckon that the land is particularly valuable, like the property of the family of Bar Marion.' The law is in accordance with R. Yosef.
>
> Where two fields [are left to two sons by their father] with two channels (running between them), Raba said that this is a case where a person may be compelled not to act in the manner of Sodom. R. Yosef strongly objected (because) sometimes one (channel) may continue running whilst the other does not; the law is in accordance with R. Yosef.
>
> If two fields adjoin one stream, R. Yosef said that this is a case where a person may be compelled not to act in the manner of Sodom. Abaye strongly objected (because) one might say 'I want to have more workers.' The law is according to R. Yosef—the increase in the number of workers is not of consequence.

Maimonides, *M.T. Shekhenim* 12:1:

> When brothers or partners come to divide land, each to take his share, if it was entirely of the same value and no particular part is either good or bad, and the entire [field] is uniform, they share according to measurement alone, and if one of them asks that his share should

be adjacent to his own land to form one tract, his wish is granted and the other is compelled to agree, since to prevent such a division is to act in the manner of Sodom.

Hoshen Mishpat 174:1:

When brothers or partners come to divide a field, each to take his share, if it was all entirely of the same value, they share according to measurement alone, and if one says 'Give me my share on this side so that it will be adjacent to other land of mine and will form one tract, he is listened to, and the other may be compelled, since to impede the matter is to act in the manner of Sodom; but if part of it was better or nearer to a river or road, and the better part is valued against the worse part and one says, 'Give me this area according to valuation,' he is not listened to and takes only by lot. If, however, he says, 'Give me on this side the bad half of the area and you take the better side so that my share is adjacent to my land,' he is listened to.

Tur, Hoshen Mishpat 174:

Brothers who come to partition and the shares are valued one against the other, and then when they come to cast lots, one of them desires one particular parcel and values it and says, 'I will give for it so much more than it was appraised at or you take it for that amount,' he is listened to and if the others do not want it at the increased price he takes it without lot.

Thus in Jewish law as well there were differences of opinion and some of the Sages did not permit a partner to enjoy, without giving consideration, something that did not make the other poorer, and even those who agreed to a right of preference restricted it to adjoining owners alone.

In the meantime, however, the movement of national renaissance has grown and the Jewish people have reclaimed the soil, and it does not seem to me that division should be so effected that a person who has contributed to the growth of an enterprise and its profitability should be prevented from selecting what he wishes when there is no dispute that all the shares are equal in value. The sentiment that a person has for a thing which he tended and nursed over many years is a worthy consideration to be taken into account no less than actual economic interest.

5. Right of Partner in Hire

See: MASHTZANSKY v. MIKALITZ, Part 9, Property—Physical and Intellectual, p. 722.

6. Outgoings

See: MISHEOL HAKRAKH *et al.* v. GROVNER *et al.*, Part 8, Obligations, p. 675.

7. Right to Use Property of Absent Partner

C.A. 227/51

NATAR *et al.* v. HAI

(1952) 6 *P.D.* 683, 685, 688

Assaf J.: This is an appeal by leave against a judgment of the Jerusalem District Court, sitting as an appellate court, in respect of a judgment of the Magistrate ordering the appellants to vacate an apartment in the respondent's house in Talpiot.

The facts are that the house belonged to the respondent's parents. She is about 25 and, having fallen ill, travelled to Switzerland in September 1947 for medical treatment and stayed there until April of this year. About a year after she left, her mother died and the respondent inherited half of the house, consisting in all of four rooms and a bathroom. On 27 February 1949 the father let three rooms to the first two appellants... for one year. On 21 June 1949 he let them the fourth room. In December 1949 the tenants went abroad and with the father's permission let the third appellant (Hans Hirsch) in to look after the apartment and the furniture. They have not yet returned to this country. The respondent, who owns half of the house, brought proceedings against the appellants for possession on the grounds that they had entered into the house under a contract with the owner of the other half without her knowledge or consent, according to her story, and she regards them as trespassers occupying the house or part of it without lawful permission...

We must now try to understand what the author of the *Mejelle* meant by an "absentee" or "missing" person. No clear definition is found in the *Mejelle* itself. If we construe the term strictly, that every joint owner not to be found in the place where the joint property is situated is "absent", it follows that where joint property is in Jerusalem and one joint owner lives in Tel Aviv, the one who dwells in Jerusalem may let the property even for a lengthy period (and so long as the tenant protection legislation continues, the letting is in fact for an indefinite period) without the consent of the one in Tel Aviv. If anyone contests what he did, it is as though he contested an act of court without avail....Such strict construction would be patently unjust and an absolute departure from the leading rule in art. 1075. We must necessarily say that not everyone who is not at the place where the joint property is situated is absent, nor can we even say that every joint owner found in the country where the property is situated is not absent whilst one who is abroad is to be regarded as being absent; it is possible that in the same country the distance between the two and the difficulties of keeping in touch may sometimes be greater than when they live in neighbouring countries.

We must therefore give "absent" a distinctive recognition sign—a person will be considered as being absent in two instances: (i) when he has disappeared and his place of residence is unknown, and (ii) where, although his place of residence and address are known, it is impossible to contact him, as in times of emergency when the two countries are at war and the like. In such instances the property of the absent joint owner is in the nature of "abandoned" property (see *Baba Metzia* 38b; *Tur* and *Shulhan Arukh, Hoshen Mishpat* 285:4) and the law empowers the other joint owner to effect certain acts. Where, however, one of the owners resides in a different city or even in another country and can be communicated with by mail, telegraph, telephone or otherwise and his view about the letting of the joint property can be obtained, he is not considered as being absent (contrary to what Goodby and Dukhan say in their *The Land Law of Palestine*, 206) and the available joint owner may not let the joint property. It is possible that the legislator once thought that a joint owner living in another town was also absent, but "it is an accepted fact that the terms of law vary with the change in the times" (art. 39, *Mejelle*). In the present case what has been said above is not to be regarded as a change in the law but rather an interpretation compatible with the intention and purpose of the legislator. Salim Baz, the commentator of the *Mejelle*, is of assistance to us when he writes that "what is intended by 'absent' is absolutely absent, not missing, and refers to a person whose absence is absolute and not one who is absent for the period of his journey."

8. Right of Partner to Reimbursement of Medical Expenses

C.A. 536/65

KATZ V. "KATZIF" LTD.

(1966) 20(3) *P.D.* 533, 544

The appellant was one of the four directors of the respondent company, and owned one quarter of its shares. One of the directors dealt with the administrative and commercial side of the business, and the other three were responsible for carrying out the projects the company undertook, with the assistance of workers and tools that the company provided. One day, the appellant was injured in the course of working on an order received by the company. In a claim for compensation for damages, the appellant claimed that at the time of the incident, the respondent was his employer, and that the company was in breach of its duty to him to institute safe working methods. The District Court dismissed the claim.

Halevi J.: I would comment that Jewish law recognizes the possibility that a partner who became ill or was injured in the course of his duties in the partnership (due to an accident, and even, sometimes, due to an offence) will be entitled to draw medical costs from the funds of the partnership—sometimes, by virtue of the law, and in other cases, by virtue of usage: see *Hoshen Mishpat* 177:2-3 and 48.

Indeed, there is nothing preventing the partners from agreeing, in the partnership agreement, to the possibility of such compensation; there is also no reason why the shareholders of a company should not agree, in the Regulations, to such a right; after all, the mutual relations between the company, on the one hand, and its directors and all other organs on the other, are dependent upon the stipulations of the company Regulations, and in these Regulations, any relationship that the parties desire may be stipulated. In the present case, however...no special contract of employment exists, nor any stipulation determining the status of the appellant as an employee, and the wording of the Regulations does not give any indication of the intention to create such a status, for him or for any of the directors. I therefore hold that the appeal should be dismissed.

Chapter Two

DEEDS

1. Possession of Deed as Sufficient Evidence

C.A. 57/71

BEN SHITREET v. BEN SHITREET

(1972) 26(1) *P.D.* 638, 641-642

The parties, brothers who had lived in Morocco but who now live in Israel, became involved in falsehoods in their testimony before the District Court. That Court determined only two facts: that the respondent had made the appellant a loan in Moroccan currency whilst they were in Morocco, and that they had agreed on the discharge of the loan before they immigrated by means of a cheque drawn on the appellant's bank in Casablanca.

Kister J.: We have heard the witnesses. The respondent admitted that he did not present the cheque for payment and therefore confessed that his testimony in the affidavit regarding the presentation of the cheque was false. It emerged that there was no reason in law for the non-presentation of the cheque to the bank; at the time the appellant had to his credit sufficient funds to meet the cheque. It follows therefore that the action on the cheque is without foundation and the respondent made an affidavit which falsified an important point.

Nor is the appellant without fault with regard to telling the truth, and the learned President [of the District Court] debated whom to believe in the absence of evidence of the loan other than that of the respondent. Ultimately, he decided in favour of the respondent, and accepted his version of how the loan was made, relying on the fact that the latter held a cheque that was not shown to have been stolen, forged or fraudulently drawn. That is a logical approach. In Jewish law there exists the presumption, "How is it that your deed is in my possession?" which is raised in many different circumstances (see e.g. *Baba Batra* 70a and Rashbam *ad loc.*; see also

Hoshen Mishpat 69:2 and *Pithei Teshuvah ad loc.* regarding a deed in the handwriting of a defendant).

The fact that the cheque is held by the respondent and that the appellant was unsuccessful in showing that it came into the respondent's hands fraudulently or was a forgery is decisive in these proceedings in favour of the respondent but only in the sense that the cheque is deemed to have been given for consideration and that the appellant is bound by what is written therein.

The fact that the cheque is held by the respondent cannot, however, serve as foundation for believing what ever else he says, especially as his story about how consideration was given sounds somewhat strange in itself. It is no wonder that, apart from the fact of giving consideration for the cheque, the lower court did not believe the respondent about anything that deviated from or was inconsistent with what was written on the cheque, which the respondent agreed to take, thereby consenting to its terms. Primarily, the lower court did not believe the respondent's claim that the cheque was merely confirmation of the loan and that it was agreed that it should not be presented but that the appellant should be bound to repay the loan to the respondent in Israel and not in Morocco.

2. Holder of Deed at Disadvantage

C.A. 536/76

MIZRAHI v. YEDID *et al.*

(1977) 31(2) *P.D.* 257, 263-264

This appeal turned on a finding by the lower Court that the linkage provisions in the sale contract involved applied to all the instalments the payment of which was secured by bills and was not conditional upon delay in payment of such instalments.

Schereschewsky J:. It cannot be said that the terms of clause 8 [of the contract] are clear enough to remove all doubts as to its meaning. Accordingly, and since the contract was drawn up by a lawyer who in fact was acting only on behalf of the building contractor, as the learned judge rightly found, it is to be interpreted against him; he is the claimant and the basis of his claim, the instrument under which he claims, must

therefore be free of all possible doubt, a legal concept that lies behind the rule that "the holder of an instrument is at a disadvantage," as explained by Rosh in his *Responsa* (68:14).

3. Witnesses to Deed Presumed to have Ascertained Ability of Party to Bind Himself

C.A. 250/70
SHARABI *et al.* v. SUBERI
(1971) 25(1) *P.D.* 429, 430-432

Kister J:. According to the submission of counsel for the appellants, the burden of proving insanity is on the party opposing probate even in a case of defective form, and the doubt as to sanity works in favour of the appellants who are asking for probate of the will.

We cannot accept this submission. All the provisions of the law regarding the making of wills are intended not only to ensure that the signature of the testator on the will is authentic, since to that end alone no need exists for the detailed statutory provisions. These provisions are intended to ensure to some degree that the document is the serious expression of the true and determinative wishes of the testator, that his estate should pass and be divided exactly as provided in the document that purports to be his will. Jewish law uses the expression *gemirut da'at* (firm resolve to effect something or other). *Hazon Ish*, *Hoshen Mishpat* 22, cites the following in the name of his father:

> A leading rule in property law is that the main element is to resolve firmly to pass ownership to the other party and for the latter to rely thereon. In some cases the Sages held that by mere verbal expression a person may resolve to pass ownership and in other cases such resolve must be manifested by the modes of acquisition set out in the Torah or provided for by the Sages.

With regard to wills, it has been customary from time immemorial to insist upon formal requirements in order to obtain probate so as to ensure that complete "firm resolve" existed, since it is difficult to adduce evidence of the mental state of the testator or of unfair pressure or influence and the

testator himself can no longer explain the motives for making his will as he did...

In Jewish law, it should be noted, a legal presumption arises that witnesses "do not sign an instrument unless they know for certain that those who ask them to do so are adults and aware of what they are doing" (*M.T. Malveh veLoveh* 24:5). I would add that Ribash (*Resp.* 371) takes the view that this presumption arises only with regard to witnesses who are well versed in the making of instruments, such as court scribes who prepare them normally, but not with regard to every individual. Although in our law no such presumption arises and no such requirements exist, it may be expected of any decent person asked to witness a will and who has doubts about whether the will was made freely and in soundness of mind, that he assure himself on this before signing. The requirements that the testator should declare to the witnesses before signing it that it is his will, and that the witnesses should sign it at the same time and state that the testator had indeed so declared, are all intended to impress upon both the testator and the witnesses the seriousness of the instrument and the gravity of the occasion. It is common in various legal systems to be strict about meticulous fulfillment of the statutory requirements regarding the form of the will, any defect in form rendering it invalid. Our statutory requirements, it may be said, are not onerous and it is simple to abide by them. Even so, the legislature desired to be lenient with a testator when for some reason a defect of form or procedure occurs and not to set a will aside by reason thereof, but only when no doubt arises that the will is authentic, that there was a firm, considered and absolute resolve to make a will in the form in which it is presented for probate. Thus sec. 25 of the Succession Law provides:

> Where the Court has no doubt as to the genuineness of a will, it may grant probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure...or the capacity of the witnesses.

This provision, it is to be observed, is also found in the 1952 Bill of the Succession Law, where the explanatory notes state that no like provision appears in the law of other countries. The notes refer to Jewish law and state that it "requires on the one hand strict compliance with certain formulae...and on the other, it developed the concept of the will because we are commanded to fulfil the express wishes of the deceased."

4. Disqualification of Deed of Debt or of Sale Not Written in Presence of Debtor or Purchaser

C.A. 252/60
SLUTSKI *et al.* v. AMIDAR...LTD.
(1960) 14 *P.D.* 2373, 2378-2379

Cohn J.: This appears to be the first occasion in which the question has arisen in this Court how to treat a contract signed originally *in blanco* with some or other of the details being inserted after signature. At all events, neither the Court below nor the parties have cited any pertinent precedent or authority...

It is noteworthy that the problem surrounding the drawing up of contracts in the presence of one side alone, without the other side being present, has also occupied the Sages of the *Talmud.* The rule is that since "one may act for a person in his absence to his advantage but may not do so to his disadvantage," it is permissible to draw up a deed of gift without the donee being present, and a sales contract in the absence of the purchaser, and a promissory note in the absence of the creditor. A debtor is not, however, bound by a promissory note made in his absence, nor is a vendor bound by a contract of sale drawn without his being present, and so in like cases (*Hoshen Mishpat* 39 and 238). The author of *Shulhan Arukh* adds that there are—

> ...some who say that a deed may be drawn up by a vendor without the purchaser being present only when the vendor attests that he has already received the purchase money from the purchaser, and if it is not so written, evidence must be produced when payment is sued for, that the sale was made with his knowledge (*ibid.* 238:2).

See: MISHOL HAKRAKH *et al.* v. GRUBNER *et al.*, Part 8, Obligations, p. 675.

5. Deed Replaced by New Deed

C.A. 551/59
KITZIS v. SHAPOSHNIK *et al.*
(1960) 14 *P.D.* 1380, 1385

Cohn J.: This appeal is well founded...

It is decided law that by substituting a bill, giving a new one in place of the original, the new bill is not deemed to have discharged the original and the latter is not absorbed by the new bill but is supplementary to and completed by it. The person who argues for absolute discharge and the expiration of the original bill has the burden of proof.

It therefore logically follows that if the original bill is not absorbed by a new bill specifically intended to replace it, and does not expire upon acceptance of the latter, then an agreement or judgment which is only intended to effectuate some other assurance existing initially under the original bill, certainly does not have the effect of extinguishing that bill or assimilating it, if it is not expressly so stated.

Counsel for the appellant in his submissions ventured far into the law of novation of contracts and tried to demonstrate from indications in French and Austrian law that here, no novation at all occurred. I shall not accompany him on his long journey but shall venture, instead, into the sea of the *Talmud* and point out the similarity between English Common law and Jewish law regarding the complete identity required for the previous bill to be absorbed by the new bill. The *halakhah* is as follows:

> Where two instruments relate to one piece of land in the name of one purchaser but with different dates, and the first was a deed of gift and the second of sale, the latter does not abrogate the former since it may be said that it was made in the form of a sale in order to add to liability....So also if the first was a sale and the second a gift, the land is acquired as of the date of the first deed since the deed of the gift was made only to enhance the position of the purchaser under the law relating to adjoining owners [rights of pre-emption]. Where both deeds are of sale or of gift, if the second is supplementary in some way, the first will prevail since the second was only made by reason of the supplement; and if it is not supplementary, the second will rescind the first (*Hoshen Mishpat* 240: 1, 2).

The commentators add that the choice lies with the person holding the

deeds: he may take the land without the supplement, or, under the second deed, with the supplement (Rashi and Alfasi to *Ketubot* 44a), as he wishes. Some have held that the rule according to which the second deed rescinds the first, generally applies only to deeds relating to land and the like, such as a woman's *ketubah* (marriage document), but in the case of deeds of admission or of loan, i.e. promissory notes, one deed is not said to absorb the other, and even if they are for the same sum and in respect of the same person, each stands on its own and creates its own encumbrance (*Piskei haRosh* to *Ketubot loc. cit.*).

Here also, the second deed (the compromise) gave nothing to the husband of the appellant which he did not already have under the first deed, and his acceptance of the second deed does not prevent him from suing under the first, which he still holds: "Where a lender produces a promissory note, the borrower is told to pay it; even after many years without a claim being made, we do not say that it was waived" (*Hoshen Mishpat* 98:1).

6. Obligation under Deed Exigible from Charged Property

See: BOKER *et al.* v. ANGLO-ISRAELI MANAGEMENT...LTD. *et al.*, **Part 9, Property Physical and Intellectual, p. 736.**

7. Set-Off

C.C.(T.A.) 1424/80

CAMPARI INTERNATIONAL LTD. v. "GYM" IMPORTERS

(1981) 2 *P.M.* 397, 406

The defendant applied for leave to defend in summary proceedings arising out of a promissory note, on the grounds inter alia *that it had a right of set-off by way of damages it claimed for breach of another engagement between the parties. Counsel asked the court to depart from the entrenched rule that a plea of set-off does not justify the grant of leave to defend in such a case, basing himself on the changed approach*

of the legislature conferring a broad right of set-off in new legislation concerning contract law.

Sternberg-Eliaz J.: Jewish law recognises set-off as a plea of payment: see *Resp. Rav Pe'alim*, Part 4, *Even haEzer* 7, and Ri'az in *Shiltei Gibborim* to *Baba Kamma* 206...."Had the defendant, however, claimed something that can be treated as payment, such as that a certain amount was otherwise owing to him, that would be as if he had pleaded payment in a single transaction."

Chapter Three

INTEREST

A. Award of Interest

1. Award of Interest for Delay in Payment after Demand

C.A. 207/51

EGGED CO-OPERATIVE SOCIETY LTD. *et al.* v. BRANDES *et al.*

(1952) 6 *P.D.* 1089, 1091, 1103-1104

Tzeltner J.: This is an appeal against a judgment given...in the Haifa District Court in a consolidated action arising out of a road accident in which...the daughter of the third respondent was killed and the first and second respondents were injured. The accident occurred on 6 February 1949 on the Acco-Zefat road, a bus driven by the second appellant having run into a light van driven by the first respondent. He and his wife, the second respondent, were injured and the vehicle was badly damaged. The second appellant was a member of the first appellant and there is no dispute that the outcome of these proceedings will affect them equally...

Assaf J.: I concur in the conclusions reached by Tzeltner J. and I only wish to add that the addition for loss of profit, at the rate of 9% or any other rate, to the amount the appellant was ordered to pay under the judgment of the lower court is not to be treated as interest nor even as *avak ribit* [a taint of interest, interdicted only by rabbinical decree], the taking and payment of which is prohibited under Jewish law.

My reason is as follows. The amount which the appellant must pay in the present instance does not arise out of the law relating to loans but out of an action in tort. The moment a person is obliged under law to pay damages and delays payment, he is bound to compensate the successful

party for the loss caused to him by delay in payment. Similarly, where a lender claims payment of his loan at due date and the borrower delays payment or causes such delay, the latter must compensate him for the delay. Although the *Jerusalem Talmud* (*Y. Baba Metzia* 9:3, 12a) states that anyone rendering the funds of another idle can only be scolded, and this is cited by a number of the early authorities, it is variously disputed by the later authorities and he is not always exempt (*Resp. Hatam Sofer*, *Hoshen Mishpat* 178; *Nahalat Zvi*, by the author of *Pithei Teshuvah, Hoshen Mishpat* 339:10).

For our purpose, the observations of *Bet Hillel* on *Yoreh De'ah* 170 (cited with dissent in *Resp. Shevut Ya'akov*) are important:

> At the present time, it is customary under local law [what is apparently meant are the Regulations of the Council of the 'Four Lands' although this does not appear from the Regulations in Sema of 1607...] to award *peseida deshuka* (market loss, requiring the borrower to make good the loss incurred by the lender in business) and no one would gainsay that.

So also R. Yosef Saul Nathanson held in an actual case before him...:

> *Ribit* (interest) does not arise here at all since he lent him nothing; his money was held back from him. Although where a person holds back another's money he is exempt, the moment he is sued for payment, he must make repayment...and everything that he holds back is not a loan but theft, and he must pay interest (*Resp. Sho'el uMeshiv*, (2nd ed.) Part 4, 123).

Accordingly, a defendant may be charged with the payment of profits from the date action was commenced against him. I have not overlooked the views of those who rule more stringently in these matters but I think that in today's circumstances we may properly base ourselves on *Bet Hillel* and *Sho'el uMeshiv*.

C.A. 461/63

THE DEVELOPMENT AUTHORITY v. AMAT BUILDING...LTD.

(1964) 18 *P.D.* 486, 491

The appellant commenced summary proceedings on two promissory notes, claiming payment of the amounts due thereunder together with interest at 9% per annum *from the date the notes were made until judgment and 18% thereafter. The respondent did not ask for leave to defend and the District Court ordered him to pay the amounts of the notes with "legal interest at the rate of 11% from the date the proceedings were*

commenced." The appellant appealed against that part of the judgment dealing with the rate of interest and the period for which it was to be payable.

Halevi J.: Sec. 58(1)(b) of the Bills of Exchange Ordinance provides that the "damages" that the holder of a bill is entitled to recover from every party liable under a bill that has been dishonoured include "interest" on the amount of the bill; it also provides the date from which interest is to run (in the present case "from the date of maturity of the bill") but does not prescribe the rate of interest nor the date down to which it is to run.

Sec. 58 of the Bills of Exchange Ordinance was copied from the English Bills of Exchange Act, 1882, and according to sec. 2, "This ordinance shall be interpreted by reference to the law of England relating to bills of exchange, cheques and promissory notes save in so far as it is inconsistent with the provisions thereof." The rate of interest usually awarded under sec. 57 of the English Act is 5% per annum since this rate is considered "the commercial value of money" (see *Maine-McGregor on Damages*, (12th. ed.) para. 544). The author of this treatise, however, adds that there is no reason why the rate should not vary with the general rate of interest that reflects "the current value of money."

Parenthetically, we may compare the term "market loss" (*peseida deshuka*) referred to by Assaf J. in *Egged* v. *Brandes* ((1952) 6 *P.D.* 1089, 1103) citing *Bet Hillel* to *Yoreh De'ah* 170:

> At the present time it is customary under local law to award *pesida deshuka* (requiring the borrower to make good the loss incurred by the lender in business) and no one would deny that.

Hence his conclusion, regarding an award of interest in addition to the judgment debt (a question which will engage us later), that —

> ...a rate of 9% or any other rate [added] to the amount the appellant was ordered to pay under the judgment...is not to be treated as interest nor even as *avak ribit* [a taint of interest, interdicted only by rabbinical decree], the taking or payment of which is prohibited under Jewish law....According to this, a defendant may be charged with payment of profits from the date that action was commenced against him.

C.A. 216/74

WEIGEL v. ETZET MEFITZIM (1965) LTD. *et al.*

(1975) 29(1) *P.D.* 141, 149

The District Court had awarded the appellant interest on a debt due to him at the rate of 11% from the date action was commenced. He submitted that the rate should properly be 15% in view of the changes in interest rates under an Order of the Ministry of Finance, invoking sec. 12 of the Adjudication of Interest Law, 1961.

Kister J.: The main point is that the ground for an award of interest by the court, where the sum claimed does not carry interest under contract, is that it is just and equitable to compensate a creditor for the fact that the defendant has employed the money and prevented the plaintiff from doing so. This is a matter that goes back very many centuries and it is proper to recall Roman law in this respect (see Dernburg, *Pandekten*, 1882, Vol.2, *Obligations*, para.29).

It is noteworthy that as regards Jewish law which prohibits interest, a number of *responsa* are to be found, cited in the judgment of Assaf J. in *Egged* v. *Brandes* ((1952) 6 *P.D.* 1089, at 1103) concerning usages and regulations in particular instances where the usual prohibition against interest, i.e. interest owing under a loan contract, does not apply:

> *Ribit* (interest) does not arise here at all since he lent him nothing; his money was held back from him. Although where a person holds back another's money he is exempt, the moment he is sued for payment he must make repayment...and everything that he holds back...is not a loan but theft and he must pay interest (*Resp. Sho'el uMeshiv*, (2nd ed.), Part 4, 123).

B. Agreement on Interest

1. Guarantee Against Fall in Value of Money

C.A. 248/53
ROSENBAUM v. ZEGER *et al.*
(1955) 9 *P.D.* 533, 548-557

Silberg J.: A wealth of experience in matters relating to interest can be found in the sources of Jewish law. This is one of the most interesting and most developed branches of Jewish law....On the one hand, there is a severe and fundamental prohibition against anything that smacks of interest, a deep detestation—the heritage of generations—of the type and business of the moneylender (who denies the very fundamentals of Judaism and makes "a mockery of the Torah and a fool of Moses" and is mentioned in the same breath as breeders of pigs: *Y. Baba Metzia*, 5:8, 10; *Berakhot* 55a and elsewhere). On the other hand, it is necessary to have regard for the demands of everyday life that require some loosening of the reins since it is not possible to forgo altogether the economic advantage of credit. And lastly, or as a consequence of these two approaches, the need exists to lay down legal concepts, patterns and forms in order to determine precisely the borderline between the lawful and unlawful. If we add to all this the fact that during and after the Middle Ages, the lending of money was a special business which, as is generally known, several historical factors compelled the Jew to engage in, then we shall not be at all surprised at the thorough ploughing of this field of law that was done by both the early and the later authorities. Interesting problems arose, interesting ideas and rules matured, and although Jewish law does not bind the court in these matters, a study of these problems and ideas can broaden the horizon and assist in viewing these matters in their true proportion.

The nature of interest was defined with admirable conciseness and accuracy by R. Nahman, a Babylonian scholar living at the end of the third and beginning of the fourth century of the Common Era: "The principle of interest is that payment for waiting for one's money is forbidden" (*Baba Metzia* 63b).

Interest is "payment for waiting", that is to say, the recompense payable to the lender for waiting for the return of the money temporarily in the possession of the borrower. Any payment obtained by the lender for

some other thing, for some other service, and any monetary transaction not constituting the return of the money lent, is not interest within the meaning of this definition. Hence certain monetary transactions came to be permitted or tolerated, the permission resting on the idea that the increment accruing to the person providing the money is, as to its legal form, a profit on a sale or the enjoyment of income of something belonging to him or "rent" for something originally lent and the like. (See the discussion concerning the sale of a field, *Baba Metzia* 65b-66b; *Tosafot ibid.* 64b, *s.v. "velo"*; *M.T. Malveh veLoveh* 5:6 and 8 etc.) "Payment for waiting" is forbidden only when it goes *directly* from borrower to lender and not when it is given to the lender by a third person. Thus a lender may accept from a borrower, at a discount, bills which the latter has received from another debtor. In formal law, this is considered as a purchase of bills and not a loan of money, although from the economic viewpoint no difference exists between them:

> There are things which are like interest but are permitted. A person may purchase the bills of another at a discount without fear and he may give another a dinar in order that he lend a third person a hundred dinars, for the Torah only forbade interest that goes from the borrower to the lender (*M.T. loc. cit.* 5:14; *Baba Metzia* 69b; *Y. Baba Metzia*, 5:1; *Tosefta Baba Metzia*, 4:3; but *cf. Maggid Mishneh* to M.T., *loc. cit.* and *Tur* and *Shulhan Arukh, Yoreh De'ah* 160:7, which introduce several reservations to the above rules).

These and similar rules effectively defined and delimited the prohibition of interest within reasonable bounds and prevented it from turning into a bane rather than a benefit, vitiatory rather than reparative, in the progressive economic life of every age.

As yet no success was achieved in overcoming one serious difficulty that attended precisely the ordinary loan, the actual lending of money, in consequence of fluctuations in the value of currency experienced even in those early times. We know this because in Jewish law, the prohibition applies not only to interest fixed in advance (*ribit ketzutza*) but also to interest not so fixed and known as *avak ribit* [the taint of interest] which was prohibited not by the Torah but by the rabbis (*Baba Metzia* 61b). In fact, any increment actually and directly accruing from the borrower to the lender in connection with and by reason of the loan is still considered interest and is forbidden even though at the date of the loan it was not clearly certain that the increment would arise. This was *avak ribit* that was not *ribit ketzutza* but was nevertheless forbidden by the rabbis.

The question was whether it was permissible to borrow a "dinar for a dinar" or whether it was feared that the dinar would have increased in

value by the time of repayment and the lender would obtain more that he had lent, which would be interest. And if in fact the dinar did increase in value between the date of the loan and the date of repayment and its purchasing power went up, might the lender claim the number of dinars he had lent or had he to deduct an amount proportionate to such increase in value?

The answer given by the rabbis of the *Talmud* is most original and interesting: all depends on the nature of the dinar. A dinar may be a mere coin (*tab'a*), i.e., legal tender for purchasing commodities unaffected by an increase (or decrease) in value since its rise in value is a misleading reflex to a fall in the price of goods (*perot*) and commodities, brought about by other causes: for this reason, the prohibition of interest does not apply to it when given on value-for-value basis. But a dinar might not be a medium of exchange but a commodity, itself bought or bartered, and if its value rises or is likely to rise, a real increase in value occurs which must be taken into account regarding the question of prohibited interest. It was decided that a silver dinar is a coin — since it is more generally current than any other coin — and therefore may be lent on a dinar-dinar basis, and no apprehension as to interest arises. However, a gold dinar (according to most of the authorities) is a commodity, and may therefore not be lent even on a value-for-value basis in case its value might subsequently rise and the lender thereby obtain interest; the lending of commodities "measure for measure" (*se'ah bese'ah*) is in principle forbidden in Jewish law as *avak ribit* (*Baba Metzia* 44b-45a: Rashi and Alfasi *ad loc.*).

> A silver dinar is coin in every respect and is not subject to an increase or decrease in value....Therefore one cannot say that a silver dinar has any aspect of interest at all and so it is permitted, but in the case of a gold dinar...since it is, as against silver, like a movable commodity, it is subject to an increase or decrease in value. Thus a gold dinar may be worth ten silver dinars at the date of the loan and ten and a half at the date of repayment. Hence an element of interest will be present (*Nimukei Yosef* to Alfasi *ad loc.*).

> It is forbidden to borrow anything on a 'measure-for-measure' basis apart from currency...and a gold dinar is treated as a commodity, it being forbidden to borrow a gold dinar for a gold dinar lest, whilst worth twenty-four dinars at the date of the loan, it is worth twenty-five at the date of repayment. It is, however, permitted to borrow a silver dinar against a silver dinar, and so also with all other coins, provided they are current (*Tur* and *Shulhan Arukh, Yoreh De'ah* 162:1. For the meaning of "all other coins", see *Bet Yosef ad loc.* and *Resp. Maharit Tzahalon* 33).

On the intrinsic qualitative difference between coin and commodities, one of the early authorities has observed:

> With all existing things differences arise from their very nature—their taste or smell or appearance...except with coin, the only purpose of which lies in its monetary use, its purchasing power: otherwise, what does its rise or fall, its thickness or thinness, matter? (Rabad cited in *Shitah Mekubetzet, Baba Metzia* at the beginning of Ch. 5).

These observations made in the thirteenth century are surprising in their modern approach and they embrace in a single sentence the theory of money as a medium of exchange, which was to become prevalent in the professional literature in the twentieth century (see Nussbaum, *Money in the Law*, (1950) 11 notes 43 and 44)....Currency is a means of purchase, the value of which is externally imposed by state law prescribing its value or purchasing power...whereas commodities possess intrinsic value...by reason of the benefit derived from their natural use.

The distinction between coin and commodities runs like a scarlet thread through all the rabbinical literature dealing with the lending of money and it serves as a major consideration in deciding the various questions connected with the law of interest. The underlying idea remained intact, or almost intact, but its practical application underwent appreciable changes due to the deflection of the boundary line between coin and commodities, as we shall see later. Every change in the value of currency by government order and every diminution of its content or weight for purposes of taxation or as result of war, rebellion and the like, immediately produced a host of enquiries to leading scholars to learn how to deal with a debt when the time came, and according to which value, the old or the new, it was to be paid upon maturity. In these cases not only was there a conflict of interest between lender and borrower but also an inner conflict in the borrower himself, if he was a person of integrity. For interest is forbidden by Jewish law both to the lender and to the borrower (*Baba Metzia* 75b, 61a and all the Codes). It is forbidden not only to take interest but also to give it. A borrower thus found himself between Scylla and Charybdis and his choice rested on a very fine thread: if he gave more than was due, he transgressed the prohibition of interest; if he gave less, he transgressed the prohibition of larceny. ("Let our righteous teacher direct us how payment is to be made so that neither interest nor larceny be involved" *Resp. Darkhei No'am, Yoreh De'ah*, 24). That too is one reason for the multiplicity of questions posed in this area of law.

An apposite description of the situation, both as regards the law and as regards the contemporary background, is found in one of the *responsa* of Ribash:

> Reuven owed Levi seven thousand, secured by mortgage on certain land, under two deeds made out in the old currency. Then King Don Enrique instituted a new currency worth less than one quarter of the old, doing so because otherwise he would have been unable to pay his soldiers. And he ordered that his currency be accepted throughout the country like the earlier currency. Some years later when his rule had become settled and he saw that the (new) currency had led to considerable injury and loss and commodities had become much dearer as a result, he abolished it.

The story continues that Reuven who "had access to the royal court and was aware of the king's wishes and his intention to abolish that currency" deposited with a trustee of a rabbinical court six thousand in the bad currency "in order that it be given to Levi upon his surrendering the promissory notes (duly discharged)." The Sages of Seville decided that the payment was good but Levi disputed that and the matter was put to Ribash for final determination. His decision was as follows:

> A valid award of the rabbinical court of the holy community of Seville (may the Lord preserve it) is final and far be it from me to doubt and question its ruling...because the law of the state is the law. The king expressly ordered that throughout his kingdom people must accept the new, debased currency and debts could be paid in it at the old rate. This is certainly an instance of the law of the state being the law and not of extortion of the king, since currency matters are part of state law and it is a royal prerogative and a constitutional right of the king to deal with currency as he pleases, give it a fixed value and raise or lower its value as he desires. And if at times, when need arises —just as he can levy taxation in order to maintain and pay his army —he thus over-depreciates the currency, who can question him? (*Resp. Ribash* 197)

This *responsum* of Ribash obviously does not raise the question of interest because Levi, the lender, actually received new debased currency instead of the old good currency he had lent to Reuven. The question was whether Reuven was not robbing his creditor by depositing debased currency. And the answer was no, because the law of the state is the law, that is, the law of King Enrique, recognising what we today call the "nominalistic principle" of money, was binding. But what would have been the law if the injured party had been not the lender Levi but the borrower Reuven? Assume that Reuven had borrowed seven thousand from Levi in the period of the debased currency, and before maturity—and for precisely the same economic reasons noted by Ribash (commodities had become

much dearer owing to the bad currency) — King Enrique had abolished that currency and replaced it by new currency worth more than the old, decreeing that all borrowers in the country must pay in the new good currency. Would the rule that the law of the state is the law, which is the nominalistic principle of money, have in that case overridden the prohibition of interest, just as in the case before Ribash it superseded the prohibition of larceny? The known rule that coin may be borrowed against coin (except gold coin and the like) would not easily have resolved the problem since here *ex hypothesi* there was no imaginary or "forced" increase in the value of an existing currency but rather its replacement by a new one with a definite intention to cheapen commodities, as aforesaid, and the new currency obviously involved a real addition of value as against the previous currency.

The above question was thus not before Ribash but, as we know, the words of the Torah are spare in one place and copious in another, and an answer may be found in the *responsa* of other authorities. Very many of these were written on the relationship between an increase in currency value and interest. The very names of the coins mentioned—*doros*, *cordanos*, *lejidis*, *veneztianos*, *perahim*, *grushosh*, *hatikhot*, *levanim*, *reichstaler*, *zehuvim*, *zlotosh* and so on — bear witness to the amplitude of place and time and it is easy to understand that no uniformity of language and content can be expected in all the authors concerned. Nevertheless, in spite of the variance of opinion expressed, on reviewing the decisions given on the question—whether an increase in currency value (not due to an increase in weight) prevents the lender for reasons of interest from receiving from the borrower the entire quantity of coins he lent — three main groups emerge.

The first group propounds that the rule that the law of the state is the law, here the nominalistic principle, disposes in point of law of the inequality in value of all kinds of coin and *ipso facto* removes the sting of interest from a transaction. Thus and only thus, I think, is use of the rule to be understood, for otherwise it would be incomprehensible (and the difficulty has been raised in the authorities) how the law of the state can permit what is prohibited:

> The later authorities determined that where one lends another *doros*, the same currency shall be repaid to him even if it has become dearer, and the reason given is that no coins are added but under the law of the state the value changes. The law of the state is the law and there is no fear of interest (*Resp. vaYomer Yitzhak*, *Hoshen Mishpat* 154).
>
> And all the more so, where there is state law on how debts are to be paid. Clearly that law is the law and no question of interest occurs

(*Resp. Shevut Ya'akov*, *Hoshen Mishpat* 175 but cf. this *responsum* at other points where the permission is grounded in other halakhic reasons; see also *Bet Efrayim*, *Hoshen Mishpat*, 4, and *Bet David*, *Yoreh De'ah*, 80).

If the king has decreed that every lender is to be repaid in the other coin, some say that the law of the state is the law and it is permitted without fear of prohibition....Here there is neither larceny nor interest (*Bet Yosef* to *Tur*, *Yoreh De'ah*, 165 in the name of the authorities).

Regarding your question about the change in currency in our country with regard to the repayment of debts, I am surprised at the question for it is agreed that the law of the state is the law (*Resp. Hatam Sofer*, *Hoshen Mishpat*, 58).

Another group also permits acceptance of the enhanced coin, but not because the law of the state is the law but for specific Talmudic reasons derived from the law of interest itself, or for no special reason at all, out of a tendency to make things easier, widespread practice and the like:

Where a person lends another so many new *zlotosh* each of which was then equal in value to thirty *hatikhot* and they thereafter increased in value and stood at thirty-six *hatikhot*, what is he to be repaid? *Prima facie* it seems that if he is repaid as many *zlotosh* as he lent, that would be prohibited as interest. We are, however, not so punctilious, since it is certain that one may lend a silver dinar for a silver dinar, and if you hold that in all such cases where the original is repaid a question of interest is involved, it should be forbidden to lend a silver dinar for a silver dinar lest dinars go up in value, just as it is forbidden to lend measure-for-measure...(*Resp. Mahaneh Efrayim*, *Hilkhot Malveh veLoveh* 24; cf. *Resp. Maharshakh* Part I, 72).

If it has been expressly stipulated that the same coin as was lent should be repaid, then the same coin must be repaid even if it has increased in value by more than one-fifth and even if commodities have thereby become cheaper, and this will not constitute interest...(*Resp. Shevut Ya'akov*, *loc. cit.*).

There is occasion to say that our Rabbi [Maimonides, who does not include in his Code the rule that it is forbidden to borrow a gold coin for a gold coin] was of the opinion that since the law concerning a measure-for-measure loan is rabbinical, it must not be added to, and it is only in that instance that one is strict but not in the instance

> of a gold dinar which is a coin as against commodities (*Resp. Zera Ya'akov* 74).
>
> It has been written that at this time, a gold coin is like a silver coin, and is lent gold-for-gold, and it is the custom to be lenient and not to protest at this, because there is a basis for their actions (*Terumat haDeshen, haPesakim*, 54, cited by Rema, *Yoreh De'ah* 162:1; and see *Resp. Maharit Tzahalon* 33).
>
> In our opinion all coins always have a fixed value and it is therefore permissible to borrow all of them on a gold-for-gold or copper-for-copper basis, and although change may occur and the value may rise or fall, he may repay with the same coin that was borrowed, and since no interest is involved the same coin must be repaid (*Hazon Ish, Hoshen Mishpat* 16:9).

There are still more *responsa* permitting the borrowing of coin for coin, and not necessarily silver dinars which are actual currency, and allowing the lender to receive from the borrower all the coins he lent, even if they have increased in value in the meantime. A long list of such decisions are to be found by those interested in the matter in *Resp. Hikrei Lev, Hoshen Mishpat* 154.

On the other hand, there is another, minority, group, which forbids the lending of coin for coin and the receipt of coin that has increased in value (although the same in number) since "the *Gemara* did not permit a coin-for-coin loan unless the lender obtains no increment" (*Darkhei No'am, Yoreh De'ah* 24, relying on Rashdam to *Yoreh De'ah* 224; so also apparently Ri Bassan as cited in *Resp. Hikrei Lev* (Salonica, 1817) 236a).

For the sake of presenting a truly complete picture, the well-known fact should be noted that at the beginning of the seventeenth century and later a number of "conventions" were made by Jewish communities to compromise, in the event of an increase or decrease in money value, between lenders and borrowers, the difference or the "loss" to be shared equally between them; but the purpose of these conventions was to apportion in an equitable manner the loss suffered under law by one of the parties and not to alter or abrogate the prohibition of interest. The matter of "larceny" and not of interest was here dealt with, since the frequent variations in the value or weight of coin brought confusion into the economic life of the mass of the people and also endangered the internal peace of the community:

> Thus disputes and altercations grew among Jews who lent one another money of a previous value which a claimant would wish to collect with

the appreciation thereon, whilst the debtor desired to avoid that (*Kerem Hemar* Part 2, *Regulations*, 89 *et seq.*).

At the end of the seventeenth century, the Governor of Egypt "declared invalid the clipped and debased *mejidis* and introduced new *mejidis* which were good both as to silver content and as to weight." At once, utter chaos followed among the Jews there, as is described with great literary flair, in the customary rhetorical style, by a leading Egyptian Rabbi, R. Avraham Halevi in a *responsum* he wrote in 1691...(*Resp. Ginat Veradim*, *Hoshen Mishpat* 4:1):

In order to avoid the dangers that beset communities and the disputes that spread among them, the above-mentioned regulations and conventions were instituted in several countries (but not apparently in Egypt). These did not alter the law of interest as such and the half-difference given to a lender, in the event of an increase in value, was permitted by law and, for the reasons set out above, did not create any apprehension about interest.

We have reached the end of our survey of Jewish law. Let us now see what conclusion is to be drawn regarding the question before us. It seems to me that a precise analysis of the principles demonstrates that the value provisions of clause 9 of the present mortgage would not be considered as involving interest in the view of Jewish law. To that end we have to translate the transaction into the terminology of Jewish law. What did the appellant do? She desired to secure herself against a depreciation of Israeli currency, which would entail a proportionate rise in prices in all commodities in the country. That means she assured for herself the right to receive on repayment the same quantity of commodities she would have been able to buy with her money when the loan was made. Her actual possessions in terms of commodities would not thereby be enlarged; only the number of coins she was to receive would increase and this increase, in spite of "the law of the state" rule or the "nominalistic principle", is in Jewish law not considered as an addition of interest although, but for the said clause, the debt could have been discharged by a lesser number of coins. We have seen that "the law of the state" rule along with the nominalistic principle that follows from it are likely to "balance" in point of law the difference between the two value rates and thus — in the case of a rise in value — nullify the prohibition of interest. But it is totally unreal — and we have not found any warrant in the sources to this effect — that because of this principle, depreciated currency should be regarded as actually equivalent in value to the previous currency and that as a consequence of this fiction a quantitative addition to the number of coins originally lent should be deemed prohibited interest. We have seen the said principle as nullifying interest but not as "catalysing" it. In all

the Talmudic and rabbinical discussions concerning the rise and fall of currency value the debate centered on the question of whether the rise and fall is inherent in the currency, its rise being that which caused the "cheapening" of commodities or increased quantities of them, or whether the rise and fall is inherent in the commodities, i.e. in some economic cause extraneous to the supposed increase in currency value, with the result that no additional value accrues to the lender because of a rise *per se* in the value of that currency. Hence the correct criterion for determining interest in Jewish law is whether or not the lender is actually enriched —in commodities—by the added quantity of currency. Actual enrichment in terms of commodities may occur without involving the prohibition of interest...and...for a variety of reasons peculiar to the law of interest...but the opposite is impossible, that without the lender being enriched the prohibition of interest nevertheless obtains.

Conclusive evidence for that can be found, if we consider the matter carefully, in the said community conventions. According to these conventions, the difference in value was apportioned between lender and borrower in the event of either a rise in the value of the coin lent or of a decrease therein. If the *grushosh*, for instance, at the time of the loan, stood at one hundred and twenty *levanim* and at the time of repayment had declined to one hundred, the borrower would have to pay the lender one hundred and ten *levanim*, i.e. one depreciated *grush* plus ten *levanim*. These conventions were agreed upon and were followed even by those authorities who recognised "the law of the state" principle, according to which a borrower might lawfully discharge his debt with depreciated currency without any addition. It follows clearly that the half-difference payable to the lender, i.e. the ten additional *levanim* that the lender received apart from the *grush* repaid to him, does not constitute an addition of interest prohibited under Jewish law. These conventions, as I have already observed, were only instituted to ensure an equitable apportionment of the loss and were not intended to change—and perhaps were incapable of changing—the law of interest itself. What is the reason for permitting this addition? Here, in contrast to the opposite case of an increase in currency value, the only reason is that the addition does not enrich the lender by comparison with his previous position when the money was lent. This is equally the law with regard to the present case.

Cr.A. 98/65

OTZAR L'ASHRAI SHEL HAPO'EL HAMIZRAHI *et al.* v. ATTORNEY- GENERAL

(1966) 20(1) *P.D.* 141, 145-146, 149-150

The appellants, a co-operative bank and its manager, were charged with levying collection fees, in addition to interest, at the rate of 11%, on loans made to members of the co-operative. The Magistrate's Court convicted the bank of levying excessive interest but acquitted the manager. Both the bank and the Attorney General appealed, the first as to its conviction and the second as to lightness of sentence and the acquittal of the manager. The District Court dismissed the appeal of the Bank and that of the Attorney General regarding sentence, but accepted the latter's appeal as regards acquittal of the manager, and convicted him.

Silberg J.: A large part of the submissions of learned counsel dealt with the question of whether the legislation has kept faith with "the definition of R. Nahman", the classic Talmudic definition of interest: "R. Nahman said: The general principle of interest is that all payment for waiting [for one's money] is forbidden" (*Baba Metzia* 63b), or whether it has turned its back upon that definition and has chosen what in its view is the better one, the lengthy and detailed definition contained in sec. 1 of the Interest Law, 1957. Counsel for the appellant argues for the continuation of the classic definition. Counsel for the Attorney-General disputes that.

One thing is clear and, in my opinion, must be acknowledged by all: be the preservation or abandonment of R. Nahman's definition in principle what it may, the adherence of the legislation thereto is at least no longer very rigorous, witness the break revealed as a consequence of the provisions of sec. 2 of the Law. In *Rosenblum* v. *Zeger* (1955) 9 *P.D.* 535, this Court, as we know, decided that any addition to principal intended to compensate the lender for a decline in the value of the Israeli lira is not interest because the addition is not "payment for waiting"; it is not a reward payable to the lender for "giving time" for the return of his money. Thus sec. 2 of the new Israeli Law provides:

> Where the loan is for a period exceeding two years or where it is for a shorter period but is actually repaid after two years, there shall not be regarded as interest any amount added to the capital...under a stipulation of linkage to the rate of exchange of the currency, to the cost-of-living index or to the increase of the price of any item designated for that purpose by the Minister of Finance...

Halevi J.: I agree and, following my most learned friend, shall point out

the remarkable similarity between the questions that have arisen in this appeal and those dealt with by the ancient sources of our national law.

The *Torah* prescribes: "If thou lend money to any of My people, even to the poor with thee, thou shalt not be unto him as a creditor; neither shall ye lay upon him interest" (*Ex.* 22:24). "And if thy brother be waxen poor and his means fail with thee...take thou no interest of him or increase; but fear thy God that thy brother may live with thee. Thou shalt not give him thy money on interest, nor give him thy victuals for increase" (*Lev.* 25: 35-37). "Thou shalt not lend upon interest to thy brother, interest of money, interest of victuals, interest of any thing that is lent upon interest" (*Deut.* 23:20).

The fifth chapter of the *Mishnah* of *Baba Metzia* opens with the question "What is *neshekh* [usury or interest] and what is *tarbit* [increase]?" And Rashi explains (*ibid.* 60b): "*Neshekh* occurs where he 'bites' by taking from the debtor something he has not given him. *Tarbit*, is where his money increases."

The *Gemara* (*ibid.*) asks: Do you think that there can be *neshekh* without *tarbit* or *tarbit* without *neshekh*?, to which Rashi explains: "He bites his neighbour but his money does not increase....The lender is rewarded without the borrower being bitten."

A similar problem has arisen before us in view of the definition of "interest" in sec. 1 of the Interest Law, 1957, which runs as follows:

> "Interest" means any consideration payable in respect of a loan and representing an addition to the principal, including a commission or discount payable as aforesaid, whether called interest or anything else.

The last question we must answer is whether the collection fees predetermined as between the lender and the borrower, that are deducted from the capital at the date the loan is made, constitute "interest" as defined. Having regard to the argument of the appellants that the lender gained nothing from the collection fees and in fact made a loss on the collection of the loan, opinion was divided in this appeal over the nature of "interest" defined in sec. 1: does its basis lie in the loss to the borrower or in the profit of the lender? In the terms of the *Talmud*, is it interest *neshekh* or *tarbit* and can there be *neshekh* without *tarbit*?

Counsel for the Attorney-General represents, as it were, the view that "there is *neshekh* without *tarbit*" and that the *tarbit* forbidden under the Interest Law is *neshekh* and not *tarbit* in the sense of the *Torah*. Counsel for the appellant represents the opposite view. As the learned State Attorney put it, the Interest Law is intended to protect the borrower against "excessive" interest and therefore the answer to the question of what is "interest" must be given from the viewpoint of the borrower;

the borrower who pays the lender collection fees additional to interest at the maximum rate prescribed, pays "excessive interest" as defined in sec. 1 ("interest the rate of which exceeds the maximum rate fixed under sec. 3 of this Law") and it is immaterial whether the lender profits or makes a loss regarding the collection of the loan. Counsel for the appellant, on the other hand, argues that if there is no profit there is no interest and that the question of what is interest must be answered from the viewpoint of the lender.

In my opinion the Interest Law must be regarded not from the perspective of the borrower nor from that of the lender but from the perspective of both, and Rabba's dictum "you cannot find *neshekh* without *tarbit* nor *tarbit* without *neshekh*" is correct in the present case.

2. Collection Fees

See: OTZAR L'ASHRAI SHEL HAPO'EL HAMIZRAHI *et al.* v. ATTORNEY-GENERAL, p. 804.

3. Negotiation Fees

C.A. 58/68

HAPO'EL HAMIZRAHI BANK v. ZORGER *et al.*

(1968) 22(2) *P.D.* 652, 657

The respondents sought to render the Bank liable to refund the bank charges it had made in respect of negotiating certain bills. They submitted that the charges were excessive interest since they were paid in addition to a deduction of 11% and the bank must refund them in accordance with sec. 6 of the Interest Law, 1957.

Silberg D.P.: We have found the following express provision in Jewish law which is the most refined and the strictest of systems in matters of interest and usury:

> A person may give another a dinar in order to lend a third person a hundred dinars, for the *Torah* only prohibited interest that passes

from borrower to lender (*M.T. Malveh veLoveh* 5:14; likewise *Yoreh De'ah* 160:13).

The source of this rule is *Baba Metzia* 69b.
The observations in *Tur, Yoreh De'ah* 160 are of great interest:

> One must take care in matters of interest not to seek any exemptions, since it is a very tempting affair, and if today the opening is as small as the eye of a needle it will expand in time to the size of a large hall-door. But the *Torah* has only prohibited interest that passes from borrower to lender, and a person can therefore say to his neighbour: 'Here is a *zuz*. Lend so-and-so ten dinars.'....So also a person may say to his neighbour: 'Here is a *zuz*. Tell so-and-so to lend me some money.' And he may say so to the son of the lender who is grown up and is not dependent upon his father, but if he is dependent on his father it is forbidden, since that would be like giving the money to the lender.

To sum up this point, a payment will not be considered interest unless it passes from borrower to lender and not to some other person. In this regard, at least, the bank charges cannot therefore be treated as interest given to the lender.

4. Interest Defined

C.A. 230/72

ZIMMERMAN v. ASSESSMENT OFFICER, TEL AVIV

(1973) 27(1) *P.D.* 802, 804

The Assessment Officer regarded the sum awarded by the Court to the appellant as taxable income under sec. 2(4) of the Income Tax Ordinance (New Version). According to the appellant, the interest to which that section refers is contractual interest, paid for a loan, but it does not refer to interest awarded by a court according to the Adjudication of Interest Law, 1961.

Kahan J.: As counsel for the appellant rightly argues, because no particular definition was provided for the word "interest" in the Income Tax Ordinance, it is our duty to interpret it according to its usual meaning in everyday language. In my opinion, the expression "interest" as commonly used is

not confined to the relations between a lender and a borrower, but rather, includes any periodic payment for money held back, which is calculated as a percentage of the capital.

...Counsel for the appellant points out that in the Ben-Yehuda and the Even Shoshan dictionaries, "interest" is defined as a payment connected with a loan. It has already been said more than once that the definition in a dictionary does not always reflect the everyday usage of a word. Clearly, in most cases, interest is connected with the concept of a loan, and this is definitely the case in the sources of Jewish law, which deal with the prohibition against taking interest in the context of a loan, but that does not constitute proof that this concept does not extend to a wider field, and does not include interest awarded by the court. In any case, the classical definition of interest in Jewish law is that of R. Nahman: "The principle of interest is that payment for waiting for one's money is forbidden" (*Baba Metzia* 63b), according to which interest is "waiting money", and this does not negate the inclusion of adjudicated interest, which in essence is "waiting money" too that the defendant pays for having held on to the plaintiff's money.

Chapter Four

BANKRUPTCY

1. Payment of Debts *Pro rata*

C.A. 283/67

TRUSTEES IN BANKRUPTCY OF A. RAFIAH AND D. BORKIN v. STATE OF ISRAEL *et al.*

(1968) 22(1) *P.D.* 124, 132-133

Two of the respondents deposited with a bank, as security for a loan, irrevocable powers of attorney for the transfer of their equitable rights in a parcel of land. After they were declared bankrupt, their trustees in bankruptcy litigated with the bank over the right to damages for uprooting trees growing on the land.

Kister J.: The law of bankruptcy is dictated by equitable principles in the simple sense that all the creditors of an insolvent person receive, each one of them, a portion of his debt and no one of them receives all while the others go empty-handed. This rule of equity that one creditor is not to be preferred to his fellow creditors is not new.

In Jewish law, the rule regarding a person who has several creditors, all of whom he cannot pay, is summed up by *Arukh haShulhan, Hoshen Mishpat* 104: 8, in the following manner:

> Although a later creditor who anticipates the others may well collect his debt, a rabbinical court dealing with several debtors must make an apportionment among them and an arrangement with the borrower, if it is known that other debtors exist but are not present to participate in the apportionment, since there is no rule as to priority. The borrower himself must act likewise for what wrong have those debtors committed who are not present?

Resp. Maharsham Part 3, 65, states:

> In the present matter where the borrower was indebted to several other creditors, had the matter come before a rabbinical court, permission

> would not have been given to pay Shimon alone but the creditors would share equally.

We have also found detailed community regulations regarding the payment of debts.

The Regulations of the Council of the Four Lands in Poland contain regulations from the years 1623-1624 concerning an absconding debtor and the benefits he had distributed. Among these regulations the following appears:

> Any one who receives from a person who has absconded some thing not in open market within three months of his absconding must make it available to the creditors jointly (*Minute Book of the Council of the Four Lands*, ed. Halperin, 1945).

As I have already said, it is very doubtful whether there is any basis for our creating a new institution, the equitable mortgage. Certainly such a right is not to be recognised as being valid in bankruptcy when it is likely to cause injustice to other creditors.

2. Majority Determination

C.A. 691/69

BASH-RAVSKY PP. *et al.* v. FOREIGN TRADE BANK LTD. *et al.*

(1971) 25(1) *P.D.* 465, 472

The respondent bank pleaded that a compromise settlement between the company and its creditors did not bind the bank, since it had not been invited to a meeting of the unsecured creditors of the appellants, it had not participated therein and did not know anything about it or about an application to the court to approve the arrangement. The bank argued essentially that it was not an unsecured creditor and therefore the resolution passed at the said meeting was not binding upon it.

Kister J.: It is obvious that if each creditor were to conduct separate negotiations, no reasonable arrangement would be reached with all of them and moreover, the weakest amongst them would be at a disadvantage. Accordingly procedures have been introduced for arranging a compromise between a debtor and his creditors acting more or less in unity, and it has

also been provided that a majority of creditors can compel the minority so that an arrangement is not frustrated.

In Roman law, indeed, no such compulsion was generally possible. In Justinian's Code, a majority decision could only be binding to grant an extension of time (Dernburg, *Pandekten*, (3 ed.) 180). Later, however, the practice developed of compelling a minority to acquiesce in order to avoid the bankruptcy of the debtor. This practice was so common that the rabbis regarded it as commercial usage having full effect and validity even under Jewish law, and decided accordingly (see *Resp. Maharshakh*—Part 3, 8, cited in *Darkhei Yosef* to *Hoshen Mishpat* 12:14, where other *Responsa* dealing with the matter are also mentioned). Today this rule has been universally adopted in bankruptcy law and in other legislation concerning the affairs of individuals or companies, where fortunes have declined and they are unable to pay their debts in full or immediately.

Part Eleven

LABOUR LAW

CONTENTS

Chapter One

MASTER AND SERVANT RELATIONSHIP

1. Status of Worker-Employee or Contractor

C.A. 47/48
AGUSHEVITZ *et al.* v. FUTERMAN
(1951) 5 *P.D.* 4, 6, 8, 12

Silberg J.: An interesting question, novel and rather complicated, arises in the present appeal: What is the correct meaning of the term "workman" in sec. 2 of the Workers Compensation Ordinance, 1947, and by what yardstick is this attribute to be gauged? The outcome of this appeal, i.e. whether the respondent is or is not entitled to receive compensation for the accident that befell him whilst working for the appellants, will depend on the answer...

The terms common in Jewish law are "hiring" (*sekhirut*), indicative of a contract of service, and "independent contracting" (*kablanut*), indicative of what we call a contract for services. The difference goes to the right of the worker to cease working (*zekhut hashevitah*): "A worker can withdraw [from his work] even in the middle of the day." With regard to this rule, however, a distinction is drawn between a hired worker and an independent contractor (*Baba Metzia* 77a; *M.T. Sekhirut* 9:7; *Hoshen Mishpat* 333: 3-4). We shall see later that by comparing the sources of Jewish law, we may learn a little, or even more than that, about the conceptual difference between these two categories, since our concern here is with fundamental legal notions that do not recognise any spatial or temporal boundaries...

As I have said, Jewish law distinguishes between the hired worker and the independent contractor and also places particular emphasis upon the elements of "control" and "authority". The practical difference between the two categories, as we have noted, lies in the right of the worker to

withdraw his labour: in the case of a hired worker this right is almost completely unfettered, but in the case of the independent contractor it is restricted and entails a number of consequences. The reason why a worker may withdraw even in the middle of the day is that he should not be "enslaved" by his master, "for it is written 'For unto Me are the children of Israel servants'; they are My servants, but not servants of servants" (*Baba Metzia* 10a), and this notion attaches only to a hired worker and not to an independent contractor, since the latter is his own master (see Rashi to *Baba Metzia* 77a, *s.v. "shani"*).

These observations of the great exegete, that an independent contractor is his own master, are felicitous and most apposite since they draw immediate attention to the concept that underlies the matter before us. In fact, both in Jewish law (regarding the right to withdraw) and in Israeli and English law (regarding the right to compensation) the ultimate question is the same: for whom did the person work as a servant, for himself or for others? Did he undertake to work for another, in which case he owes the employer that amount of labour which the latter obviously expects to enjoy, or did he work for himself and produce, as it were by self-service, the end product, entire and complete, which he owes to the employer? In the first case he is a hired worker (*sakhir*) in the Talmudic sense, a workman in the words of the English and Israeli legislator. In the second case, he is an independent contractor (*kablan*). The whole idea of control and compliance with instructions or orders is merely an external symptom, a clear sign indicating that the person is indeed not working for himself but is in the service of another.

2. Child Employed by Parent

See: BUKHABZA v. BUKHABZA *et al.*, p. 833.

Chapter Two

CUSTOM

1. Status of Custom

See: WOLFSON v. SPINNEYS LTD., p. 831.

Chapter Three

DUTIES OF EMPLOYER

1. Safety of Employee

Cr.A. 478/72

PINKAS v. STATE OF ISRAEL

(1973) 27(2) *P.D.* 617, 627-629

A person employed by the appellant as a tractor driver volunteered to descend a very deep pit to retrieve a box of tools that had fallen into it, without proper precautions being taken. He fell and was killed. The respondent was charged with causing his death as a result of carelessness, in accordance with sec. 218 of the Criminal Code Ordinance, 1936. ("Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person is guilty of a misdemeanor.") [The respondent was acquitted in the Magistrate's Court but that decision was upset on appeal to the District Court.]

Kister J.: Were we to go on and consider the moral approach, particularly that of the Jewish people, we would recall first the sanctity which attaches to the life of another as to our own and, secondly, the duty owed to care for the welfare of others engaged in our own affairs, including employees. I shall not enter into any theoretical explanations but content myself with mentioning some examples that concretize this manner of looking at things.

Subsequent to the abolition of the cities of refuge, it became impossible to sentence a person convicted of manslaughter to exile in one of these cities. Nevertheless, it was common, even when the killing was indirect and devoid of all criminal guilt, for the person involved to ask of the rabbis whether any guilt attached to him and what he might do to repent and atone for what he had done. Among the published *responsa* are to be found some that deal with people whose workers or agents had been killed whilst performing their respective tasks. Although the principals were free of criminal guilt, death had occurred as a consequence of the tasks the victims had carried out, and the rabbinical authorities directed the principals to do proper

repentance, relying, *inter alia*, on a passage in *Sanhedrin* 95a: "The Holy one, blessed be He, said to David, 'How long will this crime of yours go unpunished? Through you, Nob, the city of priests, was massacred, and through you, Saul and his three sons were slain.' " Examination of the Bible shows that although some causal connection existed between what David had done and the death of these people, the connection was rather remote and one could not speak in terms of legal fault or guilt; nevertheless, the matter was considered a transgression.

It is no wonder that people generally were fearful of having committed a wrong and being subject to Divine sanction, if any of their agents were killed in the course of their work. As I have said, many *responsa* deal with the matter, some of them collected by Dr. Shilem Warhaftig in his *Jewish Labour Law* (1969) 944-49 (in Hebrew), of which I shall cite two.

(i) R. Ya'akov Weil some five centuries ago wrote in his *Responsa*, No.125: "You have written that R. Ezra was killed whilst acting as your agent....Although King David was not really guilty, and it was only indirectly through him that the mishap occurred, he was nevertheless punished. How much more so here, where the evil happened during (the deceased's) agency, is there occasion for some corrective penalty, and it would be well for you to accept a penalty such as fasting for forty days and, if the victim has children, providing for them as generously as you can to save them from grievous distress."

(ii) In No. 3 of his *Responsa* (Mehadurah Tinyana), R. Akiva Eiger considered the case of a person who forced a laden cart to speed at night. His son and an attendant were killed whilst sitting on the load. R. Eiger considered this a very serious matter, for the person was "a major cause" (*gorem gadol*) "...and possibly like one who acts with malice aforethought" and he therefore needed to make onerous repentance. He directed him to distribute charity in the manner detailed in the *responsum* (the son and attendant not leaving next of kin), to undergo mortification (although because he was an old man, the mortification was limited to fasting on certain specified days, and, if that turned out to be too difficult, the fasting was to be commuted by fixed sums) and for the rest of his life he was not to participate in wedding meals (other than those of his issue), and he should, in addition, offer penitentiary prayer. R. Akiva Eiger points out that the person should have taken care and realized that an accident could occur if the cart were sent off at night.

It may be noted that this rule of making repentance appears in *Magen Avraham* to *Orah Hayim* 603 and in *Mishnah Berurah, ad loc.*

In respect of the matter before us, the manner of descending the pit by a rope, as described by the Deputy President, and getting up clutching

a box of tools, was indeed very perilous. Another proven and safe way was available, i.e. that used by firemen, by belting the deceased and letting him down with ropes. The principle of this method was known even in antiquity. It is described in *Jer.* 38: 10-13:

> "Then the king commanded Ebed-melech the Ethiopian, saying: 'Take from hence thirty men with thee, and take up Jeremiah the prophet out of the pit, before he dies.' " We are then told of the servant's preparations, and that he took worn clouts and rags which he made into a rope, saying to Jeremiah, "Put...these worn clouts and rags under thine armholes." Thus was Jeremiah drawn from the pit.

The dangers of falling into a pit and of being affected by noxious fumes or lack of air, even if it is only shallow, were known in Talmudic times (*Baba Kamma* 50b)....In times of emergency one may have to forgo the employment of means known to be secure and adopt a course which presents danger....But in the present case there was no need to do that.

2. Services Beyond Duty

H.C. 80/70

ELIZUR *et al.* v. BROADCASTING AUTHORITY *et al.*

(1970) 24(2) *P.D.* 649, 660

The petitioners argued that the Broadcasting Authority acted in breach of the law in televising programmes on the Sabbath, since the work permit granted for that purpose was void and contrary to the provisions of the Hours of Work and Rest Law, 1951. The High Court of Justice (largely on procedural grounds) set aside by a majority the order nisi *that had been made.*

Kister J.: Employees who in the framework of their functions may not give others instructions, and those in plants whose owners, either on their own volition or because they have not received a permit, do not employ them on Sabbaths or the Festivals, are exempt, under contract or appointment, from working on the Sabbaths and the Festivals. Included in this category generally are senior bookkeepers, pay clerks and the like. These workers are not affected adversely by the plant operating on the Sabbath. It

may well happen that they will feel uncomfortable when their superiors sometimes ask them to work on the Sabbaths, but no one should request another to do something he is not obliged to do when it is known that he will find it difficult or embarrassing to refuse. It should be noted that according to R. Yonah Gerondi, *Sha'arei Teshuvah*, Part III, 60, a person who requests another to work in such circumstances transgresses the prohibition: "Thou shalt not rule over him with rigour" (*Lev.* 25:43). However, in point of law a worker is a free person, and therefore his right to work cannot be said to be prejudiced by the permit.

See: A v. STATE OF ISRAEL, Part 3, Social and Administrative Regulations, p. 178.

3. Unnecessary Work

C.A. 268/71

THE ESTATE OF SIMHA MARGULIS v. LINDER

(1972) 26(2) *P.D.* 761, 764

This appeal centered on the obligation of the estate of the deceased to pay severance pay to a clerk working in the deceased's office who resigned because of an appreciable deterioration in the conditions of her employment.

Kister J.: It remains for us to deal with the last point, that the circumstances described in the evidence of the respondent are not to be treated as an appreciable deterioration in the conditions of her employment. The answer to the question whether or not an appreciable deterioration has occurred in the conditions of employment in any particular instance depends on the circumstances of the case, the task of the employee and his standing with the employer, and the judge hearing the case can assess whether, as regards such employee, the change of conditions justifies his resignation. During the hearing of this appeal, I pointed out to counsel for the appellant that already in very early times, laborious work was construed *inter alia* as including work which was worthless and of little value to the employer, as for example when an employer quite unnecessarily orders a workman

to heat water — see *Sifra* to *Behar*, 6, Rashi to *Lev* 25:43 and *M.T. Avadim* 1:6. Here, an office worker of mature age (according to one of the documents, she was born in 1913) is involved, who enjoyed the confidence of her employer, and when the son arrived on the scene, he denied her the authority to speak with clients, although up until then she had done so freely. She was also denied the right to take in the mail, something which suggests a want of confidence in her. Similarly, she was made to do work she had never done before, the necessity of which was generally doubtful. In view of all this, it seems that the respondent was justified in giving up her job, and her so doing is to be treated as due to an appreciable deterioration in the conditions of her employment. For this reason there is no need for us to hear the reply of her counsel.

4. Employee's Benefits

F.H. 5/69

BAT YAM MUNICIPALITY v. TEL AVIV ASSESSMENT OFFICER

(1974) 24(2) *P.D.* 37, 42-43

The Supreme Court had held by a majority that the 50% reduction in secondary school fees granted by the appellant for children of its employees fell within the category of "any other allowance" liable to income tax.

Kister J.: The matter of benefits given to an employee in addition to his fixed salary is not a device for the purpose of evading income tax, and I doubt whether the reductions in school fees given to teachers and other employees were introduced only after the enactment of the income tax legislation.

Benefits additional to wages or salary have been recognised since early times. An outstanding example of that is the right of an agricultural worker to consume the crops he is tending, whilst at work (see Maimonides, *Sefer haMitzvot*, Affirmative Command 201; *M.T. Sekhirut* 12:1, and *Tur*, *Shulhan Arukh Hoshen Mishpat* 337). This rule is based upon two verses in *Deut.* 23:25 and 26: "When thou comest into thy neighbour's vineyard, thou mayest eat grapes until thou have enough at thine own pleasure....When thou comest into thy neighbour's standing corn, then thou mayest pluck

ears with thy hand." The *Talmud* construed these verses as relating to a hired worker engaged in tending a vineyard or cultivated land, and it became decided law that such workmen have a legal (Scriptural) right to eat of the produce.

Parallel to this rule, customs arose which also enabled labourers doing other kinds of work than those enumerated in the *Talmud*, to partake of what they were working on, and these were treated as rights deriving from local practice. Both the *Talmud* and those authorities that list the *mitzvot* (commandments) offer various reasons for this usage, based on the feelings of the worker, as well as on the obligation expected of the employer to maintain a humane relationship, "to be benevolent" and not pedantic about what the worker may take for himself to eat from what he is working on, as the author of *Sefer haHinukh* (Commandment 576) puts it. In a developed society it is indeed common for an employer, even though he pays fair and proper salaries, to allow his workers certain benefits either by providing particular services free of charge or by giving reductions on purchases. It is not always practicable to require the employer generally to raise salaries or the employee to pay in full for every service he obtains or purchase he makes from his employer. That is an accepted practice and cannot be said to be necessarily connected with observance of income tax law.

5. Delay in Paying Wages

C.A. 368/77

ZIKIT...LTD v. SERIGEI ELDIT LTD.

(1978) 32(3) *P.D.* 487, 493-494

Elon J.: The law in this country expressly provides that where the primary materials necessary for producing an article belong to the contractor, the transaction is a contract of sale; all the more so where all the materials are his. That would also appear to be the position of Jewish law. When construing the laws of sale and contracting for services in Israeli legislation, we must in the first place make reference to the position under Jewish law in order to resolve any problems that may arise (see sec. 10 of the Contract for Services Law, 1974, regarding the autonomy of the Law and the non-

application of art. 46 of the Palestine Order-in-Council [which refers us to English law]).

The question of contracts for services has received extensive treatment in Jewish law—even the [Hebrew] term for contracts of services (*kablanut*) is taken from Jewish sources (see *Baba Metzia* 112a and Rashi *ad loc. s.v. "kablanut"*, and Me'iri *ad loc.*; *Baba Metzia* 77a and Rashi *s.v. "shani lei"*; *M.T. Sekhirut* 9:4 and *Maggid Mishneh ad loc.*; *Resp. Maharam miRotenburg* (Prague ed.) 477; *Resp. Avnei Nezer*, *Hoshen Mishpat* 52). This, however, is not the occasion for going into details (see A. Gulak, *The Foundations of Jewish Law*, II, 187-88 (in Hebrew); S. Warhaftig, *Jewish Labour Law*, 365-69 (in Hebrew)). For the present purpose it is sufficient to examine one *responsum*....The following question was addressed to R. Aaron Sasson: "Reuven requested a scribe to draw up a *ketubah* (marriage document) for him. The scribe did so but Reuven refused to pay the scribe his fee....Has Reuven infringed (the prohibition of delay in payment of wages) if he does not pay the scribe his fee?" (*Resp. Torat Emet*, 119). According to Jewish law an employer must pay his workman his wages upon completion of the work and may not withhold payment (*Lev.* 19:13; *Deut.* 24:14-15; *Baba Metzia* 111a; *M.T. Sekhirut* 11:1; *Hoshen Mishpat* 339:1). "Independent contracting is like hiring and payment must be made in due time" (M.T. *loc. cit.*), which is not the case with regard to any other debt arising out of sale or loan where the prohibition of wage delay does not apply...

At the outset, R. Aaron Sasson writes that the answer would seem to be clear in view of the principle set out above, that independent contracting and hiring are alike in this respect, but later he tends to the view that in the particular case put to him the law relating to independent contracting does not apply, but rather, the law of sale. He writes:

> At all events, there is occasion to consider the matter carefully. As regards the scribe, what prohibition in fact exists? He is obviously not a day worker. Nor does he seem to be an independent contractor, since an independent contractor receives some article or another from the owner and attends to it, without having any property in the article itself, for which reason he is called an independent contractor. In the present case, however, where the paper and the writing belong to the scribe himself, perhaps he is not to be deemed an independent contractor but a vendor, similar to one who sells some object; if not paid, the debt should thus be treated as a loan, and no infringement of the law of hiring and contracting is involved.

From what follows in this *responsum* this seems to be Sasson's final conclusion.

H.C. 419/81

FELNER v. KOOR METALS LTD. *et al.*

(1982) 36(2) *P.D.* 74, 78

The question under discussion in this petition is whether the Labour Court, when it has decided that a worker is not entitled to compensation for withheld wages, may award linkage differentials or statutory interest by virtue of the Adjudication of Interest Law, 1961, on wages or severance pay that were not paid on time.

Kahan D.P.: Compensation for withheld wages has a very particular social purpose, to protect the worker from delay in payment of his wages and to prevent such delay, in keeping with the commandment, "The wages of a hired servant shall not abide with thee all night until the morning" (*Lev.* 19:13); "In the same day thou shalt give him his hire" (*Deut.* 24:15). In sec. 17 of the Wage Protection Law, 1958, which stipulates that compensation shall be made for withheld wages, we find that "compensation for delayed wages shall be deemed, for all purposes except those of this section, part of wages earned."

6. Obligation to allow Employee to Resign During Course of Employment

See: BUKHABZA v. BUKHABZA *et al.*, p. 833.

See: AGUSHEVITZ *et al.* v. FUTERMAN, p. 817.

7. Groundless Dismissal

See: MOSHAYOV v. PAZGAZ LTD., p. 829.

H.C. 254/73

TSORI PHARMACEUTICALS AND CHEMICALS LTD. *et al.* v. NATIONAL LABOUR COURT *et al.*

(1974) 38(1) *P.D.* 372, 390

About two years prior to reaching retirement age, the respondent, a doctor hired to act as representative of a manufacturer of medicines, was dismissed from his employment. He applied to the Labour Court for an order directed at the employers to refrain from dismissing him. The request of the petitioners (the employers) to set aside the application in limine, *on the grounds that one cannot order specific performance of an undertaking to hire a person, was rejected by the National Labour Court.*

Kister J.: I understand the thinking of the judges in the National and the Regional Labour Courts who discussed the matter and decided as they did.

The problem of preventing unjustified dismissal of a person is a difficult one, for the payment of compensation cannot always make up for the dismissal. Our Sages already noted that there are certain types of workers who, if they are not at work, feel faint (see *Baba Metzia* 77a concerning the workers of Mahuza, and *Hoshen Mishpat* 335:1).....The traditional approach of the Jewish people and Jewish law is that a person working in a public institution should not be dismissed arbitrarily (even if the institution is not a public one from a technical, legal point of view). With respect to private enterprises too, the tendency is against arbitrary dismissal, particularly if a usage exists to the effect that if a person is taken on as an employee, it means that he will work for as long as the enterprise is operating and there is work for that worker at his job.

Chapter Four

DUTIES OF EMPLOYEE

1. Sale of Place of Employment

C.A. 80/71
MUSHAYOV v. PAZGAZ LTD.
(1972) 26(1) *P.D.* 360, 361, 363

Kister J.: This was an appeal against a District Court decision dismissing the plaintiff's suit for damages in respect of the defendant's denial of his rights to transfer to another a concession to distribute containers of gas on behalf of the defendant.

It should be noted that under Jewish law the tendency is not to permit public or quasi-public bodies to dismiss one person and replace him with another unless the person dismissed has acted improperly. Jewish law does not, however, accord a right to sell an appointment or employment even in those instances where there is recognition of the right of a son to succeed to a post held by his father when the son is fit and suitable for the post. (See *District Rabbinical Court, Tel Aviv* v. *Hechal Meir Synagogue Council*, 4 *P.D.R.* 206, 208, 214, 216 and S. Warhaftig, *Jewish Labour Law*, 192 (in Hebrew)). In modern times as well, the trend is to give a worker tenure in his employment until the age of retirement and a right not to be dismissed even on payment of compensation so long as no specific reason exists for his dismissal. It would nevertheless be very strange if a person seeking work were required to pay some sum for obtaining it either to the employer or to the person he replaces.

I have no need to dwell on the theoretical aspect of the problem or to ascertain what the situation is under the law in other countries, since it is sufficient to point out the injustice that would ensue were a person seeking employment as a distributor of gas required to pay an "entrance" fee, of so large a sum as was demanded here, where, apart from the truck, he does not acquire any tangible thing.

It is not equitable to create such usages in respect of distribution of gas containers, or of bread and the like.

2. Articles Found During Working Hours

See: STATE OF ISRAEL v. AL-FARUK. Part 8, Obligations, p. 680.

Chapter Five

COMPENSATION

A. Severance Pay

1. Obligation to Pay

C.A. 25/50
WOLFSON *v.* SPINNEYS LTD.
(1951) 5 *P.D.* 265, 267, 275, 276

Olshan J.: The appellant had served as manager of the Hadar HaCarmel branch of the respondent company from 1931 until the end of 1944. His services were then terminated by notice of dismissal in accordance with the terms of agreement between the parties.

In his evidence to the court the appellant did not say that after being dismissed he requested payment of compensation from the company. On 15 February, more than four years after his dismissal, he began an action against the respondent claiming the sum of IL.39 which he calculated was due to him for unpaid salary and a further sum of IL.650 as severance pay. But paragraph 11 of the Statement of Claim merely alleged that "the plaintiff requested from the defendant payment of the sums due to him but the defendant refused to comply with the request."

In a reasoned judgment the District Court dismissed the claim for severance pay but found for the appellant on the IL.39 salary.

Silberg J.: What is the difference between a custom and a usage? A "custom" consists of certain conduct which the public has adopted as a legal norm, binding *as if it had been decreed by the legislature*: a "usage" is certain conduct which the contracting parties usually regard *as included in the terms of the agreement between them.* A custom binds a party even though he has not accepted its burden; a usage binds a party because

to all appearances—even to the extent of a legal presumption—he has agreed to it. (See the Maxims of the *Mejelle* and compare arts. 36 and 45 with arts. 43 and 44.

Examining the question of severance pay against this background, we are, I believe, persuaded that the obligation, to the degree that it prevails among us, bears the outstanding features of an actual custom and not simply of a usage. It is common knowledge that the idea of severance pay is inherent in the obligation of the honorarium prescribed by the *Torah*: "And when thou lettest him go free from thee, thou shalt not let him go empty; thou shalt furnish him liberally out of thy flock..." (*Deut.* 15:13-14. See also *Kiddushin* 17a-b) We do not know when exactly this custom arose in this country since it was already flourishing at the beginning of the present century and began to take root with Jewish settlement here, obtaining legal or quasi-legal warrant in the many decisions of the Jewish Arbitration Courts (see Wagger-Dickstein, *Severance Pay*, chaps. 2, 3 (in Hebrew)). We are therefore faced with a settled custom, legally recognised, that derives its binding force from the legal sources, both ancient and modern. The custom actually has a foundation *ab antiquo*, although, I must add, I doubt very much whether in this country that foundation constitutes a condition *sine qua non* for the existence of the custom. I myself would incline to think that it is not so, in view of the provisions of the *Mejelle* that make no mention of this condition at all. That also would seem to have been the view of this Court (in Mandate times) in C.A. 5/40 7, Palestine Law Reports p. 80, at p. 88, 89 per Frumkin J.

By way of comparison, it should be observed here, Jewish law too accords standing and recognition—perhaps particular recognition—to customs that have evolved in labour relations. See *Baba Metzia* 83a-b, and *Hoshen Mishpat* 331. Compare the dictum of R. Hoshayah that custom will defeat *halakhah* in *Y. Baba Metzia* at the beginning of the chapter *"haSokher et haPo'alim"* and also the observations of R. Imi there.

2. Obligation vis-a-vis Employed Child

C.A. 588/66

BUKHABZA v. BUKHABZA *et al.*

(1967) 21(2) *P.D.* 3, 9-10, 13-14

Before immigrating from Tunis in 1958 the appellant signed an agreement with his father, for whom he worked, setting out the legal relationship between them and stating that all the assets belonged to the father, the respondent, and all his sons and their families would be supported by him. After arriving in this country, the parties added terms to the agreement whereby a shop in Beersheba with all its stock was to belong to the respondent. Subsequently the appellant began to act as if he was the owner and prevented the father from entering the premises. The District Court in a declaratory judgment held that all the assets belonged to the respondent and that the appellant was under a duty to account for the income from the shop.

Kister J.: Jewish law regards an agreement or obligation to provide for another or maintain him as valid.

The *Gemara* in *Ketubot* 102b deals with a case of a man undertaking to support his wife's daughter, and the rules regarding an agreement or undertaking to provide for another are elucidated in *Hoshen Mishpat* 60: 2-6, and *Even haEzer* 114. An especially common obligation was for a husband to provide for the children of his wife and for parents to maintain for some time their children who had married but were not yet in a position to provide for their families. The situation at times created problems. With regard to the present case, attention should be drawn to the importance of the discussions in halakhic literature as to how to construe an obligation or agreement to provide for another when no express period was prescribed for the same: did the obligation continue during the whole lifetime of the obligor, or only for such period as the beneficiary was in need of maintenance, or for some other period?

In the present case we must take account of a further matter: the respondent had not provided for his children and their families by way of benevolence; rather, they worked in his business and the support they received was in consideration thereof. In fact, in the agreement, Exhibit 2, a term is to be found that provides that if a son left the father's business, he went out "by himself" and had no right to claim anything from the father. This term, however, cannot assist in determining the nature of the parties' legal relationship or in resolving another question, the answer to which merely throws some light on the nature of the legal relationship,

i.e. might the father dismiss the son from the business, and if so, must he give the son some award?

To establish the legal character of family property relations such as these, I have searched in the halakhic literature and have come across a book called *Zikhronot Eliyahu*, containing "a collection of laws and halakhic novellae", written by R. Eliyahu Saliman Manny...of Hebron who died about seventy years ago. This book refers to various writings, among them two volumes by R. Hayim Palaggi of Smyrna (1788-1869) — *Nishmat Kol Hai*, 17, and *Hukot haHayim*, Part 2, 100 (the latter published in 1873). Both contain the author's answers to the question of the nature of an agreement under which a son dependent upon his father works in the latter's business. After an exhaustive analysis of the halakhic literature, he comes to the conclusion that where the son could find employment elsewhere but the father does not wish him to leave the paternal household and whatever the son receives is by way of wages, the son is treated as a hired workman. Of particular interest is a *responsum* in *Nishmat Kol Hai*, 17, dealing with an only son, at first dependent on his father and working with him, who subsequently agreed with the father that they carry on their own businesses separately. After both had been successful, they were each required to pay communal taxes which had an upper limit. The father and son then decided to join forces, with the son again becoming dependent on the father. The matter came before the local rabbis and they held that the son was not to be regarded as dependent on the father in the legal sense, but was rather his father's employee. This apart, the rabbis held that the new arrangement was a conspiracy [to evade tax] and was of no effect.

The conclusion accordingly is that the relationship between father and son in the present case is that of master and servant. From the provision that the son can at any time leave the business but only "by himself", it cannot be inferred that the father can equally do so. The opposite is the case....Only when the son leaves does he go "by himself" but not when the father dismisses him and especially when the father acts arbitrarily...Jewish law, naturally, does not prescribe a like period of time for both master and servant because of the rule that a workman may not undertake to serve his master continuously for three years or more (see *Hoshen Mishpat* 333:3 annotation) in view of the verse, "For unto Me are the children of Israel servants", from which it is derived that a workman can more easily withdraw than can the employer.

....Regarding the moral duty of an employer to pay an award to his workman at the end of employment, the rule, which is mainly ethical, is found in *Sefer haHinnukh*, 482, at the end of the discussion of the award given to a Hebrew servant who leaves after serving six years,

in accordance with the verse, "And when thou lettest him go free from thee, thou shalt not let him go empty." (*Deut.* 15:13-14) Of this rule, which clearly was applicable only when the institution of the Jewish servant existed, the author says, "In any event, even today...when a person hires a Jew who serves him for a lengthy period, or even a short time, he should make him an award upon leaving." Hence the practice of compensating a departing workman, a practice that has become a custom among Jews and is now part of the law of this country.

3. Redundancy Pay as a Right of Personal Nature

C.A. 293/73 and 305/73

BEN MOSHE v. BEN MOSHE

(1974) 28(2) *P.D.* 29, 32-36

The question involved in this appeal was whether the severance pay payable under the Severance Pay Law, 1963, is to be treated as wages, thus denying a husband entitlement to the severance pay his wife receives in consideration of maintaining her, in that it constitutes occupational earnings.

Kister J.: To answer this question we must examine whether under Jewish law severance pay payable under law is to be defined as wages or occupational earnings so as to determine whether the rule applies that a woman's earnings from an occupation is consideration for her maintenance.

It should be borne in mind that what is involved is the work a woman does outside the household out of financial necessity, as I explained in *F.H.* 23/69 *Yosef* v. *Yosef* (1970) 24(1) *P.D.* 792, 800, 804, where I cited the judgments that held that the money a woman has saved or articles she has bought with such savings are not to be accounted for by her. The question is whether severance pay is to be similarly treated even though it is deemed to be wages.

Were an employee to receive severance pay in every instance of dismissal or resignation, at the rate of one month's wages for every year of service, it could be said that this was a kind of forced saving which the legislature did not permit to be paid earlier. But an employee leaving his job is only entitled to severance pay in circumstances in which the legislature regards

his resignation or dismissal as justifying the same: see secs. 6-9 of the Severance Pay Law, 1963. There are also other differences between wages and severance pay, one of the important ones being that severance pay is only payable to certain heirs or survivors (sec. 5) of a deceased employee; and under the Wage Protection Law, 1958, although wages are not deemed to be part of a deceased's estate, an employee may direct to whom they should be paid and failing such direction they are payable to the spouse or his heirs (secs.6-7). Likewise, the Severance Pay Law makes provision for the funded deposit of severance pay under collective agreement or by order of the Ministry of Labour, in which event it cannot be charged, attached or transferred (secs.20- 26), and wages which include severance pay under an approved agreement are not immediately receivable except by special permission of the Minister of Labour (sec. 28).

The question here, as I have said, is whether, in view of these provisions, severance pay falls within a woman's occupational earnings to which her husband is entitled in consideration of her maintenance.

I have found no direct answer to the question in the sources of Jewish law, since no rule as to severance pay is prescribed by the ***Shulhan Arukh*** explicitly. Nevertheless, there exist sufficient foundations upon which to elucidate the problem.

First, it should be said, the practice of giving a workman compensation upon his leaving employment is not foreign to Jewish law; it was known as a moral duty. The practice, it is true, did not crystallise into a general custom binding under law, and only in recent times has such a custom developed in the Jewish Settlement in this country and received the force of law under the Severance Pay Law.

The moral duty was based on the rule regarding the payment of an award to the Hebrew servant on his release after serving six years or the advent of the Jubilee or the death of the master, and on the general moral duty to act towards employees in accordance with the scripturally prescribed principle, "That thou mayest walk in the way of good men, and keep the paths of the righteous" (*Prov.* 2:20). No wonder therefore that we often come across discussions in the *responsa* literature about pensions for widows or lump-sum payments to employees who have left their jobs or have been dismissed, mainly in connection with public servants. The statements in the sources about these lump-sum payments are important for our present purpose. As I have already said, the matter was derived from the payment made to the Hebrew servant whose status was largely similar to that of a hired workman. Thus it is written, "as a hired servant and as a settler he shall be with thee" (*Lev.* 25:40) and in respect of the award to the Hebrew servant, "for double the hire of a hired servant hath he served thee" (*Deut.* 15:18).

The duty regarding the Hebrew servant is laid down in the following verses: "And when thou lettest him free from thee, thou shalt not let him go empty; thou shalt furnish him liberally" (*Deut.* 15:13-14). Thus, both a positive and a negative commandment is involved. *Sefer haHinnukh* says in this respect that "in any event, even today...when a person hires a Jew who serves him a lengthy period, or even a short time, he should make him an award upon leaving" (Commandment 482). Although the law relating to the Hebrew servant had already ceased to be applicable in Talmudic times, the details were restated, including those concerning the award, in the *Talmud* and the decisors, in the main by Maimonides. In the manner common in Talmudic literature, whereby one rule is deduced from another, I shall elaborate on how the halakhic sources relate to the rule of the award and how it is defined.

The award, it was emphasised, is given only to the servant himself and not to any of his creditors, as Maimonides lays down in *M.T. Avadim* 3:15: "The gratuity of the Hebrew servant belongs to him and no creditor may distrain it."

The question remains whether the award will pass to the heirs of the servant. *Sifre* 119 to *Deut.* 15:14 states explicitly, "Thou shalt furnish him and not his heirs." The *Talmud* does not mention the matter, and some would infer from the *Talmud* that the award does pass to the heirs. I shall not dwell on the details of this issue, such as whether a creditor may levy his debt after the award has already come into the possession of the released servant or whether the prevailing view is that it does or does not pass to the heirs. The main point is what is to be inferred from the law relating to the award. Incidentally, the most widely adopted view is that the master can be compelled to make the award. Thus Sema to *Hoshen Mishpat* 86:2, when dealing with the attachment of debts observes that the award is not attachable, in contrast to the availability of wages to attachment: "The award does not go to the employee as a debt but as a compassionate concession or gift," and *Shakh ad loc.*, notes that "it is well known that the award arises under the law of charity." And I would draw attention to the fact that "the law of charity" does not mean that a mere moral duty exists. The word "charity" derives [in Hebrew] from "justice" and may be compelled under law. The law of charity embraces other commandments which are also enforceable. We may translate "the law of charity" in modern terms as "the law of social obligations" which is equally enforceable under law.

Thus, according to the authoritative sources I have cited, the obligation regarding the award differs from the rights and duties existing between master and servant and constitutes an obligation of a special kind. I do not overlook the fact that according to Me'iri to *Kiddushin* 15a the award

will pass to the heirs and is therefore regarded as a pecuniary right of the released servant; this is explained by the latter having done for the master more than the value of his wages...

I should note incidentally that the division of obligations into those arising under monetary law and under charity law or otherwise does not entail any difference in answering the question whether or not these obligations are to be deemed as legal obligations under secular law, for in this regard what is determinative is only whether the obligation is enforceable by the court. In English law there were, and still are, differences between Common law and equitable rights but each is part of the law.

In Jewish law as well, monetary law is variously categorised. R. Yehezkel Abramski in his *Monetary Law — Definition of Categories* takes the view that there are only four categories (among them, the wages of a hired workman), the other monetary obligations being differently defined. However, that does not affect our present concern. What is important is that Jewish law treats wages and salaries as belonging to the employee whereas severance pay (the alternative to the award) falls under charity law or is defined as an obligation to observe the commandment of making an award. Although severance pay is, without any doubt, a workman's entitlement that is open to enforcement, it is different, even under the civil law in this country, from ordinary monetary rights: whilst a person having a monetary right or debt may forgo it, assign, charge or will it away as he pleases, he is limited in his control of severance pay, as set out above, and it does not pass on his death as part of his estate. The purpose, or one of the purposes of, severance pay, it may be observed, as of other social entitlements, is not only that a workman shall not go empty-handed at the end of his employment but also to provide him with some capital fund with which to keep himself while he is out of work and provide for his dependents in the event of his death. That may be inferred from the fact that severance pay is destined for the employee and his dependents and from the various other provisions of the Law, as I have mentioned. In passing, it should be emphasised that compensation payable on dismissal without notice where that is required, which is intended to compensate for loss of wages until new employment is found, should not be confused with the compensation with which we are dealing here.

Accordingly, in view of the foregoing differences in the nature and purpose of wages and severance pay, and the consequences that ensue therefrom, Jewish law, it may be said, looks upon severance pay not as the wife's occupational earnings but as a separate social right.

The question may indeed arise whether severance pay is deemed to be *nikhsei melog* [part of a woman's assets of which the husband has the

usufruct without being answerable for loss or depreciation], but in view of the decisions of this Court regarding such assets no importance attaches any longer to the question.

A different question is how severance pay is to be treated where the spouses' property is held in partnership. In that case, it is reasonable to say that the severance pay of each of them falls into a common fund, but not where their property is separate. Here no party submitted that their assets were held in common and it is almost certain that the wife was not interested in such an arrangement, since it was better for her to preserve her own property, the husband being deeply in debt.

Under Jewish law, in the absence of any other agreement, the property of spouses is treated separately, and when the woman is widowed or divorced she is generally entitled to retain her own property including among other things *nikhsei melog* and *nikhsei tzon barzel* (property for which the husband, whilst enjoying the usufruct, is responsible in the event of depreciation). She is in addition entitled to her *ketubah* (marriage settlement) and in the event of divorce, according to some authorities, to consequential damages. To this separate property of the wife's there is to be added her occupational earnings as I mentioned above, that remain in her possession or with which she bought articles.

Regarding the wife's savings, a number of matters should be recalled. Radbaz (*Resp. Radbaz* 4:1261, 190), was once asked about the practice in Egypt of the husband stipulating that the wife's occupational earnings should belong to her and also undertaking to provide her with an annual sum for clothing. In the case before him the wife worked hard and saved on her clothing and was thus able to lend out money on interest to the gentiles. Radbaz ruled that the husband had no right to the usufruct of the savings even if nothing was said about it in the *ketubah*, since such was the custom. *Pithei Teshuvah* to *Even haEzer* 70:1 also mentions in the name of *Teshuvah meAhavah* that if a wife is frugal in her maintenance because she lived sparingly, her savings belong to her.

It follows from the foregoing that where a woman engages in work she is not obliged to do and becomes entitled to severance pay under custom, and now under law, the severance pay is not to be regarded as earnings from work, but as an expression of the concern the law has for the future and financial security of the worker, and in this case, the wife. This concern for the woman is well-known in Jewish law, as I showed above (the provisions regarding the woman's rights on divorce or the death of her husband and other rights). Thus R. Pinhas haLevi Hurwitz writes in his *haMakneh*, commenting on *Kiddushin* 30b (concerning a father is obligation to teach his son a trade), that this obligation includes that of teaching his daughters,

"for does only a man need to live and not a woman?....And although a husband must maintain her, how will she keep herself if she becomes widowed or divorced."

For all these reasons, I am of the opinion that according to Jewish law severance pay is not to be included in occupational earnings that were instituted in consideration of maintenance and the husband cannot claim that she should provide for herself out of pay, where the husband is able to do so and where, by law, he is responsible for the maintenance.

B. Compensation to Heirs of Employee

1. Death of Employee in the Course of Work

C.A. 111/68 and 115/68
LAPIDOT...LTD. *et al.* v. SCHLISSER
(1968) 22(2) *P.D.* 379, 390

The husband of the respondent was killed whilst employed by the appellant as a driver when the front spring of the vehicle he was driving snapped. The issues were whether the appellant should have discovered the faulty spring before letting the deceased drive the vehicle, and the amount of damages awarded to the respondents by the District Court.

Kister J.: According to Jewish tradition an employer may be expected to compensate as far as possible the family or successors of a worker killed whilst working for him, even where no statute exists, even more than any statute requires, and that is also the case where the employer was not at fault (see *Responsa Mahari Weil* 125; *Magen Avraham* to *Orah Hayim* 603 and the glossators *ad loc.*). Most certainly a person who has been at fault in causing the death of another is to be expected to provide "sustenance to the successors of the deceased since he has deprived them of their source of livelihood," as Rabbenu Tam puts it in *Sefer ha Yashar* cited in *Responsa Mahari Bruna* 265.

In fact, although the [Civil Wrongs] Ordinance was not specifically enacted with regard to master and servant relations only, and it renders liable

not only people who are actually guilty, and not only those immediately responsible, not even only those who have means, it is nevertheless this Ordinance which prescribes the measure of damages, and the court may not charge those responsible under the law to pay damages except to the extent of the pecuniary loss as therein defined.

2. Insurance of Employee's Family After Death

M. 4756/58 (*C.C.* 1091/58)

STATE OF ISRAEL v. ESTATE OF "A", DECEASED IN BANKRUPTCY

(1959) 18 *P.M.* 31, 33, 35-38

The deceased served in the Police Force in Tel Aviv. He committed suicide. After it became apparent that he owed the Treasury and others large sums which his estate could not discharge, the court decided to administer his estate as a bankrupt estate in accordance with sec. 112 of the Bankruptcy Ordinance, 1936.

Kister J.: It is customary in this country, at least among public institutions, to continue the earlier Jewish tradition of such bodies and provide for the families of deceased employees.

I have found in the Collection of Judgments of the Chief Rabbinate, pages 43 and 106, judgments where the payment of a pension to an employee's widow upon her making a claim before the rabbinical court was enforced. Here the widow claimed in her own name and not on behalf of the estate, and that is understandable, since in Jewish law, a widow does not possess the status of an heir but of a creditor. In addition, it should be mentioned that according to Jewish law, two people may enter into an agreement for the benefit of a third person, which is in keeping with the principle that one may act to the advantage of another in his absence. As an example of such a contract, one may cite a husband's undertaking to provide for his wife's children (*Even haEzer* 114), which is widespread in this country.

Certainly the tribunals of the Labour Federation (the Histadrut) and other institutions have also proceeded in this manner since, as is well-known, the Federation has played a large part in shaping labour practices that ensure the rights of employees and their families...

Let us now pass to the problem as it relates to the inheritance laws; matters of succession are matters of personal status and Jewish law is to be applied and, in any event, if the relevant law regarding contracts, the *Mejelle*, contains no provisions, the succession law applicable to the deceased, i.e. Jewish law, must be applied. The problem before us was presented as follows by Chief Rabbi Herzog in *Kol Torah* (Sivan-Tammuz 5715) 1:

> Is there any rule of succession law that deals with matters of insurance —is it similar to the case of redemption money to which no rights at all arise during his lifetime but only after death in accordance with the insurance contract, whereby the insurance company undertook to pay the heirs or other representatives of the deceased? Or do we say that upon payment of the premiums one acquires a right to a definite sum of money payable to order (on his death) and that this right passes to the heirs?

The answer he gives is that—

> ...it would appear that anything payable only after death such as redemption money [the sum insured] is not regulated by succession law since the latter concerns only things that arise by virtue of the deceased...things which he could have obtained during his lifetime. To other things the heirs do not succeed by way of the parent, who was not entitled to them during his lifetime. This is a right that derives from the contractual engagement, the obligation to pay over a specific sum after death, and this is somewhat similar to redemption money which is only payable after death. The heirs of a deceased do not receive redemption money through succession of their parent even though he did not die immediately and the right originated during his lifetime.

I should add a number of matters from that study which are possibly extraneous to the present case but should be noted in construing the Ordinance:

> It may well be assumed that the co-operative insurance society only intended to save the wife and dependant children who remained without any support, from the shame of hunger and reliance upon charity, but not to give anything to the eldest son who was not in any way dependent upon his father and was earning his own living. Even if the society made no express provision, where a matter is patently clear there is no need to provide so explicitly.

In the present instance, sec. 2 of the Ordinance regulating insurance expressly states that this is its purpose. The learned author goes on to cite

responsa and clarifications from halakhic literature regarding redemption money paid under Jewish law in cases of animals that killed, and regarding redemption money payable under other law, such as Moslem law, in cases of the slaying of a person, which give rise to the problem whether the creditors of the dead person may repay themselves out of this money. According to the *responsa* they cannot do so. I shall not cite all the sources but content myself with one from *Ohr Same'ah* (by R. Me'ir Simhah Hacohen of Dvinsk) to *M.T. Nizkei Mammon* 9:11: "It seems to me where succession law applied—as with the father's assets or his loans and the like, and it was possible that the money would have come to a deceased had his father predeceased him...here succession law applies....But with redemption money, the Torah does not require payment to be made [to the injured party] and only upon his death is it to be paid to his successors. It is not possible to say that this money is part of the estate on the assumption that it was payable to the person who was killed. The Torah grants the right to the money directly to the heirs..."

The matters which I have cited above from Jewish law constitute, in my view, a very apt definition, in the light of the Police Ordinance, of insurance moneys that become payable.

It is clear from that Ordinance, that the deceased himself could never have been entitled to any part of the insurance moneys, nor do I see any possibility that he could have received the premiums or any part of them. The sum assured is payable after death to the persons stated in the terms of the insurance and these receive such moneys not as successors of the deceased but independently under a right deriving from the contractual engagement and obligations for the benefit of the family.

I would add that even had the deceased not left any directions and the insurance moneys became payable according to a succession order of a competent court or under probate, the heirs would not have received the money by virtue of their succession, the word "heirs" here merely being indicative of the persons entitled to the insurance moneys.

It follows that the insurance moneys are not part of the estate and cannot serve as part of a fund for payment of the creditors but belong directly to the widow. Accordingly I hold that the money is not to be transferred to the trustee in bankruptcy but to the deceased's widow.

Part Twelve

INTERPRETATION

CONTENTS

Chapter One

RULES OF INTERPRETATION

1. Literal Statutory Interpretation

H.C. 333/78

BANK LEUMI TRUST CO. LTD. v. DIRECTOR OF ESTATE DUTY

(1978) 32(3) *P.D.* 202, 203, 212-214

Cohn J.: Sec. 28 of the Estate Duty Law, 1949 (as amended in 1964) provides:

> Where the Director is satisfied that duty has been overcollected and an application for the refund thereof is made to him within ten years from the date of receipt of the notice of assessment, he shall refund any amount overcollected. To the amount refunded, there shall be added interest, at the maximum rate permitted by the Interest Law, 1957, from the date of completion of payment of the duty.

The respondent, who is the Director mentioned in sec. 28, refused to refund to the petitioner duty which, it argued, had been overpaid. By consent of the parties we decided to treat this petition as if it ordered the respondent to show cause why the provisions of sec. 28 should not apply to the estate of which the petitioner is the administrator.

Elon J.: Learned counsel for the State submits that sec. 28 does not apply since an agreed valuation had been made and also that the section is to be construed in the same way as parallel provisions in other laws in which various limitations are found. These arguments cannot be upheld and my learned friend, Etzioni J., has already dwelt on that.

The same applies to the argument that in tax matters we must construe a law restrictively. That also cannot avail the respondent here since a

prior rule is that where the terms of a law, including a fiscal law, are sufficiently clear, it is to be construed literally according to its unambiguous terms, even if that leads us to a conclusion which we may doubt was intended.

This latter rule is illuminatingly expressed in the rules of construction of tax enactments in Jewish law. There, these enactments developed into a very broad area of law, especially after the tenth century when the Jewish communities grew in strength and standing, and Jewish internal autonomy generally, and judicial autonomy in particular, increased. This, however, is not the place to deal with the historical and economic factors that led to the development of tax law in Jewish law or with the judicial principles and sources on which this area of law was based in the Jewish legal system (see M. Elon, *Jewish Law*, Part 2, pp. 602 ff. and *id.*. "Taxation" in *The Principles of Jewish Law*, 1975, pp. 662-701). A considerable portion of tax law entered Jewish law by means of legislation enacted by the communities or their representatives, known as *takkanot hakahal*, which were fully valid as part of the Jewish legal system; doubts arising over the meaning of any particular *takkanah* were decided by the Sages of the *halakhah*. Thus, a number of rules were established for construing the *takkanot* — for example, where the terms were ambiguous or the *takkanot* were inconsistent, and like cases — and one of these rules is material to the present case.

In one of Rashba's *Responsa* (Part 5, 282), the rule is laid down that a person is not to suffer double taxation. Thus, A who lived in community X and had property in community Y to which he paid tax in respect thereof, could not be made to pay tax to community X on the same property. This ruling often led to heavy losses of revenue to a community....One community tried to avoid this by the following *takkanah*:

> Where people own fixed assets outside the town, such assets shall be taxable like other property within the town, provided that deduction is first made from the aggregate assets, whether within or outside the town, of expenses incurred and the taxes paid thereon outside the town, and tax is levied on the balance.

In one case it happened that the taxes and expenses relating to property situated outside a town were very high and their deduction meant that not only did the town not reap any benefit, but it incurred a loss of tax it was otherwise entitled to levy on the property within the town. The community argued that this situation was contrary to the intention of the *takkanah* and it did not apply. The counter-argument was that the *takkanah* must be followed according to its terms and in this instance the taxpayer indeed benefited. The *dayan* (judge) to whom this basic dispute was submitted

referred the question to Rashba, asking him whether one should follow the terms of the *takkanah* or its intention. Rashba found in favour of the taxpayer, saying: "I cannot see any basis for the argument of the community. Since I regard the language and terms of the *takkanah* to be explicit...the community has expressly assumed" the burden entailed in the given situation....Rashba then goes on to discuss the principle whether the language of a law, or its intent and motives are to be followed:

> You may wish to say that the intent of the community was nevertheless otherwise and with regard to vows and sworn undertakings what one says and what one thinks are required to be identical: that is only when the language is confused and an erroneous vow is innocently uttered. Here, however, both heart and mind were at one, since the mistake did not occur in the language used but in the intent. What the community meant to exclude they expressly and clearly indicated in their enactment...: but they say they erred because they did not contemplate that the deductible expenses and tax would come to so large an amount, but that was unspoken, and what one thinks of effecting does not prevail.

These observations express the principle that an enactment is to be interpreted according to what may be gathered from it and not according to the intent the legislator might have had but which does not inferentially follow from the terms of the enactment.

2. Interpretation According to Ordinary Usage

C.A. 4/67

BRITISH COLONIAL ESTATES LTD. v. TRABLUS

(1967) 21(1) *P.D.* 463, 470-471

This was an appeal from a District Court judgment confirming a decision of a rent tribunal that the roof was a part of a given apartment and that therefore the tribunal was competent to deal with the question of permitting the erection of a television antenna thereon.

Kister J.: On the question of what is and is not included in a sale or letting, many explanations are found in the sources of Jewish law and

they are apposite to the present case. The approach of Maimonides and *Shulhan Arukh*, as we know, is to have regard to the concrete details (the casuistic approach). Nevertheless, Maimonides, after dealing in Chapters 25 and 26 of *Hilkhot Mekhirah* with the question of what is included in a sale of land, when the matter is not expressly provided for by the parties, writes at the end of chapter 26, 7 and 8:

> 7. These observations apply only where no usage exists...
>
> 8. The main rule is that in all transactions we follow local terminology and usage; where there is no usage or special terms...we proceed in the manner laid down by the Sages as in these chapters.

In *Hoshen Mishpat* 216 and elsewhere the rule is the same.

Apart from local usage and terminology, there are other elements from which to derive the intention of the parties in the special circumstances of each case, among them the amount to be paid, but I do not need to dwell on that here.

With respect to the employment of precedents and decisions found in the *Responsa* and the halakhic literature regarding any particular case (as distinct from the clarification of the foundations of laws cited in the *responsa*), I shall satisfy myself by repeating the telling remarks made by R. Yeshayahu Bassan, printed in *Pahad Yitzhak*, vol. I, p. 325 (Mossad Harav Kook) that "not every one succeeds in learning from the leading *responsa*....It is also known that the law changes with the slightest change in the circumstances of the case."

F.H. 5/83

STATE OF ISRAEL v. SUISSA

(1983) 38(4) *P.D.* 701, 708-709

The respondent was convicted of and sentenced for a drug offence. On his application, the time for serving sentence was postponed, but he did not turn up to serve at the date decided upon. The question was whether he was in "legal custody" at that date and therefore had, by omission, committed the offence of escape from lawful custody or whether he had merely contravened a lawful direction.

Elon J.: From the simple meaning of the provisions of the Prisons Ordinance (New Version) regarding the meaning of "lawful custody", from which an analogy may properly be drawn as to the meaning of the term in the Penal

Law, it might seem that the idea of "lawful custody" and escape therefrom refers only to custody that involves complete physical supervision. It is possible to find further reasons for that in jurisprudence....But to give such a clear "simple" interpretation is not in keeping with the "expert sense" of the judge, bearing in mind the great variety of types of custody and quasi-custody. When, for example, the governor of a prison permits a prisoner to spend some time outside with his family and the prisoner exploits the occasion to escape, it is inconceivable that the prisoner could not be charged with escaping from lawful custody since at that moment he was outside and not under direct vigilance. Such a conclusion conflicts with "common sense", with looking at things as they really are. This sense faithfully accompanies the judge in his judicial work. Hence "lawful custody" is to be understood as custody that continues to exist even when the means of ensuring supervision of a prisoner are weak and changing....But the same sense...cannot, in my opinion, serve for the purpose of regarding a person who was under no supervision at all...and avoided coming thereunder, as one who escapes legal custody. In such a case, one of the great rules of interpretation applies: "One follows human speech" (*Nedarim* 51b: *Resp. Rashba*, Part 6, 151; *Efrat* v. *State of Israel — Customs and Excise Office*; M. Elon, *Jewish Law*, 361 ff.). This rule is particularly appropriate in the interpretation of penal law. In ordinary speech, a person only escapes from custody in which he is held, but not from custody in which he was never held. To avoid entering into custody, when the court orders imprisonment, is an offence, but only one of contravening a direction of the court.

See: EFRAT v. STATE OF ISRAEL — CUSTOMS AND EXCISE OFFICE, p. 871.

3. Interpretation According to Custom

See: BRITISH AND COLONIAL ESTATES LTD. v. TRABLUS, p. 853.

C.A. 405/68

KHALATI v. UZAN

(1968) 22(2) *P.D.* 1003, 1006

The respondent undertook by written contract to marry the appellant's daughter upon payment of a sum of IL. 40,000, half at the signing of the contract and the balance on the wedding day. The marriage took place but the balance was not paid, the appellant claiming that the marriage was not a success.

Cohn J.: Finally, counsel cast her anchor courageously in Jewish law and found support in a statement of A. Gulak, that dowry obligations "give rise to doubts from the legal aspect....Such an obligation is very tenuous under our law since it attaches to a matter without substance" (*Yesodei haMishpat haIvri*, vol. 3, p. 16). There is no need to say that this Court will treat with great respect any statement made by this leading scholar, but we are not dealing with a mere deed of engagement that may possibly be seized by the doubts and hesitations of Gulak, but with a contract made under the laws of the State, which upon the face of it possesses no defect and gives rise to no doubt or hesitations. In such an instance, Maimonides said long ago (*M.T. Ishut* 23:11-12):

> Many practices surround the dowry....The matter as such is effected according to local usage which also determines what is to be included....In all these and like matters local usage is the main element by which we decide the issue.

This contract between the appellant and respondent was made in accordance with local custom and under the law of the State, and we can only implement it as it is. Unlike the Sages of Jewish law who would appraise the mind of the obligee, whether he would not have entered into the obligation had he known what awaited his daughter, we are commanded to infer the intention of the contracting parties from the terms they employed and those alone, and we do not mend what they themselves mistakenly did. The appellant could easily have contemplated that the marriage of his daughter might not work out and could have provided in the contract for his obligation and the obligation of the respondent in such event. Not having done so, the Court will not make a contract for him.

H.C. 442/77

KATAN *et al.* v. MUNICIPALITY OF HOLON *et al.*

(1978) 32(1) *P.D.* 494, 497-498

The issue in this case was whether those participating in a public tender were required to attach to their offer a bank guarantee.

Elon J.: According to the respondents, the practice of attaching a guarantee exists only when submitting an offer to a public tender, but not otherwise. The petitioners do not deny the existence of this practice, but argue that in the present case the deposit of a guarantee was required in a "minor" tender as well. It is common for us to have regard to usage in order to determine cases where doubt or uncertainty occurs (see *H.C.* 333/68 *Moshavei haDarom Ltd.* v. *Director of Property Tax et al.* (1969) 23(1) *P.D.* 508, 512). That is the essence of the idea embodied in one of the principles of Jewish law regarding custom: "Every rule regarding the nature of which the court is doubtful is to be decided by public usage" (*Y. Pe'ah* 7:6. So also *Y. Ma'aser Sheni* 5:3. See M. Elon, *Jewish Law*, pp. 714, 732). So decided Rashbash in his *Responsa*, 354, regarding the interpretation of documents: "Wherever the language of a document is doubtful, we follow local practice on the matter in question."

4. Narrow Interpretation of Legislative Restrictions

C.A. 576/72

SAPIR *et al.* v. SAPIR

(1973) 27(2) *P.D.* 373, 380

The appellants contested the probate of a will unsuccessfully and the respondent was appointed administrator of the estate and executor of the will. The appellants contended that the will was void under sec. 35 of the Succession Law, 1965 (will in favour of witnesses etc.) as well as because of undue influence.

Kister J.: Sec. 35 constitutes a serious legislative restriction on the probate of wills made under deceit and by undue influence. Such a restriction is

generally accepted; it is important and efficacious, since the testator is not before us to be able to say that he did not so dispose of his estate. But in every such case, it must be remembered, the ambit of the restriction must not go beyond the mischief it aims to avoid....(See the considerations in regard to setting a "fence" to the *Torah*, *Avot deRabbi Natan*, chapter I, and *Gen. Rabba* 19:4.)

If we construe the restriction expansively and in excess, the consequence might well be that wills made with the utmost care, and expressing the testator's true and free wishes would not be proved, no witness being able to give evidence that the will complied with the testator's wishes.

Cr.A. 884/80

STATE OF ISRAEL v. GROSSMAN

(1982) 36(1) *P.D.* 405, 412

The respondent, a senior official of the Bank of Israel, was charged with fraud and breach of trust for acquiring on behalf of members of his family Government bonds, for the allotment of which he was responsible, since it was the Bank's policy to sell such bonds solely to pension and other like funds. There was nothing explicit in the relevant Regulations which barred allotment to the public. He was acquitted in the lower court. Hence this appeal.

Tirkel J.: The danger that faces the court when dealing with such offences is that, through its intention to impose restrictions so that public servants are kept from committing offences, it includes in the category of "offence" such conduct, which, though faulty from the viewpoint of orderly administration, does not amount to an offence. One must take care, as we have learned, "not to make a fence higher than is essential" (*Gen. Rabba* 19, 3).

5. Interpretation of a Regulation According to the Intention

H.C. 172/52

PESSAHOVITCH v. BAT YAM COUNCIL

(1952) 6 *P.D.* 934, 936-937, 938

The issue here was the power of a council to invite certain persons to its meetings.

Assaf J.: Petitioner's counsel submits that, in accordance with sec. 42(a)(5) of the Local Councils Order of 1951, a person who is "a salaried employee of a council" is disqualified from serving as a member thereof....Such duality of position is harmful to the orderly proceedings of the council and to the people of Bat Yam: the petitioner is one of these, and he even appeared as a candidate on behalf of the General Zionists for election to the council. Those who receive a salary and are dependent for their livelihood on the council and its chairman are not free in their deliberations and voting.

Respondent's counsel submits that the salary the persons in question receive is an attendance allowance, since they devote all their time to council matters and therefore spend no time in other work; what they receive is not wages nor salary. Authority for that is a passage in *Ketubot* 105a and in *Hoshen Mishpat* 9: "The judgment of one who takes a fee for acting as a judge is a nullity", but "if he only takes compensation for loss of (other gainful) work his judgment is valid." The petitioner relies on sec. 42(a)(5), which speaks of "a salaried employee", and since the said persons are not "salaried employees", he bases himself on a non-existent fact and there was no occasion to bring the petition...

I do not have to dwell on the first submission, nor is there any need to plunge into the sea of the *Talmud* and the *Responsa* literature to define precisely the notion of "compensation for loss of work" and prescribe the conditions and the cases in which one may receive such compensation but not a salary. It is sufficient if I point out that the above persons have no other occupation, and one of them formerly served as a clerk in the same department in which he works at present and with the same functions. The Council also, in its resolution, ratified "the proposal of the executive to pay" (them) "a salary". That was not said for nothing, nor was compensation for loss of work mentioned.

Incidentally, it is pertinent to mention here the views of Radakh in *Resp. Bayit 32*, that in the case of conventions and regulations we may estimate

what those enacting them intended to include and what to exclude and what, though not expressly stated, is to be deemed to have been stipulated. R. Krochmal in his *Resp. Tzemakh Tzedek* (44), goes even further and holds that in the case of regulations (*takkanot*), we follow the intention and not the literal meaning of what is stated..."even to add to its terms or to restrict its meaning." Obviously one may not do so unless what the regulation-maker intended is clear beyond all doubt.

6. Intention as Opposed to Express Language

See: AMAL LTD. v. SCHINDLER, Part 8, Obligations, p. 604.

See: BALIN v. EXECUTORS OF THE WILL OF LITVINSKY dcd., p. 864.

T.A. 2818/75

ATTORNEY-GENERAL v. HESS *et al.*

(1976) 1 *P.D.* 316, 317, 320-322

Shilo J.: The application before me is for a grant of probate of the will of Mrs. Rita Shuster, deceased, and construction of its main provisions. The application was made by the representative of the Attorney-General. Counsel for the relatives of the testatrix, who argue that they are the legal heirs, does not oppose probate but contests the interpretation suggested by counsel for the Attorney-General. Whilst the latter urges that since the charitable institutions that benefit under the will no longer exist, what was due to them should be devoted to similar charitable institutions, counsel for the relatives of the testatrix submit that the relevant provisions of the will are a nullity and the estate should be distributed among the legal heirs...

Our institution of the will is based upon the principle that "it is a religious duty to carry out the wishes of a deceased" (*Gittin* 14b). A "religious duty" means a binding legal obligation, and the religious duty of effecting the wishes of a deceased even displaces the order of inheritance fixed by the *Torah*, thus demonstrating how important is the duty. In order that at least on the surface the order of inheritance under law should be observed, it is a condition required of the decedent that he should have taken a

course consonant with an *inter vivos* transfer, that is, by adopting one of the modes of acquisition. In a *donatio mortis causa* the law waives this condition, because death-bed statements are considered as if they were sealed and delivered since in the tense circumstances of approaching death a person will have no mind for the minutiae of the law which really only go to prove the testator's intent. Instead of these minutiae, including the mode of acquisition required for every will, such intent is proved by the very circumstances of a person on his death-bed.

Thus, the law requires us to delve into intention and to extract it even from statements which *prima facie* bear another meaning.

This process of ascertaining intent and imposing it, sometimes in opposition to the plain meaning of the words in which it is clothed, is called "evidentiary evaluation". For example, "where a man devised all his property to his wife, he only appointed her his administratrix" (*Baba Batra* 131b); she is not entitled to the property but only sees to its distribution among the deceased's sons, since, as Rashbam *ad loc.* explains, "it is presumed that no one will leave his sons aside and give everything to his wife, but that he only intended to make her administratrix so that his sons should show her respect." So also is it with vows and oaths: "We consider the things respecting which he made an oath or vow and infer what he intended and proceed accordingly and not according to the meaning of what was said" (*M.T. Nedarim* 8:8).

The use of "evidentiary evaluation" is not easy, and often opinion will be divided on it, as it was in a problem similar to that before us: "Where money was collected for the ransom of captives who died before they were ransomed, some hold that it should be given to their heirs and some that we assume that the donors did not contribute for that purpose" (*Yoreh De'ah* 253:7) *Resp. Rashba*, Part 3, 170, deals with a similar question:

> A community agreed to devote money held by the charity warden...for religious duties or for defraying the expenses of providing accompaniment of a deceased member of the community to his burial by two other members, since there was no cemetery in the town, or in the case of a *met mitzvah* [burial of an unidentified decedent] to pay for the shroud. Some time later the charity fund accumulated profits and the community and its wardens deemed it unnecessary to maintain the entire fund for those purposes. The question was, could part of the funds be employed for another righteous purpose, such as teaching children or purchasing a *Torah* scroll or marrying off a needy Jewish girl? The answer was that it is a religious duty to find some other purpose at the discretion of the wardens; as stated in the first chapter of *Eruvin*, a Jew who has

donated a candle or candlestick to a synagogue may vary his gift at once.

See *Resp. Rosh* 13:14:

Concerning charity donated for purposes of a synagogue or cemetery, it seems to me that the townspeople can vary it for the purposes of school teaching because greater sanctity attaches to that, as is stated in chapter two of *Megillah* 25b...

And see further *Maharam miRotenburg* (*Decisions*, 201):

A person who vowed to donate to one charity may not give the money to another charity, but the warden may do so, as stated in the first chapter of *Arakhin*: A Jew who has donated a lamp or a candle to a synagogue may not change its purpose, but that is only where the matter is optional; with regard to obligatory things a change may be made on the authority of the wardens and of the community.

See: ELKO LTD. v. NATIONAL LABOUR COURT *et al.*, Part 8, Obligations, p. 607.

7. Intentions to be Taken into Account

See: AMAL LTD. v. SCHINDLER, Part 8, Obligations, p. 604.

8. Adoption of Conventional Language for Documents in Case of Contradiction

See: BALIN v. EXECUTORS OF THE WILL OF LITVINSKY dcd., p. 864.

9. Resolution of Contradictions

See: BALIN v. EXECUTORS OF THE WILL OF LITVINSKY dcd., p. 864.

10. Interpretation Upholding the Document

C.A. 315/79
ALPEROVITZ v. **MIZRAHI** *et al.*
P.D. (19)

The appeal here was over the appellant's obligation to transfer to the respondent possession and ownership of an apartment, including a commonly-held storeroom and parking place, in a condominium, on the basis of a memorandum of agreement drawn up between the parties.

Elon J.: The question still remains before which of the different payments did the parties intend to have the agreement drawn up: before the last payment, before another payment preceding the last, or before any payment? It seems to me that in such a case, the rule of interpretation should be that the parties intended the most certain date in comparison with the other dates that are involved. This date is the one before commencement of payment of the sale price of the apartment. There is good reason for this view, since if we dismiss this possibility we have no yardstick at all for preferring the date of the second payment over the third or the third over the fourth. It is superfluous to add that all this obviously applies where no other intention can be inferred from the contract itself or from the circumstances.

This rule of interpretation is found in an instructive *responsum* by Rosh (*Resp. Rosh* 68, 14): "You ask about a deed by which one person undertook to pay another fifteen *zehuvim* after Passover but without stating the coming Passover, and doubt has arisen whether the money can be levied immediately after next Passover or whether the holder of the deed is at a disadvantage and the money is payable after the last Passover of the [Hebrew] year 5999..." This is based on the rule that the claimant under a deed is always at a disadvantage (*Ketubot* 83b, *Baba Batra* 166a and 167a), that is, where doubt arises as to the meaning of a deed, the claimant is at a disadvantage since he is claiming something and can only succeed when no doubt exists. Accordingly when a deed allows of two meanings...one can only rely on the lesser of them (*M.T. Malveh veLoveh* 27:16).

The reply of Rosh was as follows:

> Know that we only say that the holder of a deed is at a disadvantage where the deed is not wholly defective...the rule only applies where

> a deed is not sufficiently clear and it can be variously understood. In such an instance we interpret it against the holder because he is claiming under it, provided that he does not lose out completely as in the present case, because if we interpret it as meaning the end of the sixth millennium, why was the deed drawn up at all? One must certainly assume that it is patent that a Passover of defined time was intended and the exact date was omitted by the scribe's oversight.

...A deed must be interpreted so that it subsists and not in a manner that deprives it of all meaning. In the terms of sec. 25(b) of the Contracts (General Part) Law, "where a contract is capable of different interpretations, an interpretation preserving its validity is preferable to an interpretation according to which it is void."

There still remains the following question: Why not understand the intention to be the second or third Passover, for that would yield two things together, the holder is at a disadvantage, and the deed is upheld and is not void. The answer of Rosh is that since the alternative is between the Passover at the end of the sixth millennium or the one immediately following the date of the deed, the latter must in all reason have been intended, for otherwise there is no criteria by which to establish which subsequent Passover was intended. This conclusion Rosh bases upon the principle in the *Talmud* that where the word "days" is used, the intention is presumed to be two days and not three or more (*Torat Kohanim*, *Zabim*, Ch. 7:4, ed. Weiss, p. 79a)...

Hoshen Mishpat 42:9 decides the question in a similar fashion....(On the interpretation of documents in Jewish law, see also M. Elon, *Jewish Law*, Part 2, pp. 350 ff.)

11. Rectification of Scribal Errors

App.(T.A.) 288/57

BALIN v. EXECUTORS OF THE WILL OF LITVINSKY dcd.

(1959) 20 *P.M.* 60, 71-73, 76-77

Kister J.: The deceased in this case bequeathed certain assets to a number of public institutions, amongst them "Miss May's Mission" to which he

gave "the sum of one hundred pounds (L.P. 500)." The Court held that this direction was to be interpreted as intending to give the institution five hundred lirot. English courts follow the common English practice regarding wills that where any inconsistency arises, the testator is presumed to have intended the last written directive, although to do so may sometimes be arbitrary. It follows from this that with wills we do not follow the rule normally applicable to other documents, that where an inconsistency occurs between a sum written in figures and that written in words, the latter is to be preferred.

In Jewish law, no distinction is made between wills and *inter vivos* documents. There is indeed a rule that where an inconsistency arises, the last written provision is applied, on the assumption that the person had changed his mind (see *Hoshen Mishpat* 45:5 and glosses *ad loc.*), but this rule only obtains when it is possible to presume that the writer had changed his mind in the course of drafting the document, and also when the body of the document contains various details and at the end, in summarising, errors occur. Thus in the present case when the words are set out in such a manner that there is no ground for assuming that the testator had changed his mind, the rule is not to be applied. I shall not go into the niceties but shall address myself to elucidation of the problem under Jewish law.

First I must note that it is a leading rule of that law that in the construction of documents, as is obvious from *Mesharim* 23:10, cited by *Bet Yosef* to *Hoshen Mishpat* 61 (at end), one is to follow not what is written but what was intended. I now turn to the question of a drafting error.

Although there is no express provision or *responsum*, as far as I am aware, in which the facts are exactly the same as those here, there are provisions and *responsa* that deal with scribal errors, mistakes in amounts and names, dates and so on. Although opinions may differ over the clarification of such errors, such differences largely go to the evidence necessary in this regard, whether it is important that the evidence should arise from the document itself in which the error occurs...or whether it is possible to have recourse to the evidence of witnesses.

By way of example, one may cite a *responsum* of Rashdam (*Hoshen Mishpat* 66, cited in *Knesset haGedolah* to *Tur, Hoshen Mishpat* 48, gloss on *Tur* 33). There, the document contained a provision — "the sum of forty-five to the sons" and it was argued that the word "thousand" had been mistakenly omitted. Rashdam held that the argument was not to be accepted since there was nothing in the document that pointed that way. *Knesset haGedolah*, however, gives a contrary opinion (see also *Resp. Rashdam, Hoshen Mishpat* 366).

In another case, a mistake in the name of the obligee was involved — "Shimon and his wife Rahel" and it turned out on the evidence of

witnesses that Shimon's wife at the time was Leah but the draftsman had mistakenly written "Rahel". Rosh held that the document was effective and the witnesses might replace it with another containing the correct name. (The document had not been signed by the obligee but by the witnesses.) Here it was clear that the obligee was the wife of Shimon and the evidence of the witnesses as to the mistake was accepted, although there was nothing in the document to show that a mistake had occurred.

Rema in his *Responsa* (48, following *Piskei Maharai* 206) states that where a mistake is shown from the document itself, the document may be validated but not otherwise. In this *responsum* Rema differs from Karo as to whether an assumption of error is appropriate in a will. (See *Resp. Rema* 47 (at end) citing Maharam miPadua; Maharam haGiz, *Shtei haLehem*, 1).

Reference may also be made to *Resp. Rashba* (cited by *Bet Yosef* to *Tur, Hoshen Mishpat*, 42, and by *Be'er Hetev* to *Hoshen Mishpat* 42:16) concerning ambiguity of language in a document. Rashba placed reliance on the terms of the document and its logic, supported by the evidence of a witness, and, although in Jewish law the evidence of a single witness is not determinative, it may be referred to for assistance.

As for a document, the terms of which indicate not only that there is a mistake, but also what that mistake is, we may refer to a *responsum* by R. Shmuel Bachrach (cited in *Hut haShani* by his son R. Moshe Bachrach, 39) which is relevant here: "Since the terms of the document are self-contradictory, we must conclude that an error has occurred even though such a specific error is uncommon....The clear truth, however, is that there is here a slip of the pen...which is itself not uncommon."

We can now turn to the present will. Clearly an inconsistency arises in a single paragraph—"500,000 IL. (five hundred thousand) French francs." Counsel for the appellant seeks to resolve the matter by adding punctuation marks which do not appear in the will itself and even if admitted...would still leave the paragraph unclear....And counsel for the executors are confronted with an error by reason of the typist adding "IL." It may be noted that under Jewish law deeds and wills are construed in accordance with "the terms usually employed in deeds" (*Hoshen Mishpat* 42:15, following *Baba Metzia* 104a).

12. Interpretation According to the Context of the Passage or from a Subsequent Passage

See: KATAN *et al.* v. MUNICIPALITY OF HOLON *et al.*, p. 857.

13. The Subject of a Special Statement Applies to the General Proposition

See: ROSEN *et al.* v. STATE OF ISRAEL, p. 874.

14. The Negative Implying the Affirmative

C.A. 422/78

SALMON v. ROAD ACCIDENT VICTIMS COMPENSATION ASSOCIATION

(1979) 33(2) *P.D.* 701, 702, 704

Cohn J.: The appellant is a "victim" within the meaning of that term under sec. 1 of the Road Accident Victims (Compensation) Law, 1975 (hereafter called "the Law"), except that the accident in which he was injured was a "unilateral accident" and no other vehicle was involved. When the accident occurred, the appellant was not insured as required by sec. 18(4) of the Law, which amends sec. 3 of the Motor Vehicle Insurance (Third Party Risks) Ordinance (Consolidated Version) of 1970 (hereafter called "the Insurance Ordinance"). He petitioned the District Court for a declaration that the respondent, the Road Accident Victims Compensation Fund, established under sec. 10 of the Law, was obliged to compensate him for his injury. His petition having been dismissed, he brought this appeal to us...

The appellant rests his claim on the provisions of sec. 7(a) of the Law, which excludes certain injured people from being entitled to compensation under the Law. Since the appellant does not figure among these, it is evident that he is not excluded from being entitled to compensation under the Law. In other words, every "victim" as defined in sec. 1—which includes the appellant—is *prima facie* entitled to compensation. Sec. 7(a) lists those who are not so entitled and from this negative we may infer the affirmative that any one not so excluded remains entitled. There is some substance in the appellant's argument since missing from the list of exclusions are those who did not comply with the obligation of compulsory insurance —to demonstrate the wisdom and understanding of the legislature in not considering lack of insurance in itself a sufficient ground for denying the right to compensation under the Law. The learned judge said that this argument was "attractive" but like her I cannot accept it.

(We have learned that R. Meir did not hold that the positive may be inferred from the negative (*Nedarim* 11a, 13b; *Sotah* 17a; *Shevuot* 36a). Not that he said so expressly, but the rabbis deduced it from certain observations he made. Thus, he once laid down that every stipulation which is not similar in terms to that of the children of Gad and of Reuben is not valid (*Kiddushin* 61a), meaning that when one wishes to introduce a condition one must expressly stipulate the positive and the negative aspects, in the way that Moses did in the case of the children of Gad and Reuben — "if they pass over with you" and "if they will not pass over with you" (*Num.* 32:29-30). Thus R. Meir expressed the view that one may not infer a negative from a positive and vice versa, and the positive is to be inferred, not from the negative, but only from express terms. This is exemplified by the legislature's approach in the present case; apparently it, too, did not propound that from a negative rule one may infer the positive rule but said all that was required to be said in express terms.)

15. Attribution of Correct Traditional Meaning

C.C.(T.A.) 276/46

GERSHT v. VILDENBERG

(1949) *haMishpat* 15-16

Silberg J.: Before us is an application to confirm an arbitrator's award. An affidavit accompanied the application and counsel for the respondent immediately raised a veritable host of arguments against its validity. That is the fate that befalls every affidavit...to be measured and weighed, to be tested and examined, in the light of all the precedents that have over the generations adhered to this legal creation. The time has indeed come for the Israeli legislature to give thought to the question of precedents in general and precedents of this kind in particular. So long, however, as that does not occur, the courts must, by force of the decisions of their predecessors, rehearse again and again these unimportant and nugatory arguments to fortify the approach already established by the early authorities.

The first argument levelled against the affidavit is that it commences with "*anah* (["if you please") the undersigned" instead of "*ani* (["I")

the undersigned", which, in the opinion of counsel, invalidates the entire affidavit. One need not speak at length on this argument. Clearly a normal slip of the pen has occurred here — an obvious mistake on the face of it — that cannot invalidate the substance of the affidavit. Incidentally, in Aramaic, which is very close to Hebrew and was also a Scriptural language, *anah* is used in place of *ani* (*Daniel* 4:1, 4, 15, 31, 34 and elsewhere) and it may be that the deponent actually intended this Aramaic word: only the Ministering Angels, as is known, do not know Aramaic.

The second and more serious argument of counsel was that the affidavit did not indicate, either in its body or in the *testamentum*, that the deponent swore "by God", saying merely "sworn", which, as it were, conflicts with sec. 11 of the Schedule to the Oaths Ordinance, 1936. Counsel rests this argument on a single incidental observation reported at *haMishpat* 55.

I have carefully considered this argument but have finally decided not to accept it. One must attribute to every Hebrew word, in whatever document, its correct traditional meaning. The Hebrew word "to swear" as such, without any adverb or other accompaniment, always or nearly always means to swear by God, witness the fact that when the Gibeonites came to Joshua in his camp at Gilgal, told him their well-known story and succeeded in deceiving him and the Elders, it is said that "Joshua made peace with them and made a covenant with them to let them live and the princes of the congregation *swore* unto them" (*Joshua* 9:15), whilst a few verses further on, when speaking of observing the oath, it says "And the children of Israel smote them not, because the princes of the congregation *had sworn unto them by the Lord, the God of Israel*" (*ibid.* 18). Thus "swore" and "sworn...by the Lord, the God of Israel" mean the same thing. The same is found in the story of Batsheva and King David. Nathan the prophet told Batsheva to go to David and say to him, "Didst not thou my Lord, O King, *swear* unto thy handmaid..." (*I Kings* 1:13) but when she did go into the king and repeated what the prophet had told her, she said, "My lord, thou didst *swear by the Lord thy God* unto thy handmaid" (*ibid.* 17). The same is to be found when the Patriarch Abraham made his pact with Avimelekh. Avimelekh said to Abraham, "Now therefore *swear unto me* here *by God* that thou wilt not..." (*Gen.* 21:23) but later in the same chapter (verse 31) it merely says "there they *swore* both of them." There are numerous other examples which, to put it briefly, show that apart from places where an oath is expressly said to have been made by something else — "even as they taught My people to swear by Baal" (*Jer.* 12:16), or "My children have forsaken Me and sworn by no-gods" (*ibid.* 5:7), or "they that swear by the sin of Samaria" (*Amos* 8:15) — "swear" means "swear by God".

Not only the etymological meaning of "swear" but also its juridical

content is an oath by God. The Talmudic oath was always in the name of God, and the only dispute was whether it had to be His special appellation or one of His attributes, "the Merciful", "the Gracious" etc. (*Shevuot* 38b). The rule is that one may use either His ineffable name or any of his attributes (*Hoshen Mishpat* 87:15). Maimonides wrote (*M.T. Shevuot* 11:8-9):

> The rabbinical oath, whether on a scriptural or a rabbinical matter, whether in regard to an argument of certainty or to an argument of doubt, is taken as follows—the person swearing holds a *Torah* scroll in his arms and swears by the Name or by an attribute...either out of his own mouth or out of the mouth of the dayanim [judges]....'I hereby swear by the Lord, the God of Israel' or 'By Him who is gracious' or 'merciful' that... .

In view of all the foregoing, I hold that in the present affidavit as well the word "sworn" found either in the body thereof or in the *testamentum* means "sworn by God" and accordingly, I reject the above submission.

Chapter Two

WORDS AND PHRASES

1. Dust

C.A. 534/79
EFRAT v. STATE OF ISRAEL
(1981) 35(4) *P.D.* 729, 731, 733-734

Elon J.: The sole issue in this case is a question of interpretation. Does the expression "diamonds and precious stones", found in sec. 33 of the Value Added Tax Law, 1975, include "diamond powder"? The practical difference relates to exemption from value added tax...

It emerges from reference to the dictionaries that the word "diamond" is defined as "a precious stone" without mention of diamond powder (see Even-Shoshan *sub* "diamond"). As against this the expression "diamond powder" means the powder of diamonds and the word "powder" means "material ground into small particles that form a kind of thin dust" (*ibid.* sub "dust"), in accordance with the *Song of Songs* 3:6, "powders of the merchant". As a point of linguistics, the verse does not use "dust" (*avak*) which in one sense means the same as "powder" (*avkah*) but also has a secondary meaning of "a little", "somewhat", "like" (*ibid.*). Thus for example "dust of interest" (*avak ribit*) means "like interest", where a payment is not real interest but is nevertheless forbidden. Likewise, the common expression "somewhat slanderous" (*avak lashon hara*) found in the *Tosefta* (*Avodah Zarah* 1:14): "Let no one talk even in praise of his neighbour because of some (*avak*) possible slander", since in doing so "he will come to disparage him" in qualifying his praise by pointing out some bad trait his neighbour may have (*Arakhin* 16a and Rashi *ad loc.*). From this, there developed in Hebrew literature expressions like "somewhat true" (*avak emet*), "a minor benefit" (*avak hana'ah*), "some pride" (*avak ga'avah*) (see Even-Shoshan). In connection with diamonds, "*avak*" in this sense would mean "somewhat" diamond, a kind of diamond,

and be comprehended in the word "diamond", but the term used is "*avkah*", i.e. small crushed particles like thin dust which do not come within the ordinary meaning of diamond. I mention these matters only for the sake of clarity and as "some evidence" (*avak re'ayah*). On examining the object of the Law and comparing it with other enactments, we have reached the conclusion that "diamonds" in sec. 33 does not include "diamond powder".

At the beginning of my observations I adverted to the reasons given by the learned Judge, that the term "diamonds" must be given the meaning it has in common speech, especially among those who are engaged in the diamond business. That is undoubtedly correct. The Law must be interpreted according to common usage, and where some term issued in a particular area of business, common speech means the speech of those who engage in that business. Thus in Jewish law, a leading rule is that terms appearing in documents and regulations must be construed according to the everyday speech "of the place, language and time" (*Resp. Rashba*, Part 6, 151; *Resp. Ritba* 167 and others by analogy to the interpretation of vows; see *M.T. Nedarim* 9:1, 13, and in greater detail M. Elon, *Jewish Law*, 2nd ed., pp. 361 ff. and 387 ff.). The trouble in the present case, I fear, is that we have no judicial notice of everyday speech and no evidence thereof was produced. The learned Judge observed in his judgment that "it would have been proper to have brought evidence in this regard, but counsel for the parties were content with general observations." For that reason, and since the everyday speech involved is that prevailing among a particular group engaged in the trade, I find it very doubtful whether a judge can reach any conclusion about the accepted meaning among diamond merchants on supposition alone without hearing evidence from them. (See *C.A.* 138/78 *Director of Customs and Excise* v. *I.I.L. Ltd. et al.* (1979) 33(3) *P.D.* 490, where the expression "the processing of goods" that appears in certain Regulations was interpreted as meaning that which "is dictated by common sense"; this however, is not an interpretation of a defined professional matter.)

2. Appraisement

C.A. 102/80
FRUCHTENBAUM *et al.* v. MAGEN DAVID ADOM *et al.*
(1982) 36(4) *P.D.* 739, 746

By his will, the deceased, a brother of the appellants, devised half a house which he owned at the date of the will to the first respondent. Subsequent to that date he had acquired the other half. The question was whether the latter half formed part of the devise to the respondent or in the absence of any directive in the will in that regard, the appellants were entitled as heirs at law.

Shilo J.: I may perhaps assume that when the legislature uses the root *amad* ("to conjecture", "appraise") to indicate the process of determining intent, it was influenced by its meaning in the Jewish law sources. *Amad* as a verb refers to the process of measuring and weighing the data relevant to the solution of some problem or other. Whether the result is an evaluation or estimation as near as possible to exactitude, as in the case of an appraisement of time or distance, or whether the result is absolute and unequivocal as in the case of arriving at a person's viewpoint, deciding what he actually thinks, the root *amad* as a noun nevertheless suggests only a supposition as distinct from precise knowledge, as in "Perhaps what you say is based on conjecture (*"omed"*) or hearsay" (*M. Sanhedrin* 4:5) or in "do not give tithes by a conjectural estimate" (*M. Avot*, 1:16).

On the other hand, the word *umdena*, which is also derived from the root *amad*, serves as a legal term to indicate an unequivocal result of establishing the intent of a person, when intent is part of a legal act. A distinction is made between "a manifest supposition" (*umdena b'gilui da'at*) and "a demonstrated supposition" (*umdena muhahat*). Let me quote the relevant definitions of the *Encyclopedia Talmudica*, vol. I, p. 137:

> *A manifest supposition*: matters from which the intention of the actor is not wholly apparent except in conjunction with a public statement made when the act is being done; where such statement is available, intention may also be established from the nature of the matter itself....For example, where a person sells all his land and on the occasion of the sale states that he is doing so because he intends to migrate to the land of Israel, if he subsequently does not migrate because of overwhelming pressure, the sale is void; since he made manifest his intent in selling the land, we postulate that it was out of this intention, to be able to

migrate, that he sold, the act also evidencing his thoughts that if he did not migrate the sale would not subsist, since it is unusual for a person to sell all his land...

A demonstrated supposition: matters from which in themselves it is apparent that they were done with a certain intent and no need arises for any special evidence that they were effected for that purpose....For example, where a person's son goes abroad and the person, hearing of his son's death, transfers over all his possessions to others, and then subsequently the son appears; it is a demonstrated supposition that had he known of his son being alive he would not have given all his possessions away to others.

3. Religious Way of Life

Cr.A. 54/81

ROSEN *et al.* v. STATE OF ISRAEL

(1981) 35(2) *P.D.* 821, 833-834

The appellants were convicted of delivering false information in an important particular, with the intent of evading army service, under sec. 35(b)(1) of the Defence Service Law, 1959 (Consolidated Version). Following on their declaration that reasons of religious conscience prevented them from doing army service they were found to be working at home on the Sabbath. The issue was whether the appellants' acts really did indicate an absence of religious scruples preventing them from serving.

Elon J.: I now proceed to deal with the second submission of counsel for the appellants, that what they did was no profanation of the Sabbath according to received *halakhah*. To persuade us that this is indeed so, counsel plunged into the depths of the sea of the *Talmud* and brought to our attention observations of the earlier and later authorities of world renown. I will not repeat all the explanations and novel views advanced by learned counsel, but I will point out several of the main themes of his remarks in order to make clear whither he seeks to take us and why. Counsel says that the laws of the Sabbath are known to be like mountains suspended on a hair, and that even one who is well versed in them will not

come to the end of them, and may yet stumble over some profanation of the Sabbath; *a fortiori* in the case of the appellants who have insufficient learning, nor is any great knowledge to be expected of them of what is permitted and what is forbidden under Sabbath law. He goes on to submit that the digging of holes by the appellants with spades is not scripturally prohibited since sand is crumbled earth. He cites the precise words of one of the great later authorities, *Eglei Tal* (Part I, Ploughing, para. 3). And if this is merely a rabbinical prohibition, are we to require zealous observance of all rabbinical prohibitions to show that a person follows a religious way of life? Moreover, there was no public profanation of the Sabbath; even had they done what they did brazenly in the middle of the day in one of the streets of Petah Tikvah, no proof would have been available that it was in the presence of ten Jews as required for a public act. Nor did counsel feel satisfied until he had sought to instruct us that to pass tiles into an apartment is unlike taking things from one domain to another, since public domain is only to be deemed such when six hundred thousand people throng there (*Tosafot* to *Shabbat* 6b; *Orah Hayim* 345:7) and as is well known it is not so in the streets of Petah Tikvah and certainly not the side road where the appellants did their work. Above all, since the appellants passed tiles chainwise to their sisters and the latter passed them to the father, this is a case of "two carrying it out" which does not render them culpable (*M. Shabbat* 10:5; *Shabbat* 92b; *M.T. Shabbat* 1:15-16). And if indeed it does not make them culpable though the act is forbidden (*Shabbat* 3a, 107a), it is again only a rabbinical prohibition and what right have we to require that it be observed by the appellants.

The trouble is that learned counsel in his acute erudition was mistaken in his understanding of the instant Law since he did not pay proper attention to the legislative provisions. When the Law speaks of religious conscience which prevents army service, its intention and purpose is religious consciousness involving a religious way of life accepted and practiced by those who form the public of religious observers of the *Torah* and the Commandments and who order their life style according to the *halakhah* as set out in *Shulhan Arukh*. A girl who declares that reasons of religious conscience prevent her from service declares thereby that she is a member of that public and that her way of life is based on observance of the Sabbath and the Commandments. Self-evidently, no definition, legal or non-legal, can be given in advance of what way of life is accepted and practised by the public who observe the Sabbath and the Commandments, since there are those who are meticulous about the merest detail and those who are not so meticulous. But it very certainly may be determined in any concrete instance whether one has overstepped in clear fashion what is accepted and practised, witness the case before

us. One cannot imagine a person maintaining a religious way of life, as accepted and practised by those who observe the Sabbath and the Commandments, even if not meticulous about minor and major rules, occupying himself in the middle of the Sabbath with the building of his apartment, dressed in work clothes, digging away with tools and filling buckets with sand, lifting the buckets by a special contraption common to builders, carrying in tiles for the floor of the apartment and like work in which the appellants engaged. The performance of such work blatantly conflicts with the elementary and minimal observance of the Sabbath and it is immaterial whether it is classified as scriptural or rabbinical labor, whether it constitutes a public or non-public profanation of the Sabbath in the formal sense of the concept. That this was indeed the legislative intent may be gathered from the prohibition of travelling on the Sabbath given as the prime example of Sabbath observance. It seems that this last prohibition, particularly for those who do not drive themselves, is not classified as a scriptural prohibition but it is certainly counted as a profanation of the Sabbath contrary to accepted practice in the religious way of life of the public who observe the Sabbath and the Commandments. Hence, it is not the formal halakhic classification that is the concern of the legislature but the actualities of a religious way of life accepted and practised by the public among which the deponent declares she is numbered.

4. "Other"

H.C. 170/54

ATTORNEY-GENERAL v. BACH

(1955) 9 *P.D.* 1057, 1060, 1061

Cheshin D.P.: These proceedings turn on the powers of the Minister of Justice to appoint a magistrate to act as a coroner.

Sec. 2 of the Coroners Ordinance, as amended in 1946, provides that the High Commissioner may from time to time appoint one or more persons to act as coroners for each district. The Minister of Justice—who replaced the High Commissioner for the purpose of the Coroners Ordinance—appointed "every magistrate, every stipendiary...and every senior police officer...to be a coroner in the district where he serves." Notice of this appointment

was published under the Minister's signature in the Official Gazette No. 299 of 2 July 1953...

The main and decisive argument of counsel for the petitioner is that sec. 19 of the Judges Law, which was the basis for the respondent's decision, does not apply at all to the case in hand and that therefore it cannot be said that the appointment was not an appointment. Sec. 19 provides that "a judge shall not be a member of the Knesset or of the council of a local authority, but he may, with his own consent and the consent of the Minister of Justice, temporarily carry out another function on behalf of the State, or may carry out some other public function, if in his and the Minister's opinion and in that of the President of the Supreme Court this will not impair his status as a judge."

This section comprises two parts: (i) an absolute prohibition upon a judge to be a member of the Knesset or of a local authority council; (ii) permission to carry out temporarily another function on behalf of the State.

The only and central question here is what "another" (function) signifies.

The primary and simple meaning of the word is "apart from the subject involved", not that mentioned previously but something different....Thus for example Laban said to Jacob: "It is better that I give (Rachel) to thee than that I should give her to another man" (*Gen.* 29:19). The word "another" is here intended to mean someone other than Jacob with whom the preceding words are concerned ("to thee"). Similarly "God hath appointed me another seed instead of Abel" (*ibid.* 4:25); "and Gilead's wife bore him sons and when his wife's sons grew up, they drove out Jephthah and said unto him 'Thou shalt not inherit in our father's house for thou are the son of another woman' " (*Judges* 11:2); Joab said to Ahima'atz the son of Zadok, "Thou shalt not be the bearer of tidings this day but thou shalt bear tidings another day" (*II Samuel* 18:20), and finally, when David asked Ahimelekh, the priest, for a spear, the latter replied, "The sword of Goliath...is here wrapped up in a cloth...if thou wilt take that, take it, for there is not another save that" (*I Samuel* 21:10).

5. Violence

Cr.C. 869/81

STATE OF ISRAEL v. GRACHIN *et al.*

(1983) 1 *P.M.* 265, 272-278

Under pretence of seeking to buy certain articles of jewelry from the complainants which the latter kept in their home, the defendants tricked two old people into going into a nearby room where they locked them up. The appellants then made off with the articles. The issue was whether this amounted to robbery under sec. 402 of the Penal Law, 1977, or merely stealing.

Winograd J.: Even if we adopt a test that is not necessarily purely legal, but one of ordinary language, as was suggested by the Supreme Court in *Cr.A.* 103/80 *Karni* v. *State of Israel* (unpublished), we may say that what the defendants did to the old couple was clearly an act of violence.

"A violent person" is defined in the *Encyclopedia Talmudica* (vol. 2, 11) as "a strong person who does not listen to the *bet din* [religious court] and whom people fear." Here, there is no question of physical force but of fearfulness, subjective fear. That concurs with the result we arrived at otherwise.

6. Supply

See: Marketing and Supply

7. Credit

C.A. 227/63

REIZMAN *et al.* v. MATITYAHU *et al.*

(1963) 17 *P.D.* 1625, 1633

The appellant contracted to buy a flour mill from the respondents for IL. 2,500,000. After payment of IL. 1,300,000 on account, title was conveyed to the appellants, and they undertook to pay the balance in four equal instalments, dollar linked....They provided written guarantees which linked these payments in case of depreciation but not of appreciation of the Israeli lira. After a devaluation of the lira in February 1962, the appellants asked for a declaratory judgment that they were under no obligation to pay more than the calculated instalment, together with the maximum interest permitted by law. The District Court refused the application.

Halevi J.: As to the meaning of the phrase "every credit transaction", I would say that it includes a sale on credit. The sources actually show that that is the original meaning of "credit" (*ashrai*). Consider *Baba Batra* 22a and Rashi *ad loc.*....Similarly, *Pesahim* 113a, a passage which Jastrow's *Talmudic Dictionary* translates as "in all sales on trust (*ashrai*) it is doubtful whether (the money) will be forthcoming or not, and if it is, it is bad money"....In accordance with this normal usage, Sussman J. has said...that "the definition of 'every credit transaction' obtains also in other transactions where there is foundation for the element of credit..." a dictum with which I respectfully agree.

8. "Whether It Be...Or..."

C.A. 635/68

ASSESSMENT OFFICER v. KLAL INVESTMENTS...LTD.

(1969) 23(1) *P.D.* 548, 553

This appeal turned on the kind of expenses that are deductible from the profits of a company for the purpose of calculating its liability to company tax; whether these

include not only such as are expended in producing the taxable income, or all expenses, including those expended in producing profits to which company tax does not attach.

Kister J.: Although it seems to me that the meaning of "either...or", is not in doubt, I shall say a few words about the matter here.

The expression is to be found in Scripture in *Lev.* 27:12; "And the priest shall value it whether it be good or bad; as thou the priest valuest it, so shall it be." And the same appears in verse 14....The first deals with the sanctification of an animal and the second with the sanctification of a house, and the expression "whether it be good or bad" means that the same rule shall apply to a good thing or a bad thing. These verses are considered in the *Talmud* in *Temurah* 33a and Rashi *ad loc.* explains that " 'whether it be good or bad' means that the unblemished and the blemished are treated alike."....The same expression figures also in *M. Kelim*, chapter 28, 2-4 — "whether it was or was not kept in readiness it was not susceptible to uncleanliness"; "whether a plaster is made of cloth or leather etc." "scroll wrappers, whether they are ornamented...or not etc.".

It is clear from all these examples that what is meant is that one rule applies in the given matter to both the things that are mentioned although they are different (clean and unclean, cloth and leather, ornamented and unornamented wrappings). As Gur in his dictionary puts it, "no distinction is made between the two."

9. Children or Sons

C.A. 629/79

EXECUTRIX OF THE ESTATE OF M. AVIGDORI v. AVIGDORI *et al.*

(1980) 34(3) *P.D.* 540, 543

The respondents, the two sons of the deceased by his first wife, asked the District Court to construe a clause in his will and hold that the expression "banai" referred to them alone and not to the three daughters he had by his second wife.

Y. Kahan J.: The main submission of appellant's counsel was that the expression "all my children" (*kol banai*) [which may in addition to male

include female children] means all his children without gender distinction, since the term "*banai*" not infrequently appears in various contexts in Hebrew as relating to both sons and daughters. In his summation he gives examples of the use of "*banim*" and its inflectional forms to include sons and daughters. In most instances the word refers to sons but, in not a few, it embraces daughters. Different examples are provided by the sources. For instance, Eve was told, "In pain thou shalt bring forth children (*banim*)" (*Gen.* 3:16) where there can be no doubt that *banim* includes daughters. Other examples are available of a similar use. Thus Maimonides, *M.T. Zekhiyah uMatanah*, 6:14: "Where a person sends articles from abroad and says that they should be given to his children (*banai*), they are divided among his sons and daughters." Or consider *Kiddushin* 82b: "Happy is he whose children (*banav*) are males and woe to him whose children (*banav*) are females."

Counsel for the respondent argues that the terms of a will are not to be construed as in the *Talmud* or the other sources, but according to every-day speech. Whilst I agree to that, even in ordinary speech the word children (*banim* and its derivatives) is not infrequently used to indicate all the issue born to a man, irrespective of sex. It all depends on the context in which the word is used and on the circumstances from which we might gather the intention behind it.

10. Building

Cr.A. 282/61

YIHYE v. ATTORNEY-GENERAL

(1962) 16 *P.D.* 633, 635

Silberg J.: This is an appeal against conviction and sentence in respect of the offence of breaking into a building and stealing, under sec. 297 of the Criminal Code Ordinance. The property stolen consisted of goats in a cave belonging to the complainant. The learned judge imposed a penalty of eight months' imprisonment.

Counsel for the appellant submits simply that the applicable section is not the onerous sec. 297 but the lighter sec. 272, since a cave is not a "building" within the meaning of the former section.

The question, therefore, that faces us is the meaning and range of the word "building". There is, however, the prior question of where to look for the meaning of the word — in the stores of the Hebrew language or in English dictionaries. Sec. 297 is the creation of Israeli legislation since it was enacted by the Knesset in 1955. I once raised the question whether it is not correct to interpret original Israeli enactments, that are not "translations" but "texts", in accordance with their meaning in Hebrew. (Cf. *H.C.* 15/56 *Sofer* v. *Minister of the Interior* (1956) 10 *P.D.* 1213; *M.* 89/51 *Mitova* v. *Kazam* (1952) 6 *P.D.* 4; *H.C.* 163/57 *Lubin* v. *Municipality of Tel Aviv* (1958) 12 *P.D.* 1041, 1065). And if the matter is still in doubt as regards legal terms, it is certainly not so, in my opinion, as regards common nouns such as the word "building" here. This simple word — I believe — is to be interpreted according to its meaning in Hebrew. For this reason I am not prepared to be drawn into a discussion of the meaning of the word "building" in sec. 2 of the Town Planning Ordinance of 1936 (as amended in 1938) and draw conclusions — either by way of analogy, as counsel for the respondent suggests, or *e contrario*, as counsel for the appellant suggests — as to the nature of "building" in the context of sec. 297 of the Criminal Code Ordinance.

The meaning of the word "build" (*baneh*) in Hebrew is to assemble various units or parts and make a complete thing. "And the Lord God made (built) the rib he had taken from Adam into a woman" (*Gen.* 2:22); "And they prepared the timber and the stones to build the house" (*I Kings* 5:32); the whole body of a person, made up of different limbs, is called a "building" (Cf. the expression "the structural majority (*rov binyan*) of a corpse": *M. Oholot* 2:1).

From this viewpoint, it seems to me, a cave is not a "building" within the meaning of the above section because the element of assembling is lacking. The fact that in the present case the cave had a door does not render it a building: no one would say that by attaching a door the cave itself had been "assembled".

11. Liable

See: ATTORNEY-GENERAL v. A. and B., Part 6, Penal Law, p. 482.

12. Liable to Punishment

See: ATTORNEY-GENERAL v. A. and B., Part 6, Penal Law, p. 482.

13. Pig's Meat

H.C. 163/57

LUBIN v. MUNICIPALITY OF TEL AVIV

(1958) 12 *P.D.* 1041, 1046, 1065-1068, 1069

Olshan P.: Two questions were put by the petitioner for the Court's decision: (i) Are various parts of swine, (such as the surface fat, the internal fat, the livers, lungs, innards, feet, bones and limbs) forbidden for sale under the by-laws of Tel Aviv "regarding the raising of pig and pig's meat" enacted by the Municipality in 1957; (ii) is sec. 4 of the said by-laws, which empowers an inspector to seize and confiscate pig's meat or food products made from pig's meat and intended for sale, valid?

Silberg J.: In the course of the present proceedings, it turns out to be our right and duty to express an opinion on one of the painful problems that engage the attention of our society. Not often have we had such an appropriate opportunity...

The pig has always been regarded by the Jew as a symbol of abomination, detestation and abhorrence. Already the prophet Isaiah included it among the most hateful of animals: "Eaters of swine's flesh, and the insect, and the mouse, they shall be consumed together, saith the Lord" (*Is.* 66:17). And the rabbis of the *Talmud* did not recoil from saying that "the pig is the dropping of the privy" (*Y. Berakhot* 3:3). Even the full enunciation of the word was deemed to render the lips impure and a special pseudonym was found for it — "the other thing"— the very same expression that is used to describe the disease of leprosy (*Berakhot* 43b; *Shabbat* 129b; *Pesahim* 76b). And, as we all know, the phrase entered the Yiddish language and found its place throughout the Diaspora. In this manner, the eating of swine's flesh differs from all other prohibited foods and occupies a special place, as a loathsome thing, in the consciousness of the Jewish people; no other unclean animal has so revolted the mind of the Jew. The matter

finds expression in the famous story that when, during the wars between Hyrcanus and Aristobulus of the Hasmonean dynasty, a swine struck its claws into the wall of Jerusalem, "Eretz Yisrael quaked over a distance of four hundred *parasangs* by four hundred *parasangs*" (*Baba Kamma* 82b; *Menahot* 64b). And on that occasion it was proclaimed: "Cursed is the man who would breed swine." Not a mere prohibition but a curse, to show the profound emotional alienation associated with having anything to do with this unclean animal.

The prohibition and uncleanliness of the swine are proclaimed in the *Torah*: "And the swine...is unclean unto you. Of their flesh ye shall not eat and their carcasses ye shall not touch; they are unclean unto you" (*Lev.* 11:7-8). Not only the flesh but also the other parts of the animal are forbidden. Thus Maimonides rules (*M.T. Ma'akhalot Assurot* 2:2): "Accordingly any one who eats the amount of an olive of the meat of an animal that is unclean is liable to flagellation under the *Torah*, whether he eats of the flesh or of the fat: Scripture did not distinguish between the flesh and the fat." *Yoreh De'ah* 81:1 (see *Shakh ad loc.*) renders the milk prohibited like the flesh. But Maimonides (*op. cit.* 4:18, 19, 21) excludes from penalty the use of various parts of the animal, the skin, the bones, the sinew, the horns and so on since they are not fit to be eaten.

We see, therefore, that the prohibition of eating swine's flesh—whether one is liable to flagellation or not—is not confined to those parts or limbs which various dictionaries call "meat", but includes those inner parts which the respondent's inspectors confiscated in the present case.

The Israeli legislature, by enacting an enabling Law, had in contemplation, as appears evident, the "special relation of the Jew to the uncleanliness of the swine." But as a secular modern legislature, it refrained as far as possible from interfering in the personal affairs of the individual, and as a territorial legislature whose work extends to the entire population of the country, Jew and non-Jew alike, (i) did not itself forbid but enabled others to forbid when so desired and (ii) empowered the prohibition of selling but not of eating swine's flesh. (Regarding dealing with swine, see *Resp. Rashba* 1:301; *Tosafot* to *Baba Kamma* 82b; *Resp. Maharsham, Yoreh De'ah*, 200; *Resp. Hatam Sofer, Yoreh De'ah.* 108.)

There is no doubt that the indirect end of the Law — and often the indirect result is the direct purpose of the legislature — was to minimize the eating of pig's meat, since it was not only to avoid the infuriating public display in shop windows that the Law in question was enacted — that is very clear — but by adopting the term "pig's meat" it included all those parts that come under the national religious prohibition.

Thus, it seems to me, we have resolved and disposed of the first submission made by petitioner's counsel.

We now turn to his second submission—regarding the nature and extent of the power to confiscate. Here the matter is not so simple. Nevertheless, I think, we can infer something from the "ideology" and *practical* purpose of the Law. A variety of arguments were put to us regarding the character of confiscation, but with the greatest of respect for learned counsel, the dispute between them, it seems to me, strayed somewhat in a wrong direction. The decisive question is not whether the character of confiscation is judicial or administrative but whether it is penal or preventative. If it is apparent that confiscation here is a preventative measure, then we may learn something regarding the first question...

The power to confiscate which the local authority has assumed under the by-law made by it under statutory provision can be variously defined: (i) it may confiscate the *trefah* — swine's flesh and food products made therefrom — only if it is intended for sale, whatever the intended place of sale: that is the view propounded by counsel for the respondent; (ii) it may not confiscate unless an offence has been committed therewith, namely that the person possessing the meat has already committed an offence against the prohibition of sale imposed by the local authority; a sale can occur without yielding up possession where it is offered or displayed for sale, an act which is equivalent to a sale under sec. 1 of the Interpretation Ordinance; that is the view propounded by counsel for the petitioner...

I also reject, but with greater emphasis, the second view propounded by counsel for the petitioner. The language of the Law attests that that was not the intention. The Law speaks of "intended for sale" (noadim) but not of "which is sold" (either by offering it or displaying it). Moreover, the very word "intended" also figures in sec. 1 of the Law — "the sale of pork and pork products intended for food"; and just as in the latter the meat and the products are evidently to be eaten in the future but are not yet eaten, so also they are to be sold in the future but have not yet been sold. It is difficult to see how one can attribute any different meaning to the word "intended". The word is derived from a root which always means to set aside something for some one or for some purpose (see *Ex.* 21:8-9; *Jeremiah* 47:7; *Kiddushin* 18b-19a). I do not mean to say that in point of precise language the use of the word "intended" was correct — perhaps it was not, since the meaning of the word in Scripture is that which is gathered together or congregated for a certain purpose (see *Num.* 14:35; *I Kings* 8:8; *II Chron.* 5:6) — but the draftsman who employed it in the Law wished to say "set apart" or "designated" for sale and accordingly the word cannot be related to what has already been sold.

14. Dwelling

C.A. 299/64

HAIFA ASSESSMENT COMMITTEE v. TECHNICUM SCHOOLS LTD.

(1964) 18(4) *P.D.* 477, 479, 480-481

Cohn J.: Is a company that carries on business in rented hotel rooms "a person dwelling in a hotel"? And if the owner of the hotel himself rents the building, is the company "a sub-tenant" within the meaning of the Municipalities Ordinance, sec. 269 (hereafter called "the Ordinance"), that is, "a person dwelling in a room...of a building which another occupies, who pays the occupier rent therefor?"

These are the questions that arise in consequence of the appellant's decision to charge the respondent with general municipal tax (*arnonah*) under the Ordinance. In the Haifa District Court, the learned Judge held that the respondent does not constitute "a person dwelling in a hotel", but is rather "a person dwelling in a room of a building which another occupies" and as such a sub-tenant, it is not obliged to pay the general rates...

To my mind, however, in this regard there is no difference between the Hebrew words for "residing" (*yashav*) and "dwelling" (*gar*): both of them equally are applicable to people alone. There is no need for evidence as regards "residing", but as regards "dwelling", the prophet has already informed us that the day will come when "the wolf shall dwell with the lamb" (*Is.* 11:6). It is very true that the prophet could not yet envisage a legal creature that is neither man nor animal and yet "dwells" where it does. The prophet, however, affords some precedent for the fact that the act of dwelling is not confined simply to man born of woman.

Counsel for the appellant goes on to adduce evidence from modern dictionaries which indicates that "to dwell" is of a temporary nature, whereas everything points to the "dwelling" of the respondent in the hotel as not at all temporary. I will not enter into the debate of the dictionaries, nor do I intend to dispute what they have to say, but it is well-known that the Patriarch Abraham "sojourned (dwelt) in the land of the Philistines many days" (*Gen.* 21:34) and that King David desired to "dwell in Thy tent forever" (*Ps.* 61:5).

To sum up, a person who dwells in a hotel includes a company that conducts its affairs in a hotel, and a person who dwells in a room includes a company that conducts its affairs in the room. In either case, whether

as dwelling in a hotel or as a sub-tenant, a company is not liable for general rates: of it the Psalmist says, "Thy statutes have been my songs in the house of my sojourning" (119:54).

15. Rearing

H.C. 103/65
GORENSTEIN *et al.* v. MINISTER OF THE INTERIOR *et al.*
(1965) 19(2) *P.D.* 618, 623

Halevi J.: The meaning of the word "rearing" (*giddul*) regarding animals is not confined to caring for the young until they actually grow up, and the argument cannot be accepted that thereafter there begins the stage of "keeping" (*hahzakah*) as distinct from "rearing". The sources attest to this: "Small cattle are not to be reared (*megadlim*) in Eretz Yisrael" (*Baba Kamma* 79b); "Ten special regulations were applied to Jerusalem...that no fowl were to be reared there" (*ibid.* 82b); "Pigs are not to be reared in any place" (*ibid.*); "Cursed is the man who would rear pigs" (*ibid.*); "Your face is like that of those who rear pigs and lend money at interest" (*Berakhot* 55a).

16. Firm Resolve

See: ZANDBANK *et al.* v. DANCIGER *et al.*, Part 8, Obligations, p. 595.

See: SHARABI *et al.* v. SUBERI, Part 8, Obligations, p. 784.

17. Caused

Cr.A. 330/73

ELIASSAF v. STATE OF ISRAEL

(1974) 28(1) *P.D.* 212,220-221

The issue here was whether the words "caused an accident" in sec. 64A of the Traffic Ordinance (New Version) incorporate the element of fault or merely of physical causation.

Cohn J.: I agree wholeheartedly with the learned judges of the District Court, that *prima facie*, "the driver of a vehicle who in driving caused an accident" in sec. 64A includes a driver who caused an accident without being negligent. The term "caused" (*garam*) in itself does not incorporate any negative element of negligence of fault. In the sources the word also serves to indicate beneficence and positive causes yielding a particular result. Thus, for instance, you may not curse great people whose greatness causes them to be above common folk (*Sanhedrin* 66a; *Sifra, Kedoshim* 9:7); penitence and good deeds are effective "causes" (*Ta'anit* 16a); the wisdom and modesty of R. Hanina "caused" him to be able to distinguish things and give truthful judgment (*Niddah* 20b); he who visits the sick "causes" him to live (*Nedarim* 40a). There are many other like examples.

Had sec. 64A stood on its own, the "causation" it speaks of could only be interpreted expansively to include good (non-negligent) as well as bad causation.

18. Road

C.A. 680/80

FREIMAN *et al.* v. KAV TZINOR HANEFT....LTD.

(1982) 36(2) *P.D.* 578, 580, 581-582

Shamgar J.: This is an appeal against a judgment of the Beersheba District Court upholding a decision of the learned Registrar of that Court allowing

an amendment of the statement of claim to include the plea that the ship that caused the death of the deceased (a member of the appellants' family) was a "vehicle" for the purpose of the Road Accident Victims (Compensation) Law, 1975 (hereafter called "the Compensation Law").

The appeal centred on the question whether a sailing-vessel was "a motor vehicle" or "vehicle" within the meaning of the Compensation Law and whether the accident in which the deceased lost his life was "a road accident", again within the meaning of that Law...

The Registrar of the Beersheba District Court accepted the appellants' argument. A motorized sailing vessel is, in his view, included in the above definition of "motor vehicle", and an accident which occurred at sea is a road accident as defined in that ordinance.

The District Court allowed the respondents' appeal, deciding that a sailing vessel is not a vehicle and an accident at sea is not a road accident. First the question what is the normally accepted meaning of the term "vehicle" or "motor vehicle"....In its usual simple meaning the term is defined by the dictionary of Even Shoshan as "a general noun for a conveyance used *on land* that is propelled by wheels, such as carts, bicycles, cars, motor cycles, tanks" (emphasis added, M.S.). This meaning is supported by the scriptural source of the word *rekhev* ("vehicle") to include "war chariots" (*Ex.* 14:6-7). See also the Hebrew language dictionaries of Ben Yehudah, vol. 13; of Gur; and Y. Canaani, vol. 6: "vehicle—a term for a cart, car, bicycle and the like used as a means of transport and conveyance over roads."

In summary, a boat is not included in the definition of "vehicle" which is governed by the Compensation Law,and I would, therefore, dismiss the appeal.

Landau P.: I concur, and have nothing to add apart from two linguistic embellishments:

(a) In his pleadings, appellants' counsel...repeated the verse from *Is.* 43:16...

Rashi, however, explains (*ad. loc.*): "Who puts a path in the sea: In the Reed Sea where I took Egypt out to pursue you, etc.", and other exegetes gave similar interpretations, i.e. to recall the exodus from Egypt, when the Lord split the sea, and the Israelites passed through on dry land...

19. Religious Conscience

See: ROSEN *et al.* v. STATE OF ISRAEL, p. 874.

20. Authorization

H.C. 282/51

HISTADRUT *et al.* v. MINISTER OF LABOUR *et al.*

(1951) 6 *P.D.* 237, 241

Cheshin J.: A holiday fund may be set up in two ways, as provided in sec. 18 of the Annual Leave Law, 1951: "The Minister of Labor may establish a leave fund, and he may also, on such conditions as he thinks fit, authorize (*lehasmikh*) a leave fund." The first method, the establishment of a leave fund, is clear and we need not spend much time on it. What it means is that the Minister of Labor, on his own initiative and subject to the conditions contained in sec. 37, may create a new body that did not exist hitherto, as it were *ex nihilo*....The second method is not so clear or understandable because of the uncertainty that surrounds the verb "to authorize" used by the legislature. The verb *samakh* (akin to *tamakh*, supported, sustained) in the sense of authorization of an appointment or approval of a person to a post, office or honorary title is always expressed in the active form, whilst to those who are the object of the act — authorisation, appointment or approval — the process is expressed in the passive. "For Moses had laid his hands (*samakh*, appointed) upon him" (*Deut.* 34:9); "Lay thy hand upon him" (*Num.* 27:18); likewise in the *Gemara*: "Once the imperial power decreed that any one who appointed (*somekh*) and anyone one who was appointed (*nismakh*) shall be put to death. R. Yehudah ben Babba went and sat between two large mountains, between two large cities and between two Sabbath bounds between Usha and Shfaram and laid his hands on (*samakh*, appointed) five elders" (*Sanhedrin* 14a). The causative of authorizing an appointment or approving (*lehasmikh*) an office is not found anywhere in the ancient literature. The rabbinical writings, on the other hand, begin to use the causative, as in "the authorised (qualified) rabbi" (*harav hamusmakh*) that is, one who has had hands laid upon him, who became qualified to instruct in the law. In modern legal literature this conjugation is widely used. Today many will speak of "an authorised agency" (*reshut musmekhet*), "the competent court" (*bet mishpat musmakh*), "the authorised official" (*pakid musmakh*) — bodies and persons to whom authority has been given to act — from which derives *hismikh*, giving someone powers.

21. Renunciation

C.A. 532/74
DAKLO v. MUNITS
(1975) 29(1) *P.D.* 464, 471

Kister J.: It is to be noted that not "renunciation" but "waiver" is used in the compromise agreement, in the affidavit and in the application for amending the order of probate. The two concepts are not congruous, or at least, not necessarily so. It is known that when the Succession Ordinance was still in force, the court distinguished between simple waiver and renunciation. The latter meant that an heir did not wish to take any benefit, whilst waiver for the benefit of another meant that he took his share but wished to transfer it to another heir. This meaning of "renunciation" is common in Jewish law (see *Ketubot* 83a; *M.T. Ishut* 23:2; *Even haEzer* 92:3). The Israeli legislature expressly provided for complete renunciation of rights in an estate but at the same time thought it proper to honor the wishes of an heir when the renunciation is in order to benefit the spouse or children of the testator. Sec. 6(b) of the Succession Law, 1965, lays down that "there can be no renunciation in favor of any person other than the spouse or children of the deceased."

22. "Transfer"

C.A. 602/80
AUSTIN v. DIRECTOR OF PROPERTY TAX...REHOVOT
(1980) 36(2) *P.D.* 530, 534

This appeal turned on the meaning of "owner" in relation to immovable property in sec. 1 of the Property Tax...Law, 1961.

Sheinbaum J.: The sole question that remains is whether the registered owner has "transferred" the rights involved. It seems to me that once

judgment was given requiring the registered owner to transfer the land, he "has transferred" (*he'evir*) the right as the Law provides. This interpretation suggests itself for three reasons: from the text of the Law, its object and the logic of the situation.

Textually, the words "has transferred" are defined in the dictionaries *inter alia* as meaning "has caused to go", "caused to pass." "He brought me forth into the outer court and caused me to pass (*vaya'avireini*) by the four corners of the court" (*Ezekiel* 46:21); "And Jesse made seven of his sons to pass before Samuel" (*I Samuel* 16:10); "Has caused to pass" does not necessarily involve manual transfer; it is enough if a thing has been caused to pass.

23. Distribution

See: Marketing and Supply

24. Negligence

See: ALI v. SASSON *et al.*, **Part 8, Obligations, p. 685.**

25. *Vav* Consecutive

C.A. 259/60

MENORAH...LTD. v. KATZIBO'AH *et al.*

(1961) 15 *P.D.* 619, 629-630

The respondent was very seriously injured when travelling in a truck belonging to a haulage company for which her husband worked, that overturned while passing another vehicle on a narrow public road. The accident happened during the daytime when visibility was good. The District Court awarded the respondent damages against

the driver, the haulage company and the insurance company jointly, but dismissed her action against the State and the other driver involved.

Silberg J.: In all truth I must say that I would not oppose accepting the Jewish law principle of "the lien of R. Nathan", which creates privity between a person's creditors and his own debtor (see *Ketubot* 19a; *M.T. Malveh veLoveh* 2:6; *Hoshen Mishpat* 86:1). But in the actual circumstances of today, under Israeli law, this would require a basic revision, the time for which has not yet come without being preceded by a general codification of the law of obligations according to Jewish law principles.

Therefore, whether we wish to or not, we must adopt a stand regarding the decisive question at issue between the main parties in this case, which is the interpretation of the words, "who is not a passenger being transported in pursuance of a contract of employment and in accordance therewith", which appear in brackets in para. 2 of clause 1(b)(3) of the insurance policy in question. Doubt extends as to the meaning of "and" associated with "in accordance", whether it is disjunctive or conjunctive, with the result that if a person is travelling only "in pursuance" but not "in accordance", will his injury or death come within the liability under the policy?

Reason and common sense suggest that when an insurance company insures a client's vehicles against third party risks, the draftsmen of the policy will try to make it concordant with the statutory obligations of the owner of the vehicle; otherwise they would be involving the client in an offence under sec. 4(1) of the Ordinance and indeed seriously harm the reputation of the company. Our assumption is supported by the fact that the terms employed in the policy here are of a legal-technical nature ("in pursuance of", "in accordance with" a contract of employment) which demonstrates that the draftsmen had read and were aware of the statutory provisions.

According to sec. 6(1)(b)(ii) of the Ordinance, the insurance policy must cover liability for injury or death to a passenger carried *either* in pursuance of a contract of employment *or* in accordance (by reason of an unhappy translation) with such a contract. This shows that the legislature put these two possibilities not in a cumulative but in an alternative form. Logically therefore it is to be assumed that the present policy insures against injury or death caused to a third party who is travelling only in pursuance of or only in accordance with — but not both — a contract of employment. Were it not so, no insurance of any legal value would attach to the policy.

Counsel for the company urges with great force and emphasis: what about this pitiful "and" that precedes "in accordance"? Can it be erased? The policy here provides that "the company will not be liable (in the event

of) death or physical injury to any person (who is not a passenger being transported in pursuance of a contract and in accordance therewith)." "And in accordance" means "also in accordance." Thus the policy deviates from the statutory formula, and although the owner may be guilty of an offence under sec. 4 of the Ordinance, the company cannot be made liable in an event for which it undertook no obligation.

My answer to that is that the outcome of the action against the company should not depend on "and". In Hebrew, as we all know, "and" sometimes serves in the sense of "or"; for example, "and he that smiteth his father and mother shall surely be put to death" (*Ex.* 21:15), on which Rashi comments *ad loc.* "either of them"; "and every soul that eateth that which dieth of itself and that which is torn of beasts" etc. (*Lev.* 17:15); "A sojourner of a priest and a hired servant shall not eat of the holy thing" (*ibid.* 22:10) and the *Talmud* explains "a sojourner means one who is acquired for life, a hired servant means one who is acquired for a number of years" (*Yevamot* 70a); "but if a priest's daughter be a widow or (and) divorced and has no child" (*Lev.* 21:13). There are many other examples that can be cited. Since logic compels that the obligation under the policy should be brought as close as possible to the statutory obligation, we are compelled to attach to "and" the meaning of "or", a usage which is permissible in Hebrew.

26. Prostitute

Cr.A. 236/65

AL-BANA v. ATTORNEY-GENERAL

(1966) 19(2) *P.D.* 459, 462

The appellant was convicted for living on the earnings of a prostitute and arranging for his wife to have sexual relations with the person on whose evidence alone he was convicted. No such sexual relations took place, the wife having refused, although the appellant had obtained money and spent it on food. The incident was the only one proved, nor was there any evidence that the wife was ever a prostitute.

Silberg J.: The Penal Law Amendment (Prostitution Offences) Law of 1962 contains no definition of "prostitute" (*zonah*). Although this Law

is an Israeli Law with its original text in Hebrew, I would not say that the term must be interpreted according to its meaning in Jewish law, since the halakhic sources dispute the matter. (See *Yevamot* 61b where six definitions are given.)

In my view one must give the term its common meaning in spoken Hebrew — one who is licentious, ready to give her favors to any one ready to pay her. It is interesting that this is the meaning attached to the word in biblical Hebrew: "when Judah saw her he thought her a harlot (*zonah*)" (*Gen.* 38:15) on which Rashi observes, "because she sat at the cross roads"; "Take a harp, go about the city, thou harlot long forgotten" (*Is.* 23:16); "and under every leafy tree, thou didst recline, playing the harlot" (*Jeremiah* 2:20); "and (they) assembled themselves at the harlot's house" (*ibid.* 5:7). So also R. Akiva understood the word with regard to the women a priest may not marry (*Yevamot* 61b) as did Rabad in his critique of Maimonides, *M.T. Ishut* 1:4, regarding the cultic harlot. Another thing that distinguishes prostitution is payment for the favors given, as in: "to all harlots gifts are given" (*Ezekiel* 16:33).

It follows from the foregoing that the "prostitute" mentioned in the Law means a woman who is licentious and ready to have intercourse for payment. That has not been demonstrated in the present case.

27. "Abandon"

C.A. 622/75

AVNI *et al.* v. YONASH *et al.*

(1976) 30 (3) *P.D.* 203

This appeal turned on the question of whether the appellant had abandoned the apartment of which she was a protected tenant.

Schereschewsky J.: Taken literally, the word "abandon" (*zanah*) as found in the Bible means to leave, abandon, foresake (see e.g. *Lamentations* 2:7; *Ps.* 44:10, 24; 60:12; 74:1; 89:39)....The literal meaning therefore is complete disconnection, not confined to any particular matter.

28. "Entertain"

T.A. 2408/83
GOLAN v. YAVETZ
(1985) 2 *P.M.* 148, 157

The parties had engaged in a number of arbitration proceedings, the last of which centred upon whether to affirm or set aside an interlocutory award by the Registrar of Co-operative Societies and to decide upon the validity of an arbitration by a person appointed by the Registrar.

Harish J.: Golan had no substantial grounds for coming within the (statutory) requirements for setting aside an award, and that is most important. Even if he had such a ground, the first and main reason for denying his application is that it was made too late without any good reason. Hence the court was prevented from "entertaining" the application. That may mean one of two things; either the application is not heard at all, or the application as such is refused....Thus we find that "when one petitions in Aramaic, the Ministering Angels do not 'entertain' his petition" (*Shabbat* 12b), meaning that they do not listen to him. "If he possesses his own but does not wish to 'maintain' himself, we are under no obligation towards him" (*Baba Metzia* 31b), i.e., he is not provided out of what belongs to others, either as a gift or as a loan. It seems to me that justice requires us to understand the term ["entertain"] appearing in the Arbitration Law...in every case in a manner that doing justice requires.

29. Injury

See: THE COMPETENT AUTHORITY FOR THE PURPOSES OF THE INVALIDS (NAZI PERSECUTION) LAW, 1957 *v.* ENGEL, Part 7, Torts, p. 568.

30. "Applies"

F.H. 13/68
TEL-AVIV MUNICIPALITY v. LUBIN
(1959) 13 *P.D.* 118, 131-135

Sussman J.: The difficulties which have confronted us in this case stem from the addition of the words "destined for sale" in sec. 3 of the Local Authorities (Special Enablement) Law, 1956. Why did the legislature deem it fit to add these words, having regard to the fact that the section deals with pork and pork products "to which the limitation or restriction applies," i.e. the sale of which is prohibited in the area of the local authority...

Silberg J.: (The Hebrew word for) "to apply", "applies" and "apply" [from the root *hal*] is original Hebrew of ancient descent that almost does not lend itself to translation with conciseness and precision in any European language. Its central meaning is "to fall upon", "to go to", "to affect", which, however, has various shadings. In the Bible it is found in connection with troubles, fault, punishment, and the like (cf. *Hosea* 11:6, *II Samuel* 3:29, *Jeremiah* 30:23), but in the Talmudic era it was extended, in Hebrew and Aramaic, and "was applied" to the occurrence of a particular legal status, date or *prohibition*. What interests us here is the latter use. The most widespread and most well-known use of the word in this sense is found in the discussion of whether one prohibition can be attached to another prohibition (*Yevamot* 13b, 32a-33b; *Hullin* 101a-b; *Kiddushin* 77b; *Keritot* 23a and elsewhere). I shall not cite all the sources *in extenso* in which the word figures in this context but only some of them which will bring home the correct meaning of this "application".

> Does R. Jose hold the view that one prohibition applies to another? Surely, we have learned: a person who has committed an offence which involves two death penalties is adjudged on the more severe one. R. Jose said: He is judged by the prohibition that first attached to him. And it was taught: How is one to understand R. Jose's statement that sentence must be in accordance with the prohibition which came into force first? [If the woman was first] his mother-in-law and then became also a married woman, he is to be sentenced for [an offence against] his mother-in-law; if she was first a married woman and then became his mother-in-law, he is to be sentenced for [an offence against] a married woman (*Yevamot* 32a).

> "Where a person eats the sciatic nerve of an animal not ritually slaughtered, R. Meir makes him liable twice" (*Hullin* 101a)....Rashi explains *ad loc.* that the prohibition of the sciatic nerve applies from birth and before it dies without ritual slaughter but the meat is permitted; when it dies without proper slaughtering its meat, too, is prohibited.
>
> The reason why a prohibition does not attach to a prohibition is because he had already been warned (*Tosafot Rid* to *Kiddushin* 50b).

One final quotation that is most illuminating of the nature of "applicability" (application):

> R. Shimon said: If one eats carrion on the Day of Atonement, he is exempt from *karet* [excision] (because the prohibition on eating on the Day of Atonement does not apply to the prohibition on carrion) (*Kiddushin* 77b).

The question that arises is whether this rule applies to carrion that died on the Day of Atonement itself, to which Ritba replies: "Some explain that for this reason he is exempt in respect of the Day of Atonement...and it is not a simultaneous prohibition (if it died on the Day of Atonement) since in the case of carrion the prohibited amount is the equivalent of an olive whilst in the case of eating on the Day of Atonement it is equivalent to the size of a *kotebet*...(which is greater than an olive)" (see *M. Yoma* 73b and Rashi *ad loc.*) so that the offence of eating carrion is complete before the offence of eating on the Day of Atonement. (For "simultaneous prohibition", see *Yevamot* 33a). Ritba, however, rejects this view, drawing attention to the conceptual confusion it displays:

> This interpretation does not appeal to me, since we are not concerned with the guilt of the person who ate but with how the prohibitions apply (*Ritba* to *Kiddushin* 77b).

In other words, no difference of time can affect the question of the application of prohibitions. Thus we can see that the *applicability* of a prohibition is quite different from *transgressing* the prohibition. Applicability is conceptual, abstract, it creates a "nexus", pronounces a "warning" and confers on a particular matter the "status" of a "prohibited thing". The commission of an offence, on the other hand, is the tangible act which violates the obligation, ignores the warning and infringes on the status conferred on a thing by the legislator. There will always be an interval of time between the applicability of the prohibition and the offence against it.

So also with the Law before us. The concept of its application is completely identical with that of religious prohibitions, since it is impossible

to introduce any other content into this outstandingly Hebrew noun. By linking its applicability to the "destination" of sale "to which the limitation or restriction applies" the legislature manifested that it had in mind the intermediate situation that exists between the creation of the prohibition and the offence against it. If what is involved—as counsel for the respondent argues — is (a designation of) a "destination" which is the very offence, there is no "application" but an actual offence, and in regard to that the provision does not say "to which the limitation or restriction applies." The word "applies" is decisive in that the intent was not to a designation of destination which is, as it were, itself prohibited, but rather to a designation that embraces a future offence, and once again it must perforce be said that the legislature permitted "forfeiture before conviction" and even before an offence had been committed. I have no fears about the result, because — according to my viewpoint — the very confiscation will prevent the shopkeeper from being brought to trial. I think that the "scourge" of certain immediate confiscation will serve as a more effective means of eradicating dealings in swine than a maximum fine of IL. 100 which awaits an offender under sec. 7 of the by-law in question. Long ago it was said, with regard to the verse "Let sinners cease from the earth" (*Ps.* 104:15), "Let sins cease and not sinners" (*Berakhot* 10a). [A play on the words *hata'im* and *hot'im*].

Let no one accuse me of a legal anachronism and let no one cast the aspersion that I interpret modern legislation according to *Tosafot Rid* and Ritba. I know very well — to paraphrase the well-known dictum in *Baba Kamma* 2b — that one cannot deduce the meaning of what the Knesset says from scriptural texts. What I have endeavoured to do is to explain in general terms the meaning of words used by the secular legislature. This wonderful word "applicability", so rich in content, has somehow entered fully, in all its aspects, into modern Hebrew legal terminology and the presumption is that the Israeli legislature knew the significance thereof.

My learned friend, Landau J., finds support for the submission of counsel for the respondent in the various versions that were proposed between the original Bill and the final Law. With the greatest respect it seems to me that even were we to agree in principle to learning any legal lesson from the various versions and the Explanatory Notes, we would not be much the wiser about the problem before us. The withdrawal of the first version—"destined for food"—had a very simple purpose, i.e., to avoid the possibility of confiscation from the purchaser, so that it should not be a case of "Tobias sinned and Zigud is punished" (see the wonderful story related in *Pesahim* 133b). It was not intended to avoid confiscation of the meat from Tobias himself who, either as butcher or shopkeeper, intended to commit an offence by selling it.

As for the explanation given by a member of the Knesset, Mr. Y. Sharavi, regarding the variations of text, they are also correct, although they do not quite "explain". One thing is certain. If confiscation from the purchaser had been permitted, interference with the private life of the individual would have been much greater and more prejudicial, even if only arithmetically, because the seller is one and the buyers many.

The submission of respondent's counsel cannot, therefore, derive much benefit either from the alternative versions or from the Explanatory Notes. The interpretative value of these should not be exaggerated. We should not inquire into the "ifs and ands" to gather the true intention of the legislature.

31. Partition

C.A. 165/79

DIRECTOR, LAND APPRECIATION TAX v. COHEN *et al.*

(1980) 34(3) *P.D.* 284, 287

Asher J.: I cannot, with all respect, concur in the decision of the Committee. In my view, in both cases the necessary elements under sec. 67 of the Land Appreciation Tax Law, 1963, were not present. This section deals with a sale consisting of a partition (*halukah*) of land and not with a sale consisting of an exchange of non-specific parts by joint owners of land.

In ordinary speech, "partition" in relation to property means the breaking up of the property and its separation into parts. In explaining "to partition" and "partition", Even-Shoshan's Dictionary refers us to such sources as "and they divided the land" (*Joshua* 14:5)..."thou and Ziba divide the land" (*II Samuel* 19:30). The inference is that what is intended from the outset is a physical division of a single entire property.

32. Amnesty

F.H. 13/60

ATTORNEY-GENERAL v. MATANAH

(1962) 16 *P.D.* 430, 463-464

The respondent was sentenced to three years imprisonment for attempted murder. His sentence was reduced, after he had served some sixteen months, to sixteen months imprisonment and twenty months suspended sentence. Thereafter he was again convicted of attempted murder and sentenced to four years imprisonment and the previous suspended sentence was applied consecutively. On appeal, the application of the suspended sentence was set aside.

Cohn J.: In Hebrew the concept of "amnesty" (*haninah*) has, from the earliest of times, embraced an element of free will, unrestricted even as to the extent of arbitrariness. Rashi explains the passage, "I will be gracious (*hanoti*) to whom I will be gracious, and will show mercy on whom I will show mercy" (*Ex.* 33:19) as meaning, "I will be gracious those times when I wish to be gracious." And the *Midrash* (*Ex. Rabba*, 45) sees a connection between "being gracious" (*haninah*) and a "free gift" (*hinam*): "To him who has not, I give freely, since it is written 'I will be gracious to whom I will be gracious', to him to whom I wish to be gracious." *Tanhumah* adds: "It does not say 'To him who has been graced' but 'to whom I shall be gracious' ", which Solomon Buber explains: " 'To him who has been graced' means one who has already been graced by his own good deeds, but 'to whom I will be gracious' means 'on whom I will spread My mercy for the moment even if he is not worthy.' " The Gemara also tells us that R. Meir said that God will be gracious and show mercy even to him who does not deserve it (*Berakhot* 7a), and the *Midrash Lekah Tov* adds: "One may not be of two minds about the ways of God and ask why there are righteous people to whom good befalls and righteous to whom evil befalls, evil people to whom good befalls and evil people to whom evil befalls — 'there is a time for every purpose and for every work' (*Eccles.* 3:17); to teach you that for every human being there is an accounting and no one should despair of the day of judgment" (On *Ex.* 33:19).

33. "Non-Urban"

C.A. 20/60

D'GEI DO'AR LTD. v. DIRECTOR, RATES OF COMPENSATION FOR WAR INJURIES

(1960) 14 *P.D.* 1933, 1936

Cohn J.: The word "hakal" is Aramaic with the same root as the Hebrew "helek", "helkah" (plot) which means a field. In Aramaic as well, "hakal" and "helek" are interchangeable (see Onkelos to *Gen.* 49:32) and the Targum to *Prov.* 23:10; *Micah* 2:4; *I Chron.* 8:8).

At first the "hakla'i" was simply a land worker, but by Talmudic times its meaning had already been broadened and a distinction was made between "townspeople" and "country folk" (*Bnei haKlita*) as regards the style and cut of their clothes (*Shabbat* 12a), as well as their taste in food—the *rihata* of *hakla'i* contained a large amount of flour whilst that of townspeople had less flour, but had honey as its main ingredient (*Berakhot* 37b). And it was said of the rural dweller that even when he becomes a king he does not take his basket from off his back (*Megillah* 7b).

It seems therefore that if, etymologically, the original meaning of a "meshek (household) hakla'i" was merely a farmstead, in the broader meaning the term came to embrace every non-urban economic unit.

34. Suspicion

See: SAHAR v. ATTORNEY-GENERAL, Part 5, Evidence, p. 367.

35. "Idiot"

Cr.A. 523/72
AZRAN v. STATE OF ISRAEL
(1974) 28(1) *P.D.* 128, 136

The appellant appealed against conviction for insulting behaviour towards a public official.

Cohn J.: It remains for me to say something about the insult contained in calling the local council clerk an "idiot" (*metumtam*, moron). If learned counsel did not spare us...the argument that there is no insult in a person's idiocy, it was only because he thought—although he did not say it—about Abraham and Sarah, may they rest in peace, of whom R. Ammi said that they were *tumtamim* (*Yevamot* 64a), and there is no need to say that there was nothing further from the mind of R. Ammi than to defame them. If the truth be told, however, the *timtum* of Abraham and Sarah was a physiological phenomenon (they were originally of doubtful sex), a matter which does not concern us here, whereas the *timtum* of the local council clerk, as the appellant understood and intended it, is not a physical blemish but a mental one. Such *timtum*, according to our sources, is caused by a certain relish *kutah*, because it contains milk whey and closes up the heart (*Pesahim* 42a). The closing up of the heart that comes from eating strange (vinegary) food may be in the nature of a disaster, but certainly not an insult. But our early rabbis also taught us that sin closes up the heart: "Ye shall not make yourselves detestable with any swarming thing that swarmeth, neither shall ye make yourselves unclean with them that ye shall be defiled thereby" (*Lev.* 11:43); "Do not read 'Ye shall be defiled' (*nitmetem*) but 'Ye shall become dull-hearted' " (*nitamtem*) (*Yoma* 39a). Thus a person may become close-hearted when he transgresses.

In modern terms, *metumtam* indicates the closing of thought processes, either generally or particularly. It is immaterial that such closing comes from the state of one's health or from evil-mindedness or from gluttony (as some urge) or from excessive authority. In any event a person is insulted and disgraced if his thinking has ceased, for what distinguishes such a man from the beast? The deeds or conduct or reaction of a person may create the impression that he has stopped thinking, if only temporarily, and then it is only humanly natural that he should be reproached in one way or another; calling him *metumtam* is not the most polite or legitimate way of doing that.

36. Jew

See: RUFEISEN v. MINISTER OF THE INTERIOR, **Part 1, Jewish Law in the State of Israel, p. 46.**

H.C. 113/84

BANKOVSKY v. HAIFA RABBINICAL COURT

(1985) 39(3) *P.D.* 365, 373

In the course of an action for the division of marital property, it emerged that the conversion of the petitioner was a nullity and as a consequence the marriage was void and the petitioner could make no claim to the so-called marital property.

Weiss J.: It is not clear to me why the rabbinical court found it necessary to deny the Jewishness of the woman. True, it is a long-established rule that we do not sit on appeal against a decision of a rabbinical court nor go into the question of whether its judgment conforms to Jewish law. Authority lies with the Supreme Rabbinical Court to hear final appeals against a District Rabbinical Court. However, brief and even superficial examination of the various sources of the ***halakhah*** shows that to deny the Jewishness of a convert is not a simple matter at all. It was unclear to the Sages of Jewish law whether a convert who reverted to his old ways becomes a complete gentile and his conversion is void *ab initio* (see I.Y. Unterman and O. Yosef in 13 *Kovetz Torah sheBe'al Peh* (1971) 13-20, 26-32, and the opinion of R. Zolti in *H.C.* 467/75 *Hutchins* v. *Minister of the Interior et al.* (1976) 30(3) *P.D.* 148 at 153). But all that is only to avoid conflict and we have no powers to doubt these decisions. We must deal with the situation before us (see M. Shawa, "Jurisdiction of Rabbinical and Civil Courts in Matrimonial Cases (*C.A.* 359/67)", *haPraklit* (1969- 70) 617).

37. "Intended"

See: LUBIN v. TEL AVIV-JAFFA MUNICIPALITY , p.883.

38. "Dwelt"

See: Dweller, Resident

39. "As One"

Cr.A. 135/59

HED v. ATTORNEY-GENERAL

(1960) 14 *P.D.* 1501, 1504-1505

This appeal concerns the kidnapping of a child by the mother, who took her abroad without the husband's consent and against his wishes.

Berinson J.: The really important question is who is authorised in point of civil law to consent on behalf of a child: the father alone or the mother, or both together? The answer depends on the interpretation of sec. 3(a) of the Women's Equal Rights Law, 1951, which provides: "Both the mother and the father are together the natural guardians of their children; where one parents dies, the survivor is the natural guardian."

The word "together" (*k'ehad*, "as one") means according to the different sources and dictionaries together or jointly; simultaneously; jointly or severally ("thou knowest not which shall prosper, whether this or that, or whether they both (*k'ehad*) shall be alike good"—*Eccles.* 11:6).

In what sense did the legislature use the word here? Silberg J. in his *Personal Status in Israel* (p. 411) states that "its meaning here is that natural guardianship is combined in the two parents; neither takes precedence over the other, both together represent the child and may act in its name." Counsel disputes this interpretation and argues that the general purpose of the Law in conjunction with the marginal heading "Equal guardianship" points to the intention that each of the parents is a natural guardian of the child and may act on its behalf by himself or herself. I do not agree for a number of reasons.

40. "Office"

H.C. 59/52

RAPPAPORT v. MAYOR OF NATANYAH *et al.*

(1952) 6 *P.D.* 492, 493, 494-495

Assaf J.: The petitioner is a member of the Netanya Town Council elected on the Histadrut list. The first respondent is the Mayor of Netanya, elected on the General Zionists list. The second respondent, the Deputy Mayor, was elected on the Herut list. In September 1951, some months after being elected Deputy Mayor, the second respondent was taken on as a part-time paid teacher in the Bialik School in Netanya with the consent of the Mayor. Thereafter, on 1 February 1952, the Mayor informed the second respondent that the appellant was contesting his membership on the council in view of his employment as a teacher. The second respondent immediately stopped teaching and irrevocably repaid the salary he had received in the intervening months...

Sec. 45 of the Municipal Corporations Ordinance (Amendment) Law, 1950, provides: "The following are disqualified from officiating as members of a council." Counsel for the respondent advanced two complementary arguments:

(i) In using the word "disqualified" (*pasul*) the legislature had in mind the meaning that the word possesses in Hebrew. No disqualification is perpetual which cannot be remedied to make the person concerned reeligible. Thus we read in *Sanhedrin* 24b: "These are ineligible [to be witnesses or judges]: a gambler with dice, a usurer, a pigeon trainer and a trader in [the produce of] the Sabbatical year." A *beraita* lays it down that all these may become eligible again on repenting from their sinful acts (*ibid.* 25b). "When are [usurers] deemed to have repented? When they tear up their bills and reform completely", so that they do not lend money on interest even to a Gentile. Thus the disqualification is temporary and may be set aside. Hence it may be inferred that the disqualification of a paid municipal employee is also temporary and not permanent; he does not cease to be a member of the council but is disqualified from exercising his functions as long as he remains a paid employee, but after giving up employment, and, needless to say, after returning the salary he received, he becomes eligible once again.

(ii) "Disqualified from officiating". Here, according to counsel for the respondent, the intention is "disqualified from actually carrying out his

functions", without making him cease to be a member of the council and removing him from the roll of its members. In support, he turns to sec. 49 which provides that a council member who has been absent from its meetings for three consecutive months ceases to be a council member, unless his absence was due to ill-health or by reason of service in the Army or with the council's permission: "Ceases" (*hadal*) automatically, and he no longer serves as a council member, whereas sec. 46 does not provide "the following cease to be members of the council."

After considering the matter, it seems to me that we cannot accept the argument of counsel. "Disqualified from officiating" must be understood as disqualified from serving as a council member. "Office" is a part of service, as Scripture expressly says: "Put me, I pray, into one of the priest's offices" (*I Samuel* 2:36); "Aaron also and his sons will I sanctify to minister unto Me in the priest's office" (*ibid.* 44). The draftsman of the Law of 1950, amending the Municipal Corporations Ordinance, used the word "officiating" not in the sense of carrying out an actual function but in the sense of an appointment and service. The amended sec. 9(2)(a) reads "in a municipal corporation where a council is officiating" and subsec. (33), "in a municipal corporation where a municipal committee is officiating." A member of a council disqualified by virtue of sec. 46 ceases therefore to be counted in the number of members thereof. The difference between secs. 46 and 49 is that the latter does not relate to a member disqualified by reason of personal disqualification under the Law but by reason of his lack of activity due to absence from meetings; thus if he is absent with permission of the council he may continue to be a member. Under sec. 46, however, the consent of the council cannot remove the disqualification. The disqualification is indeed not permanent and the disqualified person may stand as a candidate in future elections, but he cannot return to his office on the council of which he was a member after he becomes disqualified from officiating therein and ceases to be a member.

41. "Includes"

C.A. 263/60

KLEINER *et al.* v. DIRECTOR OF ESTATE DUTY

(1961) 14 *P.D.* 2521, 2551-2552

The property of a testator who was never resident in Israel was vested in the Custodian of Absentee Property. The testator had died in 1952 and the property was released to the appellants in 1960 upon their application. The property had never been in the possession of the Custodian and he had not paid any estate duty thereon. The appellants argued that, being absentee property, it is not to be treated as a deceased's estate and that a distinction must be made between a vesting by way of succession and a vesting, even in an heir, by way of release by the Custodian. The District Court held against the appellants.

Cohn J.: Since at the date of his death the property was not in the ownership of the deceased and does not figure among the property listed in sec. 3(a)(2-5) of the Estate Duty Law of 1949, it is not part of an "estate" on which tax is to be imposed. And since the said property was not in his ownership at his death and does not so figure, no estate duty is chargeable.

This conclusion is confirmed by the leading rule that no tax or compulsory payment is to be imposed except under legislation which charges it in unambiguous terms: *Oriental Bank* v. *Wright* (1880) 5 *A.C.* 842, 856. The fact itself that the court would regard it as discriminatory or unjust that one estate is charged with duty and another exempt does not justify the imposition of a tax where the terms of the statute do not necessarily require it. As Lord Cairns said in *Partington* v. *A.G.* (1869) *L.R.* 4 *H.L.* 100, 122, "If it is permissible to construe any statute in an equitable manner, that is certainly not the case with a statute that imposes a tax, where the terms of the statute must alone be adhered to."

Hence, were it not that the word "includes" in point of linguistics admits of a meaning other than that which the learned President of the lower court attached to it in his judgment, I would admit that, in spite of all the questions and difficulties that attend the construction of secs. 1, 2 and 3 of the Law in one connection, the word "includes" should be given the single meaning which it can, as it were, bear, and the result might well have been that at which the learned President arrived. It appears, however, that the correct meaning of "includes" is to embrace everything and not to leave anything unincluded. "A Roman matron once asked R. Jose why with

regard to the second day of the Creation it does not say 'it was good'. He replied: Everything was included at the end, when 'God saw everything that He had made and, behold, it was very good' " (*Midrash Rabba, Gen.* 4:8). The word is also found to comprehend disparate things (see *Y. Berakhot* 2:4-5 and *Shevuot* 23b).

But everywhere, "includes" lays down a rule which embraces everything without leaving anything unincluded and I fear that the English translation in the sense of inclusiveness without being exhaustive does not fit in with the Hebrew.

42. Molestation

Cr.A. 247/71
STATE OF ISRAEL v. BAHJAN *et al.*
(1972) 26(1) *P.D.* 76, 84

This was an appeal against dismissal of a charge under sec. 121A of the Criminal Code Ordinance (molestation of witnesses) on the ground that the section had been erroneously construed as meaning that it was necessary under the section to prove that the accused intended the witness to give false evidence as a result of the molestation.

Cohn J.: However it seems to me that "the intent to frustrate" (*hakhshalah*) the testimony does not have to be an intent to frustrate it completely, either because it will be rejected as false or because it is not given at all. It is sufficient for the intent to place some barrier in the way of the witness giving his evidence as he intended. Generally "to frustrate" goes to a person and not to an act. Once only in Scripture do we find, "He hath made my strength to fail" (*hikhshil, Lamentations* 1:14). But even when "strength fails" (*Ps.* 31:11; *Nehemiah* 4:4) and the knees "totter" (*koshlot, Is.* 35:3; *Ps.* 109:24), they still continue to exist in spite of their "frustration"; they are merely weakened and enfeebled and are unable to assist their owners sufficiently at a time of stress. That is also the case when "truth has stumbled" (*kashlah, Is.* 59:14) and uprightedness cannot enter the broad place but always stands at a distance. So also with the frustration of testimony; even if the "molester" knows that it is to be given, even if he knows that the testimony to be given is what the witness intends to

give, it is enough that the testimony will be frustrated, hesitant, faltering or irresolute. In this respect the intent "to frustrate" is parallel to the intent to impair the credibility of the witness.

43. Possessed

M. 89/51

MITOVA LTD. v. KAZAM

(1952) 6 *P.D.* 4, 6-7, 11-12, 16

Silberg J.: The outcome of the present application for leave to appeal — which by consent of the parties came to be treated as the appeal itself — depends upon and will be decided by the answer to the question of whether a debt due to an absentee person is "property" within the meaning of the Absentees' Property Law, 1950. Doubt arises over the application of the definition in sec. 1(a) of the Law...

It appears to me that the appeal should be accepted. Counsel for the appellant very ably analyzed several sections of the Law, from which it emerges indirectly that the intention of the legislature was to include a debt under "property". In my opinion, however, all this evidence is unnecessary and the labour was in vain. The answer to the question is to be sought and found in the very definition provided in subsec. (a), and the learned judge erred in thinking that "the words to which attention is to be paid in this instance are 'moneys' and 'a right in property'." The learned judge did not bother to read to the end of the sentence and he overlooked the final words. The whole subsection reads as follows: " 'Property' includes immovable and movable property, moneys, a vested and contingent right in property, goodwill and any right in a body of persons or in its management."

The terms "vested" and "contingent" [in Hebrew] in their distinctive senses are not part of common speech. They are legal terms, manifestly borrowed by the legislature from the sources of Jewish law, giving a patent Hebrew form to the legal substance of the parallel terms "choses in possession" and "choses in action", as will be explained later.

The first legal source for the said Hebrew terms is the *Mishnah* in several places, among them the *Mishnah* in *Bekhorot* 51b:

> The firstborn takes a double share of the father's estate but...does not take (a double share of) the improvement (of the estate) nor of what will fall due (to the estate) as he does of what is held in possession.

The reason as the *Gemara* explains at 52a, is because Scripture says "by giving him a double portion of all that he hath" (*Deut.* 21:17), that is, what the father happened to have in his lifetime. Again in *Baba Batra* 125b we read:

> R. Papa said: ...the firstborn does not receive a double portion of a prospective (contingent) (part of the estate) as of that which is in possession (vested) nor does he receive a double portion in a loan (owing to the father) whether they (the heirs) levied it in land or in money.

Rashbam *ad loc.* explains that the last rule arises from the fact that "neither the land nor the money was left to them by their father, but was something contingent." Maimonides, *M.T. Nahalot* 3:1, puts it as follows:

> The heir does not take a double portion in property that may prospectively fall in after the death of his father but only in property actually possessed by the father, that had already fallen into his domain...

Cheshin J.: I concur with my learned friend Silberg J. in granting the appeal and for the reasons he has given. His argument is well-ordered and does not require affirmative support. I do not intend to add anything to his observations but rather, with all respect, to restrict them, not on the merits of the case but as regards general principle.

The path Silberg J. followed in seeking a solution to the problem that has arisen here—an immeasurably honourable path—may serve as an opening to an important, lengthy and complex chapter in the law of interpreting original Jewish legislation enacted since the Declaration of Independence and that which may be enacted in the future by the legislative arm of the State. As we know, the genesis of every statute is in the legislature. There it is born, there it receives form and content, and there it obtains the breath of life and it first sees the light of day. But at the point where the legislative labour is completed, the work of interpretation commences. During Mandatory times in this country, that work did not encounter any particular difficulties, even with regard to the Jewish judge who read the law in translation and wrote his judgment in Hebrew. The English language was then predominant and the other two languages, Hebrew and Arabic, were only auxiliary languages and the law provided expressly that in the event of any inconsistency between the English version of an

enactment and the Arabic or Hebrew versions, the English version should prevail (sec. 34 of the Interpretation Ordinance of 1945). This provision, in conjunction with the basic principle behind art. 46 of the Palestine Order in Council, opened the door wide for the interpreter to the rich English jurisprudence from which he could draw exhaustive legal material regarding the construction of words and phrases which the legislator employed in the original English version of an enactment, and likewise the modes and rules of interpretation.

When the State was established, deliverance came to the Hebrew language as well. The English language was made to yield its dominance and the Jewish judge was freed from the fetters of translation by which he had been restrained during the Mandatory period. Hebrew became the original language of all laws, regulations and orders. At this point the legislature was faced with one serious difficulty...on the one hand, it was not released - and in the nature of things could not be released overnight — from the mass of laws left over by the outgoing governmental authority. On the other hand, the need arose to introduce amendments and changes in the body of such laws, as well as to enact new laws for the purposes of the reborn State. The legal thinking of the legislature, of the legal draftsmen and also of those who interpreted the law continued—as it will continue for a long time—to nourish itself from English law, whilst the law itself—whether it was entirely new or an amendment of an existing law -needed an original Hebrew "attire", i.e. it had to be given expression in an organic basic Hebrew, and not make do with a variable literal translation of foreign thought. No wonder, therefore, that in completing the process of renewing our ancient political life, the aspiration grew to revive also the forms of original Hebrew idiom. To this end the legislature has turned to the treasures of our ancient culture, primarily to the *Mishnah* and *Talmud* and gathered from there the age-old modes of expression in order to inject into them new concepts. It is like filling an old bottle with new wine. In the nature of things, however, the form does not always fit the matter injected. It happens that the legislature, or the legal draftsman, has mingled unlike things; sometimes the exact form has not been found and in an emergency what is thought to be the nearest and most appropriate has been chosen for the task at hand. The interpreters of the law, therefore, bear the duty to exercise great care when embarking on their task. It would be a gross error to construe, for example, every term and expression in our laws according to the context of the *Mishnah* or *Talmud* where it appears, although it is abundantly clear that the term or expression is taken from that particular source. Thus, we may not construe the terms "promissory note", "loan", "encumbrance", "partnership", "abandoned" or "absentee's property" and like legal terms and expressions as they are

construed or defined in Jewish law, although there is no dispute that they are culled from the ancient treasury of Jewish thought and law. The vessels have been borrowed from one place, but their contents are original or taken from another place. I have no doubt that the day will come when legal scholars will provide us with a legal lexicon to which the official seal of the legislature will be attached, and this lexicon, or at least an authorized statute of interpretation of wide proportions that will precede it, will render the difficult path of the interpreter easier. For the moment, it seems to me, one must adopt the following rule of construction: whenever the court is required to interpret a legal term found in any enactment since the establishment of the State, and the term is also to be found in our ancient literary sources or is borrowed therefrom, it may address itself to these sources in order to shed light on its meaning and determine the concept it embraces. This applies, however, only if after comparing the two, it is beyond all doubt that the rules emerging from the law and the ancient source are alike within the framework of the subject at hand or that the legal concept embedded in the source is broad enough to include the legal concept to which the legislature has sought to give expression against a new background by the term it has "borrowed".

Schereschewsky J.: It is unnecessary to go deeply into this question for the purpose of the present matter since the Law includes in its definition of "property" in sec. 1(a) both vested and contingent property. I have, however, found it right to make some remarks in consequence of what Cheshin J. has said in order to show how great is the need to be cautious if we wish to use the legal ideas of Jewish law for construing expressions that appear in the enactments of the Israeli legislature, which although identical in form are not identical in content.

44. Qualified Halakhic Authority

See: DAYAN v. MINISTER OF RELIGIOUS AFFAIRS *et al.*, Part 3, Social and Administrative Regulation, p. 154.

45. "Cooperative Settlement"

H.C. 421/77

NIR *et al.* v. BE'ER YAAKOV LOCAL COUNCIL

(1978) 32(2) *P.D.* 253, 262-263

This petition turned on the refusal of a local council to give approval to education outside the State school system for the children of the petitioners who constituted an agricultural cooperative.

Elon J.: Moreover, if the idea of a *moshav* (smallholder's settlement) in sec. 1 of the Compulsory Education Law, 1949, is divorced from the usual definition of a *moshav ovdim* or *moshav shitufi* (two forms of cooperative settlement) that form a distinct and separate municipal entity (see sec. 1 of the Local Councils (Regional Councils) Order, 1958, and reg. 1 of the Cooperative Societies (Membership) Regulations, 1973) and is taken to embrace every society having cooperative agricultural objectives — even the most lofty — we will be opening the door to a multiplicity of local education authorities, not necessarily agricultural. *Moshav* by itself has various meanings, among them "a group of people dwelling together" (on the basis of *Ps.* 1:1 and 107:32), or "people dwelling in one place" (on the basis of *II Samuel* 9:12), as detailed in the dictionary of Ben Yehudah. Now, every group of people who pursue a way of life in common or have common educational and scientific aims, would be called a local education authority. Of these the Sages said, "you should not form separate sects" (*lo titgodedu*), "do not heap on groups" (*agudot*, *Yevamot* 14a), or, for our purposes, do not create an abundance of authorities.

46. Measure

H.C. 586/85
A. *et al.* v. B.
(1976) 40(1) *P.D.* 483, 489-490

The three judges of the Military Appeals Tribunal were divided in their opinion concerning the sentence that should be imposed on the petitioners who had been convicted. One judge prescribed imprisonment for three months, another, imprisonment for 45 days, and the third, a conditional prison term. According to sec. 392 of the Military Justice Law, 1955, the judge who proposes the harshest sentence is deemed to have concurred in the opinion of the judge who proposed the sentence which was closest to his own. The petitioners argued that the closest sentence, from the point of view of severity, to that of the judge who prescribed three months of actual imprisonment, was that of the judge who proposed a conditional three month prison sentence, and that the petitioners should therefore be sentenced to a conditional three month term.

Elon J.: The Court imposed one type of punishment, i.e. imprisonment, and it is entitled to instruct that the implementation of that punishment should be, either wholly or partially, conditional. This provision concerning the discretion to prescribe either actual or conditional imprisonment is a matter of the measure of punishment: in other words, the punishment of imprisonment, just as it can be applied in the measure of one month, in the measure of six months, in the measure of one year and so on -- and all within the framework of the maximum sentence prescribed by law for the particular offence -- may also be applied immediately, or it may be applied conditionally, and this, too, must be within the bounds of the maximum period prescribed by law. As such, the word "measure" (*middah*) in Hebrew means not only a fixed measure of length, height, etc., but it also means manner and mode: "But Ben Azai said to him: This is not in accordance with the established rule [*middah*]. Nay, rather, they set apart therefrom the wages of the craftsmen" (*M. Shekalim* 4:6); "One who occupies himself with Scripture [only] is learning in an incomplete fashion; one who occupies himself with Mishnah [only] is learning in a manner that brings no reward; one who occupies himself with Talmud - there can be no greater satisfaction" (*Y. Shabbat* 16:1); we find "the measure of law and the measure of mercy", meaning the way of law and the way of mercy: "measure for measure" (*Nedarim* 32a) which means that the recompense should be in accordance with the deed, and in similar vein,

"In the measure with which a man measures it is meted out to him" (*M. Sotah* 1:7; and see in the Ben-Yehuda Dictionary, and the Even Shoshan dictionary, under the entries "*maddad*", "*middah*").

47. "Money"

C.A. 505/79

ELIYAHU INSURANCE CO. LTD. v. TZEIG *et al.*

(1981) 35(2) *P.D.* 123-124, 137-138

The two main issues in this appeal were (i) whether a driver's insurance company can be sued for compensation in respect of a car accident without joining the driver himself, and (ii) whether there is to be deducted from the compensation awarded to the husband and dependents of a woman who had been killed in an accident the money saved by her death. The District Court had held that the driver must be joined and that no deduction was to be made.

Cohn D.P.: From the viewpoint of the Hebrew language the term "money" (*mammon*) has a very broad meaning and may include every tangible thing even if not expressible in terms of money. The debate of the Talmudic rabbis whether benefits come within the definition of money (*Pesahim* 46b; *Nedarim* 85a; *Kiddushin* 58a-b; *Baba Metzia* 11b), whether a thing that yields money is money (*Ketubot* 34a; *Baba Kamma* 71b, 98b, 105b; *Shevuot* 32a-33a), whether physical injury is included in pecuniary damage (*Baba Kamma* 4a, 23a, 31a and elsewhere) and whether indemnity for mental anguish is a monetary indemnity (*Avodah Zarah* 67a, *Nedarim* 41b), all these demonstrate the proposition that in the present case it is immaterial whether the rule is that a benefit comes under money or does not—what is determinative is that here the concept of "money" can linguistically carry the meaning of benefit as well. The view that a thing that yields money is like money can serve us as firm ground for the assumption—that would lie behind any estimate of the material loss caused by the death of a person who contributed nothing to the family funds—that there is no person whose very being alive and continued existence is not, in practice, a source of money, and that his death and departure is not in fact a pecuniary loss.

48. Delivery "into His Hands"

H.C. 461/81

DAVID v. NATIONAL DISCIPLINARY COURT, ISRAEL BAR ASSOCIATION

(1982) 36(1) *P.D.* 779, 783

The issue here was whether a decision of the disciplinary court sent by hand to the petitioner, which he refused to accept and which was returned unopened, was properly delivered in accordance with the relevant rules of procedure.

Elon J.: In my opinion, the words "service...by delivery into the hands of..." in Rule 77 of the Chamber of Advocates Rules (Procedure in the Disciplinary Courts) means delivery not only in the physical sense of a person's limb but also in the technical sense of delivery into the power and control of the person concerned. I reach this conclusion because of the plain common meaning of "hand" in a context such as the present and because of the logic of the situation. The term "hand", in addition to its physical meaning...bears many connotations, like "the hand of a king" (in abundance), depending on the context in which it appears. One frequent and common meaning is authority, supervision and control, which I need only exemplify by the following verses: "And the Lord delivered them into the hand of Israel" (*Joshua* 11:8); "And the kingdom was established in the hand of Solomon" (*I Kings* 2:46). So also in the *Talmud*: "If a person says to another, 'I have no claim whatsoever on this field, I have no concern with it, and my hand is removed from it (I entirely disassociate myself from it)' " (*Ketubot* 83a); "A man who has sinned (has a sin in his hand) and confesses but does not repent" (*Ta'nanit* 16a). This is an extensive theme. In *Deut.* 24:1, "and he writeth her a bill of divorcement and giveth it in her hand"—is construed by the Sages to include delivery of the bill to the house of the woman and not actually into her hand (*Gittin* 77a). "R. Yishmael taught: 'And he took all his land out of his hand, even unto the Arnon (*Num.* 21:26), does this mean actually from his hand?....From his control' " (*Y. Gittin* 8:1). Thus, in construing the meaning of Rule 77, as above, we may conclude that service of a document must be by delivery into the domain of the recipient, so long as the owner of the domain knows that the document has been so delivered, as the context of the relevant paragraph implies....The same is also logical, for who would imagine that if a document is placed on a table at which the recipient is sitting, that would not be delivery "into his hands", when the latter sees it being placed there before him, as was the case here?

49. Act of Prostitution

Cr.A. 236/65
AL-BANA v. ATTORNEY-GENERAL
(1965) 19(2) *P.D.* 459, 463

Silberg D.P.: "A person who knowingly receives something that has been given for an act of prostitution" etc. (sec. 1(a)(2) of the Penal Law Amendment (Prostitution Offences) Law, 1962)...

The legislature was specific, saying "something that has been given for an act of prostitution," and not "something that has been received." That is to say, it is not the purpose of the receiving which is the main thing, but the purpose of the giving. Here the purpose for which the money was given was a future act of prostitution. Although it was not shown that the woman was "a prostitute", the person giving the money wanted it to be in consideration of "an act of prostitution." Not every act of prostitution is the act of a prostitute, just as not every foolish act is the act of a fool; even a prudent person will sometimes commit a folly, witness the Midrashic commentary: "Korah was an intelligent person but why did he see fit to commit this folly?" (*Num. Rabba* 18:7). A woman who is not a prostitute, who engages in sexual intercourse for payment, commits an act of prostitution, especially as here where the woman was married and was living with her husband. Even though in fact she did not have sexual intercourse, the money was given for an act of prostitution, so that intercourse should take place. The defendant received the money from his wife, knowing why it had been given to her. Hence every condition of sec. 1(a)(2) of the Law was met and we must convict him of the offence.

50. Distress

See: ILIT LTD. *et al.* v. ELKO LTD., Part 6, Penal Law, p. 475.

51. "Had Been Required"

Cr.A. 835/79
BAKAL v. STATE OF ISRAEL
(1980) 34(4) *P.D.* 548, 549, 551

Cohn D.P.: The appellant was convicted in the Jerusalem Magistrate's Court of sixteen offences under sec. 117(b) of the Value Added Tax Law, 1975, for not filing sixteen periodic returns in accordance with sec. 67, with the intention of evading payment of the tax. The District Court dismissed his appeal against conviction...

I fully agree with the learned judges of the District Court who argued that the phrase "he had been required" (*nidrash*) (in sec. 117) includes that which is required under the Law as distinct from what is required by some human being. This is what the prophet meant when he spoke of "My people who have sought (required) of Me without My being asked," (*Is.* 65:1) as explained by Kimhi *ad loc.*. But the mere possibility of such an interpretation is not enough. We must examine the terms used by the legislature in this particular enactment and see what meaning it intended to attach to this term in the special context of the enactment. (Only if such examination does not yield a solution will it be proper to look at other enactments dealing with similar and related matters.)

52. Encumbered Property

See: BOKER *et al.* v. ANGLO-ISRAELI MANAGEMENT...LTD. *et al.*, Part 9, Property—Physical and Intellectual, p. 736.

53. Hebrew

H.C. 18/72

SHALIT v. MINISTER OF THE INTERIOR *et al.*

(1972) 26(1) *P.D.* 334, 336

The petitioner, whose two children were registered by virtue of a decision of the High Court of Justice as members of the Jewish nation, is seeking to register his third child as a Jew in the Population Registry, and alternatively, as a member of the Hebrew nation. His request was denied by the Ministry of the Interior, in view of the provisions of sec. 3A of the Population Registry Law.

Berenson J.: The petitioner does not claim that the mother is Jewish—and from an earlier case, we know that she is not Jewish—and neither does he claim that the child was converted. This means that the refusal to register the child as a Jew in the rubric of "nation" was lawful. In our opinion, this also applies to registration of the child as belonging to the "Hebrew" nation. Such an entry would constitute evasion of the law, since in both theory and fact there is no difference between the Jewish nation and the Hebrew nation, and both these names, as well as that of Israel, are simply synonyms, and no substantive distinction is made in the use of these terms, neither in the sources nor in spoken language.

The father of the nation, the Patriarch Abraham, is called "Abraham the Hebrew" in the *Torah* (*Gen.* 14:13), and as Ben Yehuda explains in his dictionary, this term is used in the Bible mainly to distinguish between an Israelite and a Gentile, and in general, the term "Hebrew" means "a person from the nation of Israel". We have even found in one passage in the Bible that the two terms are used consecutively, with identical meanings, as in *Jeremiah* 34:9: "That every man should let his man-servant, and every man his maid-servant, being a Hebrew man or a Hebrew woman, go free; that none should make bondmen of them, even of a Jew his brother". Even-Shushan's *New Dictionary* also indicates the identity between Hebrew and Jew. "Jew" is defined as a "Hebrew, Israelite, member of the nation of Israel", and "Hebrew"—as "Israeli, Jew, a person of the seed of Abraham, Isaac and Jacob".

When the petitioner was asked what group of people constitutes the Hebrew nation, to which he would like his son to belong, he did not know how to answer. He argued only that those people who—because of the definition in the Law—are not able to register as "Jews", should at least

be registered as "Hebrews", as people who identify in their nationhood with the Hebrew nation, even though they do not believe in the Jewish religion and they do not meet the criteria set by the law and based in the Jewish religion with respect to "Jew". As we have said, such a solution is merely a way of evading the law concerning registration of a person as being of the Jewish nation, and it is clear that the Court cannot be involved in this.

54. Salaried Employee and Unemployment Compensation

See: PESSAHOVITCH v. CHAIRMAN, BAT-YAM COUNCIL *et al.*, p. 859.

55. Oppression

See: Distress

56. "On Condition That"

Cr.A. 245/62
MATLOVSKI v. ATTORNEY-GENERAL
(1963) 17 *P.D.* 2114, 2116, 2127

Agranat D.P.: The appellant was convicted in the Tel Aviv District Court of acting as a go-between in giving a bribe, contrary to sec. 6(a) of the Penal Law Revision (Bribery) Law, 1952. In the summer of 1959 he received from one Israel Zikhroni "the sum of IL. 150 on condition that he induce an unknown official in the Tel Aviv Licensing Office to accord preferential treatment and enable Mr. Zikhroni to take a test for a bus-driving licence at a time when Zikhroni was not entitled to do so." For this offence he was sentenced to one year's imprisonment and a fine of IL. 1,000 or,

in default, three additional months' imprisonment. The appeal is against conviction and the severity of sentence...

Halevi J.: In the Hebrew language sources, there is a condition in the form of " 'on condition that...' which relates to a state of affairs already existing when a contract is in the course of being made, such as, 'Be thou betrothed to me on condition that I am wealthy'—and he is found to be poor, or 'poor' and he is found to be wealthy. 'On condition that I am a priest' and he is found to be levite, or 'a levite' and he is found to be a priest" (*M. Kiddushin* 2:2); "If a man betroth a woman on condition that she has no vows upon her and it is found that she has...or on condition that she has no blemishes and blemishes are found in her" (*ibid.* 5). Use of this phrase is, however, not frequent today and the use in sec. 6 of "on condition that he give" and "on condition that he induce" is apt rather for a condition that goes to something to happen in the future, as in "Behold thou art betrothed to me on condition that I give thee 200 zuz" (*ibid.* 3:2); "Here is your *get* [bill of divorce] on condition that you look after my father, on condition that you give suck to my child" (*M. Gittin* 7:6).

Hence, according to the terms of sec. 6(a) alone, I would not arrive at the conclusion that "on condition that he give a bribe" or "condition that he induce" do not include a person who receives money "for" or "in consideration" of an act that has already been effected, the giving of a bribe to an official or inducing preferential treatment or discrimination. From the viewpoint of civil law, it is very possible that there is no difference between payment of the money before or after the act, but from the viewpoint of criminal law everything depends on the terms of the relevant sections.

57. "Redeemed"

C.A. 197/77

SHPER, TUSSIA-COHEN PARTNERS. v. MUNICIPALITY OF JERUSALEM *et al.*

(1978) 32(1) *P.D.* 505, 506, 507

Cohn J.: The appellant law firm was required to pay business tax to the Jerusalem Municipality in accordance with item 103(b) of the Jerusalem (Municipal Business Tax) By-laws of 1972 (hereafter called "the By-laws") which provides that "if the turnover (*pidyon*) exclusive of taxes and fees paid on account of clients, exceeds IL. 80,000, for every IL. 10,000 of turnover or part thereof—IL. 100."

"Turnover" is defined in sec. 1 of the By-laws as "the inclusive annual turnover made by the businessman in the previous year whether on his own account or as agent, middleman or as attorney on account of another." This definition has been interpreted by the respondents and following them also by the learned District Court judge as meaning that the turnover of a lawyer for the purpose of item 103(b) is the aggregate of the moneys that have passed through his hands, including deposits and trust funds of different kinds from which he is forbidden to benefit...

On the other hand, I find substance in the submission of the appellant that "turnover" for the purpose of item 103(b) should not take into account sums received by a lawyer on trust...

The Hebrew word *padah* has received only in recent literature the further meaning of money obtained in consideration of a sale or on credit. (The earliest source cited in the dictionary of Ben Yehuda for its use in this sense is the *Pithei Teshuvah* by R. Avraham Zvi Eisenstadt, a commentary to *Hoshen Mishpat* 176.) The original meaning was, as we know, a money ransom for release from servitude, as in the ransom of prisoners, the redemption of the first born son, or of the firstborn of an ass, the redemption of one's life or the redemption of a pledge. But even in its later modern meaning there remained attached to this word the sense of procured profit—as if the goods sold had been redeemed and the money received in consideration replaced them.

58. "Turnover"

See: "Redeemed"

59. Dispersion and Distribution

See: Marketing and Distribution

60. Disqualified

See: Office

61. "Dissolved"

H.C. 301/63

SHTREIT v. SEPHARDI CHIEF RABBI *et al.*

(1964) 18 *P.D.* 598, 623-624

After a civil marriage in Rumania in 1925 and after immigrating in 1949, the petitioner refused to accept a divorce from her husband in the Rabbinical Court and the husband abandoned the divorce proceedings. Two years later the Rabbinical Court gave an "interim" judgment against the husband for maintenance. Shortly after, her claim for an increase in maintenance was dismissed, the husband contending that the marriage had been a civil one only, which the wife admitted. The Court also set aside the earlier maintenance judgment and was upheld by the Rabbinical Court of Appeal. The wife obtained satisfaction by proceeding in the secular courts. In 1961, the husband again sued for divorce in the Rabbinical Court and that Court held that the wife must accept a divorce, failing which it would allow the husband to remarry in accordance with special procedure under Jewish law, subject to approval of the Chief Rabbi.

Silberg J.: Let us now consider the retroactive effect of secs. 2 and 3 of the Penal Law Amendment (Bigamy) Law, 1959. Sec. 3 provides:

> A person who has been married is, for the purpose of sec. 2, presumed to be married, unless and until he proves that his earlier marriage has been annulled or dissolved, either by the death of the spouse or by a final judgment of the (civil) court or of the competent religious court or under Jewish religious law in a manner approved by the competent religious court, and he shall in that case be regarded as unmarried with effect only from the time of the death or the time when the judgment or approval was given.

This section is far more vague than it is clear, but for the purpose of this judgment I shall not attempt to smooth out the difficulties but confine myself to the question of the meaning of the word "dissolved"—retroactively or prospectively. At first glance, it would seem to have retroactive effect. Thus it is stated in *Gittin* 33a, "The Rabbis dissolved his betrothal," meaning retroactively, as may be seen from examining the *Gemara* and Rashi *ad loc.*

On further reflection, however, doubt arises in my mind. The term, it would seem, may also be applied prospectively. That, in fact, is the more common use of the term. "Her betrothal was dissolved" (*Y. Yevamot* 1:1); when a consecrated bird breaks loose, its sanctity is annulled ("dissolved") (*Hullin* 139a); "Sanctification, 'leave' and emancipation annul (dissolve) a creditor's lien" (*Gittin* 40b); "A heathen cannot own property in the land of Israel so fully as to absolve it from tithe" (*ibid.* 47b); *Shemitah* [the remission of debts every sabbatical year] absolves the borrower from the lender (*Tosafot* to *Kiddushin* 38b); "the dissolution of rights" is a frequent phrase in Rabbinical literature.

All these examples and others besides show that the Hebrew word translated as "dissolution" or "absolving", or "annulment," in all its forms is of prospective effect. That is also the case in modern legal terminology, as "decree for dissolution of marriage" that is found in the Palestine Order in Council.

Accordingly I am not prepared to say that "dissolution" in sec. 3 above is to be taken retroactively. On the contrary, since doubt exists regarding its meaning and since a criminal statute is involved, it must be construed in favour of the accused and that requires it to have prospective effect. That would mean that the end of the section, "and he shall in that case be regarded as unmarried" etc. must likewise be construed prospectively. The effect of construing the term retroactively would be that he goes free even when dissolution is ordered by a court after he married another woman.

C.A. 419/64

PRESKO v. MATVILAH

(1965) 19(1) *P.D.* 513, 515-516

The appellant was charged with the maintenance of the respondent, his mother-in-law, although his wife was no longer alive.

Silberg D.P.: I agree with my learned friend, Manny J., that the appeal is to be allowed and the judgment of the lower Court set aside.

Sec. 15(b) of the Family Law Amendment (Maintenance) Law, 1959, provides that "a right to maintenance arising out of a marital relationship ceases upon the dissolution of the marriage between the spouses." In the present case the mother-in-law is therefore no longer a "mother-in-law" since the marriage between her son-in-law and her daughter has come to an end, and *ipso facto* the duty to maintain resting in the ex-son-in-law regarding the ex-mother-in-law under sec. 4(1) has also ceased.

How could the learned judge have reached a contrary conclusion? Could he have thought that a widower is still "married" to his deceased wife? Surely not. The learned judge never gave utterance to such an absurd idea. What then? His view—so it seems to me—was that the phrase "dissolution (*pekiyah*) of marriage" applied only when a marriage is annulled as a result of some act, either legal (such as a Jewish *get* [bill of divorce]) or judicial (such as a decree of divorce made by a court) but not when the marriage ends of its own as a result of some physical event (such as the death of one of the spouses) which puts an end to the existence of the marital relationship.

This is what, so it seems, the learned judge thought. But it is not so. In the terminology of Jewish law, by which the Israeli legislature undoubtedly and rightly was influenced, "dissolution" includes the cessation or rescission of a status or right in consequence of the death and ceasing-to-be of the status holder or the person possessing the right. "A deed does not vest anything after death, since the authority of the giver has ceased (*pak'ah*)" (*Gittin* 9b and Rashi *ad loc.*).

Clear and decisive proof of that is found in *Ketzot haHoshen, Hoshen Mishpat* 182:2, which applies the word "dissolution" to the cessation of marriage by reason of the death of the husband. Needless to say that in the present case, no difference exists between the death of a husband and the death of a wife.

62. Ignominy

H.C. 436/66

BEN AHARON *et al.* v. CHAIRMAN LOCAL COUNCIL OF PARDESSIA

(1967) 21(1) *P.D.* 561, 564-565

*The respondent notified the petitioners that they had become disqualified from serving on the local council, following their conviction under the Defamation Law, 1963. The petitioners claimed that their offence did not involve ignominy (*kalon*) and sought to have their disqualification set aside.*

Cohn J.: Ignominy here is moral turpitude that attests to the person concerned not being fit to mingle with people of integrity and therefore not being fit to bear public responsibility for decisions and acts on which public matters and public welfare depend. Such ignominy disqualifies judges (Judges Law, 1952 sec. 22(a)(3)) and lawyers (sec. 44(1) of the Chamber of Advocates Law, 1961) and others holding positions of public trust, since their ignominy and respect for them cannot abide together. This ignominy must indeed attach to a person because of his misdoings even after he has been punished for the act he committed, as it is written "He will get blows and ignominy and his disgrace shall not be wiped out" (*Prov.* 6:33).

Ordinarily, ignominy leads people to keep away from the dishonored person; if they do not associate with that person, they will not elect him to act as their representative. That is the presumption lying behind the provision that ignominy disqualifies a person from serving on a local council. From the negative one may infer the affirmative, that where one would not think of not electing a particular candidate because of some offence he has committed, no ignominy attaches to disqualify him. The yardstick which the court employs in such circumstances is the attitude of the "reasonable" elector who wishes to have effective representation on the local council—and not the reasons of reformers or the considerations of enlightened judges. The use of coarse and insulting language (and especially if on one occasion alone) does not detract in the least from the practical trustworthiness and effectiveness of a person elected a member of a local council. For that alone, no elector would withhold his vote —a sure sign that the person is not disgraced and no ignominy attaches to him. I agree with Landau J. that the court, by interpretation of the law, can perform an educational function and do something towards

raising the standards of public and private behavior, and it is obliged to do so, but no legitimate and reasonable interpretation can introduce into the term "ignominy" what it does not contain; it does not contain an inkling of the type of reaction which is normal and accepted in a dispute, even in coarse and sharp terms, between political rivals in the midst of a political campaign. As the *Gemara* puts it, "here it was only faulty behavior but was not ignominious" (*Sanhedrin* 55a).

H.C. 178/81

JA'FAR v. ODEH, HEAD OF THE JALJULYAH LOCAL COUNCIL *et al.*

(1982) 36(1) *P.D.* 40, 49

The petitioner, a member of the local council, was convicted of impolite behavior towards a passenger he was carrying in his taxi, and of taking him beyond his destination, in contravention of the Traffic Regulations, 1961. He was also convicted of false imprisonment of a passenger. The first respondent informed the petitioner that his place on the local council had become vacant as a result of his conviction for the above offences, which have an element of ignominy. The petition turned on the question of whether these offences involve ignominy.

Levin J.: I concur, with all respect, in the view of the learned Deputy-President Cohn in *H.C.* 436/66 *Ben Aharon et al.* v. *Chairman, Local Council of Pardessia* (1967) 21(1) *P.D.* 561, 564, which was as follows:

> Ignominy here is moral turpitude that attests to the person concerned not being fit to mingle with people of integrity and therefore not being fit to bear public responsibility for decisions and acts on which public matters and public welfare depend....This "ignominy" must indeed attach to a person because of his misdoings, even after he has been punished for the act he committed, as it is written, "He will get blows and ignominy and his disgrace shall not be wiped out" (*Prov.* 6:33).

63. Chose in Action

See: Possessed

64. Pursued

Cr.A. 522/78

BIRMAN v. STATE OF ISRAEL

(1979) 33(3) *P.D.* 326, 329-330, 331-332

The appellant was acquitted of the offence of threatening violence to certain police officers after it had been proved that the latter had not acted in the course of duty in attempting to search the appellant's home without a search warrant. On appeal, the acquittal was set aside.

Kahan, J.: The question is: Did the policemen act in the course of their statutory duty when they tried to search the home and look for the son of the appellant who had escaped from lawful custody? In my opinion this question must be answered in the affirmative. I agree...that the phrase "to pursue a person" (*rodef*) in sec. 25(4) is not to be interpreted as meaning that the pursuit must be close in time to escape from lawful custody or the commencement of the pursuit; a policeman will be considered to be "pursuing" a person even if some appreciable time has lapsed between the escape and the pursuit...

The Hebrew word "to pursue" (*radaf*) does not necessitate the interpretation which the Judge below preferred; examples are to be found in the sources of the word being used other than in the sense of immediate pursuit. When *Ex.* 15:9 tells us: "The enemy said: I will pursue, I will overtake, I will divide the spoil," it certainly did not mean immediate pursuit after the Israelites had left Egypt. The District Court rightly held that the pedantic interpretation of the judge in the lower court is likely to lead to intolerable consequences. Assume that a dangerous criminal has escaped from custody and a month afterwards is seen by a policeman in the street and the criminal hides himself in his or a friend's house nearby: will the policeman, without a warrant, be forbidden from entering the house in order to apprehend the escaped criminal? The language used by the legislature does not compel such an interpretation of the Law...

Elon J.: I concur in the conclusion of my learned friend, Kahan J., that the appeal should be dismissed and I do so for the reasons set out below...

The provisions of the Ordinance regarding search warrants and searches made without warrant do not deal at all with such a warrant which

accompanies an arrest and which is essential therefor. Sec. 23 concerns a search warrant issued by a judge in order to find some article required for legal proceedings or where it is suspected that the article will serve some illegal purpose, and also to find a hidden person who must be searched for and found. Sec. 25, search not under warrant, deals with cases, the common element of which is that the search is required because at that very moment some offence is being committed in the place or because the immediate intervention of the police is necessary and time does not allow for an application first being made for a warrant. In this context, in my opinion, the provisions of subsec. (4) must be construed as meaning that the pursuer is in immediate pursuit of the person pursued. My learned friend, Kahan J., thinks that the phrase does not require immediate pursuit. In my view, in point of the simple meaning of the phrase (especially in the form of "pursuing after" (see, for example, *Gen.* 31:23; *Joshua* 2:7; *Judges* 4:16; *II Samuel* 20:10; *Baba Kamma* 35a; *Sanhedrin* 73a-74a) and particularly in view of the general context of the section, what is intended is immediate pursuit. Although it is not necessary that the pursuer should not lose visual contact with the pursued, since it is usual in the course of every pursuit for the pursued to fall out of sight, the act of pursuit must in practice be continuous and immediate.

65. Interest

See: ZIMMERMAN v. ASSESSMENT OFFICER, TEL AVIV, p. 807.

66. Vehicle

C.A. 680/80

ESTATE OF ZVI FREIMAN dcd. *et al.* v. EILAT-ASHKELON OIL PIPE LINE CO. LTD. *et al.*

Shamgar J.: This is an appeal by leave against the judgment of the Beersheba District Court which granted an appeal by the respondents

against a decision of the learned Registrar of the said Court, allowing amendment of the statement of claim by the appellants to include the plea that the ship that caused the death of the deceased was a vehicle for the purpose of the Road Accident Victims (Compensation) Law, 1975 (hereafter called "the Compensation Law").

This appeal revolves around the question of whether a sea-craft is a "motor vehicle" or "vehicle" within the meaning of the Compensation Law and whether the accident in which the deceased lost his life falls within the meaning of a "road accident" under that law.

First as to the question of the ordinary and accepted linguistic meaning of the term "vehicle" (*rekhev, kli rekhev*) or "motor vehicle" (*rekhev mano'i*). The ordinary and simple dictionary meaning is that it is "a general name for every land transport appliance propelled on wheels, such as carts, bicycles, cars, motorcycles, tanks" (*Even-Shoshan*).

What is involved is some apparatus used on land. That is also so in the light of its scriptural origin as a general name for a war chariot (*Ex.* 14:6-7; *Judges* 4:7 and elsewhere; see also Ben Yehuda's Dictionary, XIII s.v. "vehicle"). Y. Canaani writes in *The Treasury of the Hebrew Language*, vol. 7, s.v. "vehicle" — "a term applied to a cart, car, bicycle, and the like that serves as a means of transport and road conveyance."

67. Volition

Cr. A.(T.A.) 152/82
DAN COOPERATIVE...LTD. v. STATE OF ISRAEL
P.M. (19)

Ilan J.: In Hebrew the term "of his own volition" (*lirtzono*) accords better with the interpretation given in the judgment than does "on his own responsibility" (*al da'at atzmo*). See *Lev.* 19:5, where the term means "voluntary and without compulsion" in speaking of a voluntary sacrifice (see Hartom's Commentary *ad loc.*). So also in *Sanhedrin* 9b — R. Yosef said, "If a man says that someone committed sodomy with him against his will, he himself and another join to convict the other person. If of his own volition (*lirtzono*), he is an evil man, since Scripture says: 'Put not thy hand with the wicked to be an unrighteous witness' "(*Ex.* 23:1).

Rava said, "Every man is considered a relative to himself and no one can incriminate himself'." See also *Yevamot* 25a where R. Yosef is similarly reported.

The problem in the *Gemara* is whether, where an offence has been committed against a person's body, he is qualified to act as a witness of fact. R. Yosef distinguishes between one who has been forcibly sodomized and one who did the act voluntarily. *Hoshen Mishpat* 34:26 decides:

> Where a borrower testifies against the lender that the latter had lent him money at interest and there is one other witness with him, the two are joined to disqualify the lender. Although the borrower himself committed a vengeful act, the situation is separated out and he is believed as regards the lender but not as regards himself. Similarly when one testifies that he has been sodomised even voluntarily.

Although in the above contexts there possibly may have been consent to the act involved and even criminal intent, from the viewpoint of the Hebrew language the expression "of his own volition" is the opposite of "compulsorily".

68. Control, Domain, Public Domain

Cr.A. 471/77

STATE OF ISRAEL v. GESANG *et al.*

(1978) 32(1) *P.D.* 39, 40, 43

Cohn J.: What happened was that one morning at 6 a.m. when the respondent wished to go to synagogue, the police — apparently on information they possessed — arrived and searched his home for foreign currency. Two hours of searching revealed nothing and then at about 8 a.m. one witness who, according to the learned Judge of the District Court, possessed a sharp instinct for discovering concealed money, found in certain hidden places notes and cheques to the value of $17,910 and some money in Israeli currency. The respondent had first told the police that he had no foreign currency but when the money was discovered he said that it belonged to a tourist who had given it to him to look after.

The respondent was convicted of an offence under the Regulations for

having "received into his possession" (*reshuto*) foreign currency not through an authorized dealer and for not offering the currency to the Treasury ....The meaning of *reshut* as indicative of power and control without right of ownership is already to be found in the sources, even in relation to a bailee. A person may be a bailee who steals an article that is in the *reshut* of its owner, or it may be in his own *reshut* as a bailee which he converts to his own use and then claims that it was stolen from him (*Baba Kamma* 118b; so also *M.T. Genevah* 4:10). Similarly, the Sages are divided over whether the law relating to stolen goods which the owner has not given up hope of recovering and which remain in his ownership will vary if the goods are found in the *reshut*, i.e. in the physical control of the thief's heirs or of a purchaser from him. One view is that possession by an heir is like possession of a purchaser and one view is that it is not (*Baba Kamma* 111b), or, as the Midrash puts it, "evil people are under the control of their hearts (desires), righteous people control their hearts..." (*Gen. Rabba* 67:8).

See: KUPAT AM BANK LTD. v. HENDELES *et al.*, Part 9, Property—Physical and Intellectual, p. 759.

See: ROSEN *et al.* v. STATE OF ISRAEL, p. 874.

69. Authority

M.(T.A.) 633/76

GOLDMAN *et al.* v. HERMAN *et al.*

(1978) I *P.M.* 400, 401, 405-406

The appellants delivered to the respondent, a trustee in bankruptcy, two proofs of debt without stating the date when their cause of action regarding the debts had arisen, except in one case. The trustee rejected the proofs on the ground that, in view of the declaration of bankruptcy some seven years earlier, the Prescription Law of 1958 applied.

Harish J.: This appeal...necessitates decision on two basic questions on which there is no decided law in bankruptcy. They are: (i) Does prescription apply to bankruptcy, and (ii) Assuming that it does, is the trustee to be considered "a judicial authority" (*reshut shiputit*) that can apply the law and hold that a particular debt may not be sued for because the period of limitations prescribed by law has run?...

Although it seems that according to the terms of the Law we must say that a trustee in bankruptcy is also to be regarded as a "judicial authority"...it is not correct to argue that "authority" is only an authority actually set up by law, acting under full "royal" authority. The term *reshut* is indeed used in the sense of control and official powers and this definition *prima facie* and in the contexts in which appears ("Be guarded in your relations with the ruling power" *M. Avot* 2:3; "Seek no intimacy with the ruling power" *ibid.* 1:10) denies the view that a trustee in bankruptcy comes within the meaning of "authority" in sec. 1 of the Law. This definition, however, does not exhaust all the nuances of the meaning of the expression. *Reshut*, says Ben Yehuda in his Dictionary, includes an "authority", the bearer of power — note the bearer of power but not necessarily the holder of an office — and he gives examples from *Tosefta Kiddushin* 1:11 ("A man can do things but a woman cannot because she is under the *reshut* of her husband;" "so that the *sectarians* should not say that there are many ruling powers (*reshuyot*) in Heaven" (*M. Sanhedrin* 4:5). The conclusion must be that according to the widespread use in the sources, the concept of authority includes everyone possessed of powers, and hence a trustee in bankruptcy must presumptively be an authority by virtue of his appointment by the court.

70. Oath

See: GERSHT v. WILDERNBERG, p. 868.

71. Marketing and Supply

C.A. 285/57
MIRTZAFIAH LTD. v. MAYOR OF TEL-AVIV *et al.*
(1958) 12 *P.D.* 1590, 1591-1592, 1594

Witkon J.: The appellant was requested to pay business tax in accordance with item 11 of the First Schedule, Part A, to the Tel-Aviv (Municipal Business Tax) By-laws of 1954. The business of the appellant was the manufacture of tiled flooring and the like and its factory was outside Tel-Aviv within the jurisdiction of Petah Tikvah. In Tel-Aviv itself, it had only a two-room office where one of the directors and two clerks would receive orders for its products, for which purpose samples were kept there. The accounts of the company and various other office jobs were also conducted there. It is true that the registered office of the appellant was also in Tel-Aviv and board meetings were held there, not in the said office but in the auditor's office.

The respondent claims that the appellant carries on business at its office for supplying and marketing its products within the meaning of item 11 as above, whereas the appellant argues that this office comes under item 76 which imposes tax at a lower rate on "an office or storage place where goods are distributed or orders are received for a factory or workshop...situated outside Tel-Aviv"...

Cheshin D.P.: "Marketing and supply" (*shivuk veAspakah*) — like "dispersal and distribution" — are terms indicative of removing a thing from one central place to another place beyond it, such as to a market, to particular and other customers, or regionally. By contrast, "centralization and accumulation" — like "collection and storage" — means gathering and stockpiling in one place from various dispersed places. Just as with centralization and accumulation two elements are required, i.e., distance and the act of gathering together from one place to another, marketing and supply cannot subsist without these two elements but in the opposite direction: the acts of marketing and supplying are carried out from one central place to an outside area, and if no center exists, there can be no marketing and supply.

For instance, "And the Lord shall scatter (distribute) (*veHeifitz*) you among the peoples" (*Deut.* 4:27); "And the sheep shall be scattered" (*Zechariah* 13:7): "Let thy springs be dispersed abroad" (*Prov.* 5:16);

"There is a certain people scattered abroad and dispersed among the peoples" (*Esther* 3:8); "The Holy One Blessed be He was merciful to Israel by scattering them among the nations" (*Pesahim* 87b). And in the converse, "And let them gather all the food of the good years...and lay up corn" (*Gen.* 41:35); "And He shall gather thee in from all the peoples" (*Deut.* 30:3); "And I shall gather them from the outermost parts of the earth" (*Jeremiah* 31;7); "And thither were all the flocks gathered" (*Gen.* 29:3); "And Laban gathered together all the men of the place" (*ibid.* 22).

In the case before us, the office in Tel-Aviv serves as the place where orders are received. The goods are not stored in the office and do not pass through it. Customers do not come to the office to collect goods nor are the goods sent to them without an order. I am even prepared to assume that the office is engaged in distribution of the goods — an activity that also falls under item 76 — but "distribution" is in no wise identical with "marketing and supply"; it occurs after the goods have been ordered or allocated to certain people. Marketing and supply mean distribution and sale not by means of orders, and the assigning of goods to certain customers alone. A person who every morning brings milk to our homes does not market the milk or supply it: he merely distributes it.

72. Market

F.H. 6/62

IHUD HAMADGIRIM... LTD. v. MAYOR OF TEL-AVIV *et al.*

(1962) 16 *P.D.* 2220, 2222-2223, 2224, 2225-2226

The appellant maintained an office in Tel-Aviv for acting as middleman between its members and purchasers of chicks on a nonprofit basis. As a middleman, it claimed that it should be charged with business tax at a lower rate than that imposed on the business of marketing. At first instance it was held that the appellant engaged in marketing and this was upheld by the District Court. In the Court of Appeal, opinion was divided and the appellant instituted this Further Hearing.

Silberg J.: My answer to the question before us is that given by R. Nahman to R. Hanan bar R. Katina: "I know no Hillak and no Billak. I only know tradition" (*Hullin* 19a).

I also know only the Tel-Aviv By-laws in which the municipal legislator uses the term "marketing" (*shivuk*). "To market" is a transitive verb which means to send goods to market; "a market" is a place where goods are sold in actual fact, not a place where they are prepared and adapted for that purpose. Thus we find, "He is treated as if he were a slave being sold in the market" (*Baba Kamma* 83b); "But a person may make utensils and take them out and sell in the market" (*Baba Batra* 20b); "A baker who makes to sell in the market" (*M. Hallah* 2:7), and finally when a person seeks to monopolise the market, it is declared that "he may not sell until the others have sold" (*Baba Metzia* 65a and Rashi *ad loc.*). Here the word "market" indicates the very idea of "sale"; the market is maintained and sales are impeded.

It follows that the appellant here does not engage in marketing at all, since it does not, indeed cannot, sell — not being empowered to do so — the wares of other people; it is merely a place for inquiry, recommending the chicks hatched by the hatcheries. It acts as a go-between for prospective purchasers and sellers. To such a business, not item 11 but item 87 applies, as my learned friend Berinson J. has held.

I have reached the above conclusion after inquiring into the meaning of the word "marketing" in Hebrew. I do so because I think that an original Israeli legislature must express itself in Hebrew and not in some other language. It is impossible that its Hebrew should only be understood by those who speak English, especially when it is not a purely legal term, understood only by lawyers, that is involved, but rather a common term in daily use. Is the citizen to be bound to ask a lawyer the meaning of a word like "chair" or "table" which the Israeli legislature employs in one of its enactments?....It is clear that the English "marketing" is congruent with the Hebrew "to market" and therefore the meaning I gave to it should satisfy the most punctilious.

One brief, final observation on the reasons voiced by my learned friend Witkon J. regarding the important question of "pouring new wine into old bottles." The question is a very serious one, not to be discussed against the mundane background of "market" and "marketing". Let me say this: we should not over-tire the three root letters of the word in Hebrew, and burden them with a multitude of activities and functions. We have not yet exploited one hundredth part of the enormous treasury of words of our ancient literature. If we labor enough and do not over-work the limited number of words that are known and emphasized, we shall find a Hebrew expression, apt and suitable, for almost every new modern

activity arising in the evolution of human society. Had our innovators so done, they would probably have found release for the monster "marketing" that they harbor in their hearts.

Witkon J.: Finally, a word on the mode of interpretation adopted by my learned friend, Silberg J. He showed us with his wide erudition the meaning of "market" in the *Gemara*, as a place where purchases and sales are effected. Since "marketing" is derived from the root "market", it is essential, my learned friend thinks, for it also to be interpreted in connection with "sale". With the greatest of respect, it seems to me that it is possible to assume that the idea of sale informs the terms "market" and "marketing" without compelling the conclusion that every one who has a hand in marketing must himself be a seller. In the many wide-ranging conditions of modern commerce there are so many activities that lead ultimately to the distribution of products among the public, so that the function of marketing, its organisation and regulation, can be an independent occupation, separate from the function of selling.

Furthermore, language evolves with time. A term which in a primitive society indicated a "tangible" thing, for example the place and occasion where and when some activity is effected, can in time receive an abstract meaning, still embodying the original idea but rid of all its accessories and forms of manifestation. That is the test for a word in a living language which plays its part in the development of society and its material and spiritual advancement. In this manner, which is a figurative process, a word preserves the original idea — or perhaps only its main or one of its main ideas — but this idea may become embodied in a form which has nothing in common with the original form. Thus the word "market", from earliest times until the present day, undoubtedly had and has the concrete sense of a place and occasion for trading in goods, but the term has not remained unaffected, and in modern economics it signifies what was deemed to be its main conceptual content, the convergence of supply and demand. If the term "market", which is of long lineage, implies many things, all the more so the term "marketing" which is entirely the creation of modern thinking. The latter certainly derives from the conceptual content of "market" as that is apprehended today, and it would be anachronistic to construe it from the viewpoint of a period when the way of life was quite different.

In renewing our ancient tongue, we have always sought to revive its hidden treasures and pour new wine into old bottles. Those who work to this end cannot be bound to all the past external manifestations of a word; they must uncover its main idea and derive therefrom new uses consonant with the spirit and requirements of the time. That is the practice

in every living language. If "marketing" is derived from "market", in spite of being far from the original meaning of the word, are we to be prevented from following the same path in deriving the Hebrew equivalent? Would it be better to coin some Hebrew barbarism in case the derivative is too narrow to express the full meaning of "marketing". This is not a new problem and it has already been dealt with in *M.* 89/51 *Mitova Ltd.* v. *Kazam* (1952) 6 *P.D.* 4 (above) and in many other judgments (collected by U. Yadin, "On Interpreting the Laws of the Knesset" in *Pinhas Rosen Jubilee Book*, p. 125). Literary interpretation has its due place and who is like my learned friend an authority to renew and enrich the language. I, however, prefer to refrain from that when, as in the present case, it is likely to attach to new expressions meanings which are outdated and which will ultimately impede the development of our new language.

73. Indemnity

C.A. 639/77

SEFI-YAM (1972) LTD. *et al.* v. YANAI INVESTMENT INSURANCE CO. LTD.

(1979) 33(3) *P.D.* 533, 535, 538-539

Cohn J.: The respondent submits that it is only liable to indemnify the appellant for the expenses actually incurred in making good war damage, excluding that which was not actually spent for so making good, whether for inspection or for floating the vessel for the purpose of repair or inspection...

As for the Hebrew language, it may in truth be said that the word "indemnity" (*shipui*) in its technical legal sense is a modern creation, but like most modern legal creations it still hints at our early legal tradition. Rava once said, "Know that a seller guarantees to the buyer 'I shall confirm, satisfy (*ashpeh*), clear and complete these sales, them and the resulting gains and the improvements thereof' " (*Baba Metzia* 15a): to "indemnify" a sale means, according to Rashi *ad loc.*, to make it secure against any protest. The same is to be found in the dictum of R. Ashi: "We seek out a person whose property is secure (*demashpu*)" to administer the estate of orphans. A guardian may not buy land for orphans "in case they are not secured" (*Gittin* 52a) which Rashi *ad loc.* interprets, "They will not be left

in peaceful possession and title be disputed." A real indemnity, almost in the modern sense, is to be found in the story of the man who sold land to another and undertook liability "against any accident that might occur", i.e., any defect in the transaction. Some time later the authorities dug a canal through the land and the parties came before Ravina. The latter told the seller, "Go, clear it (*shapei*) for him since you undertook liability for any accident that might occur" (*Gittin* 73a). What is common to all these expressions is that the security attained does not depend for its legal force and its possibility of implementation on pecuniary loss suffered by having first to incur expenses; any injury or obligation for which the indemnifier is liable is sufficient.

74. Resident

H.C. 129/63

MATALON v. TEL-AVIV DISTRICT RABBINICAL COURT *et al.*

(1963) 17 *P.D.* 1640, 1644, 1646-1647

A couple married in Egypt in 1946 and had three children. In 1953 they fled to Italy and made their permanent residence there. Subsequently, in 1962, after disputes arose between them, the petitioner, the wife, applied to the Milan Rabbinical Court and obtained a temporary separation order. The husband then left Italy and settled in Israel and acquired Israeli nationality, but his wife was not included in the certificate of nationality. He thereafter applied to a rabbinical court here for a divorce or for permission to marry another woman. The petitioner denied the competence of the Rabbinical Court to deal with the matter.

Silberg J.: Sec. 1 of the Rabbinical Courts Jurisdiction Law, 1953, provides that "Matters of marriage and divorce of Jews in Israel, being nationals or residents of the State, shall be under the exclusive jurisdiction of rabbinical courts." "Resident" means permanent resident, domiciled. That is the correct significance of the Hebrew *toshav*. "I am a stranger (*ger*) and sojourner (*toshav*) with you" (*Gen.* 23:4); "A stranger from another country and I have settled (*hityashavti*) among you" (Rashi *ad loc.*); "I am a sojourner...since I have come to settle among you and not merely to reside" (Sforno *ad loc.*); "A person who comes from the country of

his birth and settles in another country is called a sojourning stranger or a stranger and sojourner" (Ibn Ezra *ad loc.*); "Behold I am a sojourner among you since I desire to stay (*lashevet*) in this country" (Nachmanides *ad loc.*); "A stranger is an occupant, a sojourner is a householder." (*Gen. Rabbah* 58:6).

The rule that a wife takes the domicile of her husband has its source in the idea of "they shall be one flesh" (cf. *per* Lord Denning in *Formosa*) except that the preceding words, "and he shall cleave unto his wife" (*Gen.* 2:24), have been overlooked. If a man wishes to separate what is cleaved together and terminate personal relations, no good reason exists to bind the woman umbilically to the absconding husband and regard her as an uninvited partner in his new domicile.

75. Good Faith

See: Part 8, Obligations, p. 587

76. "Dependent Upon..."

C.A. 135/67

TEL-AVIV ASSESSMENT OFFICER v. PORAT

(1967) 21(2) *P.D.* 411, 415-417, 418, 419

The respondent and his wife practised as lawyers from the same offices, each occupying different rooms and engaging in different kinds of matters. One clerk, however, served them both and the ledgers, bank accounts, filing system, receipts and letter-heads were joint. Their gross income was not differentiated, whilst the net income was divided arbitrarily between them, 65% to the respondent and 35% to his wife. The Assessment Officer refused to assess them separately. The District Court, however, allowed the appeal of the respondent in this regard, after finding that the wife's source of income did not depend on the husband's source of income.

Silberg D.P.: Here it is necessary to make a short excursion into the recesses of the origins of the Hebrew expression "dependent upon" (*talui*

b). Cohn J. researched the matter in *C.A.* 82/69 *Fuchtwinger* v. *Assessment Officer* (1960) 14 *P.D.* 1366, 1368-1369, and remarked:

> Where one thing is completely dependent on another thing and falls away without it and has no existence, in most cases the expression used is 'hangs on' (*talui alav*) the other thing rather than 'dependent on it,' (*talui bo*) as with 'hangs on the tree' or 'hangs on nothing.' But a thing which is connected with another, is bound up with it, but has an independent existence of its own even without that other thing, in most cases the expression used is 'depends on it' as with a Commandment that depends on the land, or love that depends on an object.

With the utmost respect to my learned friend, it seems to me that it is not so, witness the very phrases "love that depends on an object," "a Commandment that depends on the land." The first of these occurs in *M. Avot* 5:16 — "When love depends upon an object, with the passing of that object, the love too passes. Which love depends on an object? The love of Amnon and Tamar", etc. The object upon which it is dependent is a *sine qua non*, a thing which but for it, that which is dependent would collapse or would not come to be at all. That is actually what happened with the love of Amnon and Tamar; the thing on which Amnon's love for Tamar was dependent was her readiness to yield to him; and upon her saying "Do not thou this wanton deed...and thou wilt be as one of the base men in Israel" (*II Samuel* 13:12-13), and upon her refusing to give herself to him, his love turned into a great hatred exceeding the love he had previously had for her...(*ibid.* 15).

The same is true of the second phrase, "a Commandment that depends on the land." The *Mishnah* (*Kiddushin* 36b) tells us that "Every Commandment which is dependent on the land is only practised in the land." "Dependent on the land" means a Commandment which is not a personal obligation but is territorial, "imposed on the earth or its produce, such as heave-offerings, tithes, gleanings, the forgotten sheaf, the crop on the corners of a field, the crop of the sabbatical year, the fruit of newly planted trees, new cereal crops, diverse seeds" (Rashi *ibid.* 37a).

Without the soil (the land), there is no produce, no occasion for observing the said Commandments, the "land" is a *sine qua non* of each of these Commandments, and for precisely this reason they are called Commandments dependent on the land.

Such is the linguistic use of "dependent on" in Hebrew, and in this manner — in the sense of exclusive dependency — is the phrase to be interpreted whenever it appears in Hebrew in original Israeli enactments. One can contemplate the exclusive dependency of the source of a woman's income upon the husband's source of income where they are both lawyers

and he, for instance, is engaged in litigation and she in matters of execution. In the present case, however, as is patent, there was no such dependency; the wife could well serve her clients without the clients of the husband, even if he were not a lawyer. For this reason, her source of income must be treated as not dependent upon the husband's income and she should be separately assessed, as the District Court decided...

Witkon J.: Had the spouses taken care to separate their respective income instead of mixing it all up together, it is possible that I would not have regarded the sources of their income dependent on one another, despite the joint office, since joint offices are very common among lawyers without creating necessarily and for that reason alone a partnership or other dependency amongst them. But when two incomes are mingled into one and are simply shared out between the two of them (there was not even any consistency in determining the yearly sharing), how can it be said that the two businesses are not related and conjoined, or as Even Shoshan (at p. 1797) puts it, that one is not bound up or connected with the other? In these circumstances, the phrase "dependent upon" will subsist even in its most precise and onerous meaning, propounded by Silberg J. in reliance on the use of "Commandments dependent on the land" and "love that is dependent on an object", that is, in the absence of one, the other also does not exist. (See the Note by B. Shachewitz, "The Meaning of the Word 'Dependent' " in (1965) 22 *haPraklit* 33). My assumption, obviously, is that the "dependent" source can only be the business or occupation taken as a whole, with all that involves, and not what is materially received from clients, which could never be "dependent" on one another, even if they were derived from one business alone.

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