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C.A. 776/80

ISRAEL BRITISH BANK (LONDON) LTD. (in Liquidation)

v.

ESTATE OF THE LATE WALTER NATHAN WILLIAMS

In the Supreme Court sitting as a Court of Civil Appeals
[September 24, 1984]
Before: Ben-Porat V.P., S. Levin J. and Netanyahu J.

Bank-customer relationship - Limitation of actions on a debit balance - Construction of contracts and the parties' intentions.

The appeal turns on the question as to when the cause of action arises, for the purposes of limitation of actions, in a suit brought by a bank against its customer and founded on a debit balance in a current account: on the date the debit balance came into existence or on the date of the demand for payment.

Held by the Supreme Court:

A. (1) All of the terms, upon which a particular indebtedness is conditional, must be complied with in order to vest in the other party to a contract the right to claim its discharge. That is a fundamental rule in the law of contracts and, in the absence of any flaw nullifying a particular condition (for example, where it offends against some compelling rule of law), it should be preserved by dint of the principle of freedom of contract and the will of the parties.

(2) Where a party to a contract undertakes to perform a certain obligation "on demand" or "within a specified period of time after demand," the reasonable construction is, that an actual demand on the part of the creditor constitutes an essential condition of the formation of the right to have that obligation fulfilled. Only with the demand (besides other conditions, if any) as agreed upon, is the creditor's cause of action established and, accordingly, only then does the limitation of that right begin to run.

B. (1) The rule, whereby a contract is to be construed in accordance with the parties' intention, was accepted early in Israel also and took root here.

(2) The parties' intention is to be deduced from the contract itself and, if not apparent therefrom, then from the circumstances.

(3) The intention of the parties to a particular contract is the determining factor.

(4) The ancient exception laid down in English law, whereby the cause of action for a loan debt repayable on demand arises without a demand immediately upon the granting of the loan, contradicts the foregoing test of construction of contracts and the accepted policy in Israel. It is, therefore, regarded as incompatible with local conditions, within the meaning of that phrase in Article 46 of the palestine Order-in-Council, 1922.

(5) The object of a loan agreement is the use of the loan monies by the borrower in return for the profit that the lender derives, within the framework of his business, from such use for as long as it continues. The condition, the repayment shall be "on demand" (namely, on the demand of the lender), only enables him to bring the transaction to a close whenever he so desires but, as long as the thing is, in his opinion, worthwhile, he may elect to prolong the transaction even for many years, going beyond the period of limitation. That is totally inconsistent with the notion, that the borrower is under an obligation to repay the loan immediately upon its being granted.

(6) The demand on the part of the bank is an essential element in the formation of a cause of action against the customer.

C. (1) Minority opinion of S. Levin, J.:

In the absence of agreement to the contrary, the cause of action on a debt, repayable on demand, arises immediately on the receipt of the loan by the borrower. The fact that the indebtedness under the loan includes interest does not alter the date on which the cause of action was created. Accordingly, limitation, in the case of a loan repayable on demand, begins to run on the day the loan is granted.

(2) The same applies to a promissory note payable on demand in which, for that purpose, the period of limitation commences with the issue of the note.

(3) The lender and borrower are at liberty to determine between themselves, expressly or impliedly, that the need for a demand is part of the cause of action.

(4) There are instances where the court is prepared to deduce from the circumstances surrounding a particular relationship, that a demand is a necessary part of the cause of action. For example, it is assumed that a collateral undertaking, such as a guarantee or security for a debt, may not be enforced unless preceded by a demand as part of the cause of action. Even then, however, the rule applicable to such cases is subject to the interpretation of the express or implied intention of the parties to the transaction.

(5) With respect to banks, too, the cause of action on a debt payable on demand arises with the creation of the debt.

(6) The English rule of law, whereby limitation of action, in relation to the customer's credit balance begins to run from the date of the demand, and not from the date the credit comes into existence, has become so deeply embedded in our country's jurisprudence, that it ought not to be altered other than by legislation.

Judgments of the Supreme Court referred to:

[1] *C.A.* 51/62- MV *"New Rotterdam" v. Ennisfield,* 16 *P.D.* 72.

[2] *C.A.* 345/78 - *Bank Hapoalim Ltd. v. Sardes,* 33 *P.D.* (Part I), 683.

[3] *C.A.* 323/80 - *Iltith Ltd. v. Bank Leumi LeIsrael Ltd.,* 37 *P.D.* (Part II), 673.

[4] *C.A.* 279, 280/53 - *Levi v. Klinger et al.* and counter-appeal, 10 *P.D*. 802; 23 P.E. 298.

[5] *C.A.* 395/57 - *Ila Hotels Co. Ltd. v. State of Israel,* 22 *P.D.* (Part I), 20.

[6] *Cr.A.* 515/75 - *Katz v. State of Israel,* 30 *P.D.* (part III), 673.

[7] *C.A.* 679/76 - *Sali, by her parents v. Estate of Karl Schaeffer et al. 32 P.D.* (Part II), 785.

[8] *Cr.A.* 595/83 - unpublished.

[9] *C.A.* 160/62 - *Levi et al. v. Municipality of Tel Aviv-Yaffo,* 17 *P.D*. 1773.

[10] *C.A.* 96/50 - *Tsinki et al. v. V.A. Chayat et al.* 5 *P.D.* 474; 4 *P.E.* 103.

Palestine judgment referred to:

[11] *C.A.* 209/40 *Friedman et al. v. Ali et al.* 7 P.L.R. 569; (1940) S.C.J. 555.

English judgment referred to:

[12] *Norton V. Ellam* (1837) 150 *E.R.* 839 (Ex).

[13] *Jackson v. Ogg* (1859) 70 *E.R.* 476 (Ch.).

[14] *Re J. Brown's Estate Brown v. Brown* (1893) 69 *L. T.* 12 (Ch.).

[15] *Bradford Old Bank v. Suttcliffe* (1918) 2 *K.B.* 833 (C.A.).

[16] *Joachimson v. Swiss Bank Corporation* (1912) 3 *K.B.* 110; (1921) *All E.R.*92 (C.A.).

[17] *Foley v. Hill* (1848) 9 *E.R.* 1002 (H.L.).

[18] *Douglas v. Lloyd's Bank Ltd.* [1929] 34 Com. Cas. 263.

[19] *Hartland v. Jukes* (1863) L.J. Ex. 1052.

[20] *Parr's Banking Company v. Yates* (1898) 2. *Q.B.* 460 (C.A.).

[21] *Lloyd's Bank Ltd. v. Margolis* [1954] 1 *All E.R.* 734 (Ch.).

[22] *Carter v. Ring* (1813) 170 *E.R.* 1445.

[23] *Winter Garden Theatre v. Millennium* (1947) 2 *All E.R.* 331 (H.L.).

American judgment referred to:

[24] *Union Bank v. Knapp* 15 Am. Dec. 181 (1825).

Scottish judgment referred to:

[25] *Macdonald v. North of Scotland Bank* (1942) S.C. 369.

Appeal from the judgment of the District Court of Tel Aviv -Yaffo (Judge D. Levin), dated October 8, 1980, in C.F.201/79. *Appeal allowed (S. Levin, J., dissenting). The file was returned to the District Court for continuation of the hearing.*

A. Shavit for the Appellant.

Y. *Meron* for the Respondent.

JUDGMENT

S. LEVIN, J.

1. On January 25, 1979, the Appellant, a company registered in England and a subsidiary of the Israel British Bank Ltd. , brought an action by way of summary procedure in the District Court of Tel Aviv -Yaffo against the estate of the late Walter Nathan Williams, represented by the interim administrators of the estate (the Respondent in this appeal). From the Statement of Claim we learn, that until his death on October 31, 1971, the deceased served as chairman of the board of directors of the Appellant company, and he held five accounts with the bank; on August 8, 1974, the Appellant company went into liquidation and the present action was brought by the liquidators.

On August 8, 1974 (thus alleges paragraph 3(b) of the Statement of Claim), the state of the deceased's accounts with the Appellant company was as follows:

"(1) The deceased's no. 1 account showed a debit balance of B218,969;

"(2) The deceased's special shares account showed a debit balance of B176,031;

"(3) The deceased's no. 3 account showed a credit balance of B730.79;

"(4) The deceased's no. 4 account showed a credit balance of B151.85;

"(5) The deceased's policies account showed a credit balance of B1,975.75."

Appended to the Statement of Claim were photostatic copies of the last two pages of account no. 1 and the last page of each of the other accounts.

The Appellant company avers, in paragraph 3(d) of the Statement of Claim, that it set off the credit balances in accounts no. (3), (4) and (5) against the deceased's debit balance in accounts no. (1) and (2) and claimed from the Respondent the balance of B393,149.69, together with interest thereon.

After rejecting another argument of the Respondent, that the Court lacked local jurisdiction, the District Court dismissed the action *in limine on* the ground that it was statute-barred; hence the present appeal.

2. The learned Relieving President (as he then was), decided that the cause of action was founded on overdrafts by the deceased before his death, together with the accumulated interest on the overdrawn sums, as from the date the accounts had become overdrawn and until the date of the bringing of the action. More than seven years had elapsed from the date of his demise (31.10.71) until action was brought (25.1.79), so that the allegation of limitation of action was well-founded. The Relieving President went on to state:

> "There is no dispute - indeed, it is apparent from the bank documents appended to the Statement of Claim - that no withdrawals from the deceased's account took place after his death. It follows, therefore, that the last withdrawal from the deceased's accounts could have been made on the day he died, namely, October 31, 1971. That raises the question: when does the cause of action arise, where the subject-matter is an overdraft in a bank account? Counsel for the bank contends, that the

> cause of action arises on the date the bank demanded payment of the overdrawn amount, in this instance, on January 2, 1979. Counsel for the estate, on the other hand, rejects this view and submits, that the determining date is the day on which the overdraft appeared - and he is right."

After reviewing the authorities cited to it, the District Court formed the opinion that, in the absence of any other specific agreement between the bank and the customer, the bank's right to sue for its money arose on the day the debit balance was created and, as from that time, "the period of limitation starts to run with respect to the debit balance created by the withdrawal." Accordingly, the action ought to be dismissed, in so far as it related to the capital amounts drawn by the deceased, and to the interest payments with which he had been debited, where the dates on which they had become due were more than seven years before the action was brought. The right to claim the interest, with which the accounts had been debited afterwards, had, indeed not become statute-barred, but the sums were so tiny, that the Relieving President assumed there was no point, from the Appellant company's point of view, in continuing to conduct the action "within the limits of the paltry sums of interest that had not yet become statute-barred." He, therefore, dismissed that part of the action summarily, too, but without prejudice to Appellant company's right to bring a separate action therefore.

3. In our Court, counsel for the Respondent rightly abandoned the contention that the court lacked local jurisdiction. So there remained but one question to be considered, namely, when is the bank's cause of action created, for the purposes of limitation, in so far as it relates to a debit balance in its customer's account: on the date of the demand for payment (in which case it is not statute-barred) or the date on which the debit balance is created (in which case the claim is statute-barred)? But before I turn to a discussion of the issue on its merits, I must first dispose of certain arguments submitted to us by the Appellant company, and to deal with one argument raised by the Respondent.

(a) In paragraph 3(c) of the Statement of Claim, the Appellant company alleged, that "the deceased expressly and/or impliedly undertook to pay the Plaintiff company the balance

of his debt in each of the accounts above stated, on demand." If it turned out, that there had been such an express agreement, the action would most certainly not be statute-barred and the Appellant company should be allowed to prove its factual allegation regarding the existence of an agreement; but in the course of his argument before us, counsel for the Appellant company waived his submission on that score, whereas his submission as to the existence of an implied agreement did not hinge on any particular facts, but rather on the relationship generally existing between a bank and its customer. It was not contended before us, that there was any legal significance in the fact, that the deceased served as chairman of the board of directors of the Appellant company; so the aforesaid issue regarding the date on which the cause of action arose, for the purpose of limitation of actions, remains to be decided by us in its general form.

(b) In the course of the hearing before us, counsel for the Appellant raised the argument, that there had been a waiver on the part of the Respondent of the submission regarding limitation. That matter is not referred to in the learned Judge's judgment, but after judgment had been delivered, the Appellant company applied to have the court record amended (in Motion 7888/80) by the addition of a statement by counsel for the Respondent in the following terms:

> "For the sake of good order I beg to note, that we are not alleging limitation of action, in so far as the claim could have become statute-barred on October 30, 1978, because we have an agreement to the effect that, with regard to every right of action available against the estate which might have become statute-barred, if at all, on October 30, 1978, the beginning of the period of limitation is postponed to February 1, 1979."

The Court, with the consent of counsel for the Respondent, allowed the Application. On the strength of that it was argued, that the agreement revived the claim that had become statute-barred on October 30, 1978.

Counsel for the Respondent explained to us that, at a certain stage of the proceedings, the possibility (which the Respondent denies) had been mooted of calculating the period of limitation from the date of the deceased's death. Counsel for the Respondent agreed, that if that proposition were indeed correct, the action had not become statute-barred, notwithstanding its having been filed some seven years and three months after the demise, and for that reason the above declaration had been made. After the aforementioned judgment had been given, the Appellant company thought that the Court had actually adopted that proposition and, in order to put the Appellant company's mind at rest, there had been no reason for counsel for the Respondent to refrain from consenting to the amendment, which reflected the actual situation. In point of fact - so counsel for the Respondent argued - the learned Relieving President had not regarded the date of death as the determining date, so the above-mentioned declaration and the agreement referred to therein are of no consequence in our deliberations. In my opinion, the Respondent is right. A perusal of paragraph 9 of the Notice of Appeal makes it quite clear, that the Appellant company, too, attached no importance to the aforementioned declaration, save in so far as it was referring to the Appellant company's interpretation of the District Court's view, namely, that it regarded the date of the deceased's demise as the appropriate date for determining when the period of limitation began to run; whereas when you read the judgment, it becomes quite clear, that the date of the demise was noted there only as the ultimate limit of the last possible withdrawal from the account and that, in the Court's opinion, the limitation started running on the day the debit balance came into existence. The Appellant company did not, in the District Court, dispute the argument that, if its cause of action arose with the creation of the debit balance, rather than with the demand for payment, then the action was statute-barred. In those circumstances the aforementioned allegation of waiver is without substance.

(c) The appeal before us was at first pleaded orally. Counsel for the Appellant company addressed us orally and we then ordered that argument be completed in writing; the Respondent would reply to the Appellant company's submissions, and the latter would be entitled to respond with its own arguments. Only in the course of the Appellant company's rejoinder did a new submission appear, the substance of which is this: examination of the photostat copy of the second page of the no. (1) account shows that, on November 5, 1971

(that is to say, after the deceased's death), there appears a credit balance in the sum of [011]36.95. Details of that credit balance were noted thus; "CHO CL." Appellant company contends, that a credit balance puts a stop to the course of limitation. That argument must be rejected, for two reasons: first, it was not raised in the District Court or in the written propositions or in counsel's oral argument in this Court. It was an assumption accepted by both parties up to the latest presentation of the Appellant company's submissions, that any items in the account, registered therein after the demise, were irrelevant to the issue of limitation. The Respondent rightly applied to have this submission struck out of the Appellant company's argument, since counsel for the Respondent had had no opportunity of referring to that submission and replying to it; secondly, after we had determined, that the agreement referred to in the preceding paragraph was valueless in the present circumstances, as it only related to a certain assumption, that has proved to be without foundation, it is evident that the claim was brought after more than seven years had elapsed from the date when the above-mentioned credit balance had been registered so that, assuming the District Court was right in its general view of the law, the action had become statute-barred.

4. Counsel for the Respondent, for his part, argued before us, that the accepted case-law regarding the merging of the various items in a current account into the balance (C.A.251/62 [1]) does not apply to an account that is permanently overdrawn. In the case of such an account (so it was argued before us), the period of limitation should be calculated from the date on which each one of the withdrawals was made. For this submission, he relied on statements made in C.A.345/78 [2]. I find no support for that argument in that judgment. The issue of limitation of actions never arose there at all; all that judgment says is, that the act of debiting an account that is overdrawn does not constitute payment, unless the bank and the customer have otherwise agreed. There is even contradictory authority to the Appellant company's contention: see C.A.323/80 [3]. However, as will appear anon, this submission of the Respondent calls for no decision, since in the circumstances of the present case, the relevant debit balance came into existence more than seven years before the action was instituted.

So we return to the original issue: when, for the purpose of limitation of actions, does the bank's cause of action against its customer arise, where it is based on a debit balance in a current account: from the date it comes into being or from the date of the demand for payment? In order to answer that question, I shall refer to three points, dealing with each in turn:

(1) the relationship between lender and borrower generally, where the debt is payable on demand; (2) the relationship between a bank and its customer, when the account shows a credit balance; (3) the relationship between a bank and its customer, where the account is overdrawn.

5. *The Relationship between Lender and Borrower generally, where the Debt is payable on Demand.*

(a) From time immemorial it has been the accepted principle of English law that, in the absence of agreement to the contrary, the cause of action on a debt payable on demand arises immediately on receipt of the loan by the borrower. In the case of Norton v. Ellam (1837) [12], Parke J. states (at page 840), that:

> "The cause of action arises instantly on the loan."

This was repeated by the court in the case of *Jackson v. Ogg* (1859) [13], at page 378. In both cases it was held, that the fact that the indebtedness under the loan included interest did not alter the date on which the cause of action was created. According to the principles laid down in both those judgments, the limitation of an action on a loan repayable on demand begins to run on the day the loan is granted. That rule applies equally to a note payable on demand in which, for that purpose, the period of limitation commences with the issue of the note (Y. Zussman, *Law of Bills* (Duff-Chen, 6th Edition, 5743-1983), p. 381; and *cf Re J. Brown's Estate; Brown v. Brown* (1983) [14].

(b) As already noted, the lender and the borrower are at liberty to determine between them, expressly or impliedly, that the requirement of a demand is part of the cause of action. There are instances where the court is prepared to deduce from the circumstances surrounding a certain relationship, that the requirement of a demand is part of the cause of action. For example, it is assumed that a collateral undertaking, such as a guarantee or

security for a debt, may not be enforced, unless preceded by a demand as part of the cause of action: *Bradford OId Bank v. Sutcliffe* (1918) [15]. However, even in that case, the rule applicable in those instances is subject to the interpretation of the express or implied intention of the parties to the transaction; *see also, Re J. Brown's Estate* aforesaid [14].

(c) It follows from the foregoing, that when we speak of a debt on a loan repayable on demand, we may be referring to two distinct kinds of case: in the one case, the debt is due to be paid, as it were, "immediately"; in the other, the debt is due to be paid only after a demand has been addressed to the debtor. In the first case, the cause of action arises "immediately" on the granting of the loan; in the other case, the cause of action arises only after the presentation of the demand. In the first case, the claim becomes statute-barred seven years from the date the loan was granted, whilst in the other case, it becomes statute-barred seven years from the date of the demand.

(d) An examination of the first kind of case mentioned raises a problem: if the loan is indeed due to be repaid "immediately," the borrower must return the loan to his creditor immediately upon receiving it. Since by law, a debtor must seek out his creditor, it would follow that he is not in fact entitled to receive the loan at all, being under an obligation to return it to his creditor on the spot. If he nevertheless receives the loan and does not return it "immediately," he is bound to compensate his creditor, under section 11(b) of the Contracts (Remedies for the Breach of Contract) Law, 5730-1970 (hereinafter called "the Remedies Law"). Such a result is obviously unacceptable and the parties' intention is that the borrower is not supposed to return the loan unless called upon to do so; and so long as the borrower is not called upon to return it, he is not expected to do so and there is, of course, no ground for charging him with compensatory interest. How can all that be reconciled with the proposition, that the cause of action arises with the receipt of the loan?

Mr. Meron, for the Respondent, tried to compare the requirement of a demand, in the kind of case in question, to a notarial caution, such as was required before the Remedies Law, by the Ottoman Civil Procedure Law, and with respect to which it has been held that, although such caution had to be served as a preliminary step to a claim for damages for breach of contract, its service does not constitute a part of the cause of action for the purpose of limitation of actions: C.A.279,280/53 [4]. But that does not help us here, for while the notarial caution may not have constituted a part of the cause of action, it did serve as a prior condition to an action, within the meaning of that term in Rule 94 of the Civil

Procedure Rules. 5723-1963; thus if the Defendant alleged in his Defence, that the notarial notice had not been served before action was brought, the claim would be dismissed, whereas in the kind of case we are dealing with here, the non-delivery of a demand does not cause the action to fail and the Statement of Claim may itself be regarded as the demand for this purpose.

(e) The solution to this mystery, it would seem, is to be found in the recesses of ancient English law. In days of yore, monetary indebtedness was regarded as having been created by the receipt of the consideration, a *quid pro quo,* rather than by the promise to pay the debt. The cause of action arose, accordingly, immediately upon the granting of the loan; but it was generally agreed that in practice, the debtor would return the loan only on demand. So long as no demand was forthcoming, he was not expected to repay his debt, nor was he obliged to pay damages. The cause of action, for the purposes of limitation, commenced on the date of the receipt of the loan, but on the other hand, the demand did not constitute a prior condition to the institution of an action and even less a part of the cause of action (A. L. Corbin, *On Contracts,* (St. Paul, vol. 3A, 1960) p. 75. Thus in the Scottish judgment, delivered in the case of *MacDonald v. North of Scotland Bank* (1941) [25] (which departed from the English decision in the case of *Joachimson v. Swiss Bank Corporation* (1921) [16], which held that the presentation of a demand by the customer to the bank was a necessary ingredient of the cause of action for the refund of the monies standing to his credit in his account), it was hinted by Lord Cooper, that the forementioned rule of law was based on the ancient writ of *indebitatus,* in which a demand was required as part of the cause of action.

(f) It is difficult to base the above rule, applying to the first kind of case, along with its component parts, on grounds of legal logic, just as it is difficult to regard it as being particularly consistent. As with many rules of common law, it was probably created in order to provide a solution to practical needs and, in the course of time, became a part of the case-law as a rule that no one bothered to question. Indeed, if the notarial caution has been described as a purely incidental part of the cause of action, the demand referred to could be called the incidental to the incidental part thereof. Whenever the legislature wanted to depart from the rule in order to provide that the cause of action on a debt payable on demand was created with the demand, it specifically said so: see, the Prescription and

Limitation (Scotland) Act, 1973, and in England, sections 5 and 6 of the Limitation Act, 1960.

Since the rule has been accepted in the world of commerce, that the period of limitation of a debt payable on demand is to be calculated from the date of the granting of the loan (whatever its sources may be), and in the absence of any legislative provision to the contrary, I see no reason to depart from it, even where we are referring in our country to a debt payable simply upon demand. In point of fact, we have not been asked by the parties in this appeal to do so.

6. *The Relationship between a Bank and its Customer, when the Account shows a Credit Balance.*

The relationship between a bank and its customer has never lent itself to a precise definition within one of the recognized legal categories. When a customer deposits a sum of money with his banker, is there created between them a relationship of bailment or deposit? Is the bank considered to be the customer's trustee? Is the customer looked upon as one who has lent money to the bank? Halfway through the last century it was held, that the relationship between a bank and its customer, who deposits monies with it, is that of lender and borrower: *Foley v. Hill* (1848) [17]. We would seem, however, to be dealing with a more complex relationship: the bank is not obliged to seek out its creditor, the customer, and its obligation to return the loan does not extend beyond the branch in which the account is managed at the usual working hours. The bank may not refrain from honouring the customer's withdrawals without reasonable advance notice. The bank does not pay out except against the customer's written demand, while the customer, for his part, undertakes to behave with a reasonable degree of caution in giving written instructions, so that the bank is not misled and in order to avoid, as far as possible, the opportunity of forgery by others. The demand is an integral part of the customer's cause of action against the banker, so that the limitation starts running from the date of the demand and not from the date the credit balance comes into existence. It was so held in the above-mentioned *Joachimson* case [16] in 1921, a decision that has always been regarded in England as the *locus classicus* of banking law.

Counsel for the Respondent, Mr. Meron, opened a frontal assault on that decision which, in his submission, is unsuited to modern developments in commercial life. That rule

has not been adopted in Scotland (see, the *Macdonald* case [25]), and it is doubtful whether it applies in South Africa: D. V. Cowen, *On the Law of Negotiable Instruments in South Africa* (4th ed. by D. V. Cowen and L. Goring, 1966), p. 661. On the other hand, it applies to the United States: see A. H. Michie (ed.), on *Banks and Banking* (Charlotteville, vol. 5B, 1973), p. 126. I myself do not share that criticism, but whatever the position may be, that rule has been adopted and become so well-established in our country's case-law, that it seems to me that there is no way of altering it other than by legislation. *Cf.* C.A.251/62 [1], C.A.395/67 [5], Cr.A.515/75 [6], at p. 688, and C.A. 323/80 [3], at p. 679. One of Mr. Meron's arguments turns on those cases, where the account in question has been dormant for many years, and if the rule in *Joachimson'*s case [16] were applied, the bank would be obliged to preserve documents and records relating to the account for dozens of years, in fact, without any limitation of time. English case-law has found a way of overcoming such situations, by creating a presumption of fact, in the circumstances of a specific case, that after dozens of years of inactivity in an account, the bank's debt must be presumed to have been cleared off: *Douglas v. Lloyds Bank* (1929) [18].

Mr. Meron relies on that judgment as proof of the unsatisfactory consequences of the *Joachimson* case [16], so much so, that the only way to overcome them was by creating a presumption of fact, as described above. But the Israeli legislator has intervened in this matter, perhaps unconsciously, and has restricted the effect of the decision in *Joachimson* [16] in relation to inactive accounts. Section 13B(a) of the Banking Ordinance, 1941, as amended in the Banking Ordinance Amendment (No. 15) Law, 5741-1981,provided as follows:

> "A banking corporation shall endeavour to communicate with the owner of an inactive deposit soon after the due date for refunding the deposit; as regards a deposit to be refunded on demand, the due date for its refund shall be deemed to be the date on which the deposit became inactive."
>
> An inactive deposit was defined in section 2 of the Ordinance, as: "A deposit, whether in Israel or foreign currency, in respect of which ten months have elapsed since the instruction was received from the owner of the deposit."

I have said, that the intervention of the legislature was perhaps unconscious, because a perusal of the Banking Ordinance Amendment (No. 14) Bill, 5741-1981, would seem to indicate, that the object of the amendment was to prevent the loss in value of inactive deposits rather than to restrict the application of the *Joachimson* rule: but the wording adopted had more far-reaching consequences. As stated above, I see no reason to depart from that rule and, in my opinion, the Respondent's arguments on this matter should be rejected.

7. *The Relationship between a Bank and its Customer, where the Account is overdrawn.*

The Appellant company has argued before us in favour of a legal symmetry between the situation where the customer's account at the bank was in credit and that where it was overdrawn. The Appellant company further contended, that there was no support, both in the authorities and in professional literature, for the view that no distinction could be drawn between those two situations. Let us review the authorities and literature on this matter:

(a) In the case of *Hartland v. Jukes* (1863) [19], the question arose as to when limitation begins to run with respect to a claim brought on a general guarantee, given by the guarantor of a debit balance in a debtor's account with a bank. Pollock J., delivering the judgment of the Court, held that the cause of action against the guarantor had not arisen at the time the debtor's debt had been created, but after the guarantor had been served with a demand. The action against the guarantor had not, therefore, become statute-barred. No one in that case disputed the view, that the principal debtor's debt had been created by the withdrawal.

(b) In the case of *Parr's Banking Company v. Yates* (1898) [20], the Court departed from that rule, as far as the cause of action against the guarantor was concerned. Vaughan Williams J. held, that the right of action had been created with the appearance of each item of debit balance, and so both the principal debtor and the guarantor were entitled to benefit from the defence of limitation as from such date.

(c) Similarly, in the *Bradford Old Bank* matter [15], already referred to, the defence of limitation, raised against a claim brought on a guarantee given to secure the debit balance on a current account, was considered. The Court held, that the demand does not usually constitute a part of the cause of action for the refund of the debt, but this does not apply in

the case of a guarantee. In that case, the answer to the question, whether or not the demand constitutes part of the cause of action, depends on the construction of the document in question, although *prima facie*, a demand is required. As regards the guarantee under consideration there, the Court preferred the approach adopted by the Court in the *Hartland Case* [19] to the opinion expressed in the *Parr's Banking Company Case* [20] .

In all three of those judgments it was not disputed, that the demand was not part of the bank's cause of action against its customer, where the claim was based on debit balances in the latter's account, so there is no substance in the Appellant company's submissions in this respect.

(d) The Appellant company also placed reliance on a judgment given at first instance in England, namely, the matter of *Lloyd's Bank Ltd. v. Margolis* (1954) [21]. The facts in that case were these: a bank received from its customer a deed of mortgage on certain land to secure his overdraft in current account. The bank sought to foreclose on the mortgage and demanded payment of the debt, but it was met with the defence of limitation; if the determining date was the date of the overdrafts, the claim had become statute-barred, whereas if the date of the demand was the decisive factor, the defence ought to be rejected. The Court noted that the issue, whether the demand was part of the cause of action, was one of construction of the instrument in question and, in its opinion, the proper interpretation called for the service of a demand before action was brought. Upjohn J. also added the following remarks, at p. 738:

> "In my judgment, where there is a relationship of banker and customer and the banker permits his customer to overdraw on the terms of entering into a legal charge which provides that the money which is then due or is thereafter to become due is to be paid "on demand", that means what it says. As between the customer and the banker, who are dealing on a running account, it seems to me impossible to assume that the bank were to be entitled to sue on the deed on the very day after it was executed without making a demand and giving the customer a reasonable time to pay. It is indeed, a nearby correlative case of that decided in Yoachimson v. Swiss Bank Corporation...

> In this case the agreement has provided quite clearly what is to be done before the bank can sue. They must demand the money."

It is quite evident, that that statement relates to the construction of the document under discussion and that the court was disposed to insist upon a demand as part of the cause of action, because the document in question was by way of a security. The Court does not refer to the case where the issue is when does the cause of action generally arise in the relations between a bank and its customer, the latter's account being overdrawn and there is no document defining the relationship between them.

8. A review of the legal literature reveals, that the majority of scholars support the view negativing the application of the rule in *Joachimson* [16] to an overdrawn current account; see, for example, J. R. Paget, *Law of Banking* (London, 9th ed., by M. Megrah and F. R. Ryder, 1982), p. 79; T. G. Reeday, *The Law Relating to Banking* (London, 4th ed., 1980), pp. 47-48; H. P. Sheldon, *The Practice and Law of Banking* (London, 10th ed., 1972), p. 199; C. H. S. Preston and G. H. Newson, *On Limitation of Action* (London, 3rd. ed., 1953), p. 29, and also Cowen, *supra,* who notes that that is also the attitude in South Africa. Michie, too, in his monumental essay mentioned above, notes that in the United States, as well, the period of limitation with respect to a debt arising from a debit balance in a bank, is calculated from the date on which the debit balance is registered in the account. The sole authority on which the learned author relies to support his conclusion is to be found in a judgment, given in 1825 in the Commonwealth of Massachusetts, namely, *Union Bank v. Knapp,* (1825) [24], p. 181. I have had a look at that judgment and it seems, that the question of the meaning of the term "a debt payable on demand" was not in issue. Nevertheless, the Court took it for granted, that the overdrafts created an immediate indebtedness, so that the discussion turned primarily on the question of whether the indebtedness came into existence with each withdrawal or only with the latest debit balance in the account. The fact that no particular or additional judgments on this point have been delivered in the United States during the 150 years that have elapsed since the judgment would seem to indicate that that rule has been accepted without question in that State, which is one that boasts a highly developed banking system.

The only author, to whom our attention has been drawn as holding the opposite view, namely, that favouring the Appellant company, is J. M. Holden, who in his book *The Law and Practice of Banking* (3rd. ed. , 1982), comments, at p. 41, that there exists an understanding between the bank and the customer, that the bank shall call in its debt by notice. The author comments, however, that the question is of little significance, as it is difficult to imagine a bank leaving an overdrawn account dormant for a long time without calling in its debt. Mr. Meron rightly drew our attention to the fact that, in his book, *Law of Banking* (London, 5th ed.), Lord R. S. T. Chorley calls Holden in aid, but nevertheless takes the view, that limitation starts running on the day the loan is granted (*ibid.,* at p. 22). At the same time, the author notes there, (in footnote 4), that while there exist differences of opinion among scholars on this point, he prefers that of Grant, *On Banking* (7th ed.), p. 182, who favours the existence of a single rule with respect to a credit balance and debit balances in a customer's account with the bank.

9. If one adopts the assumption that, in the absence of an agreement to the contrary, the cause of action on a debt payable on demand arises with the creation of the debt, it is difficult to appreciate why it is necessary to distinguish between an ordinary creditor and one who happens to be a bank and to bestow on the latter privileges denied the ordinary creditor, the fact that, as a result of the decision in *Joachimson* [16], assymmetry has been created in the formation of the cause of action in various situations of credit and debit balances, need not deter us. Symmetry is an aesthetic concept rather than a legal one. In the *Joachimson* Case [16], the special reasons that led the Court to require the customer to serve a demand on the bank as a prior condition to the forming of a cause of action were explained. Those reasons do not exist where the customer's account is overdrawn, so there is nothing to prevent us reaching the opposite conclusion. In practice, I see no reason for preferring a bank, which is a creditor for a sum of money owed it by its customer on account of a debit balance in a current account, to any other creditor of a debt payable on demand.

Even were I to consider the *lex ferenda* to be that contended for by the Appellant company, I would still not allow the appeal. The existing rule has been formulated and accepted by nearly everybody. As the learned author Holden, *supra,* has remarked, the

number of instances where the question in issue before us is likely to arise is very small. If the existing rule is, indeed, so undesirable, let the legislature come and say so.

10. I have read my distinguished colleagues' opinions and I find myself unable to agree with their conclusions. Incidentally to a consideration of a comparatively limited issue of the relationship of a bank to its customer, whose account happens to be overdrawn, my distinguished colleagues feel justified in overturning a general rule of law concerning the relations between lender and borrower, which has become deeply rooted in the whole of the Anglo-Saxon world as well as in Israel - a rule. whereby the period of limitation, in the case of a debt payable on demand, commences on the day on which the debt is created, and not on the date of the demand. In the arguments presented to us that question was not raised as an issue in dispute, and from this Court there will go forth, *ex curia* as it were, a far-reaching rule of law, revolutionizing time-honoured arrangements, well-established in the world of commerce!

Admittedly, the theoretical foundation for the present rule is somewhat shaky; but the greatness of the common law lay in its ability to formulate practical rules that have stood the test of time, even where the theoretical source was somewhat doubtful. The fact that the theoretical source of a legal norm is doubtful does not render the norm undesirable. Observe what may be the result of adopting the majority opinion: a lender, who has not demanded of the debtor payment of his debt for very many years, can start the period of limitation by presenting a demand, thereby obliging the lender to preserve the documents pertaining to his account almost indefinitely. Is that really what a normal lender and borrower had in mind with respect to a debt repayable on demand?

In my judgment, this appeal should be dismissed.

M. BEN-PORAT, V-P: All the conditions, on which the creation of a certain obligation is made dependent, must, as we all know, be complied with before the other party to the contract becomes entitled to demand its performance. That is a fundamental rule of contract law which, in the absence of a flaw nullifying some term or other (such as one that contradicts a compelling rule of law), must be maintained by virtue of the principle, that freedom of contract and the will of the parties should be respected. Moreover, I accept the rule, that found its expression in Corbin's book *(supra),* whereby, when a party to a contract

promises to perform a certain obligation (whatever it may be) "on demand" or "within a specified period of time after demand" it is reasonable to construe that as meaning, that an actual demand on the part of the creditor becomes an essential condition in the formation of the right to have that obligation performed. Only on delivery of the demand (besides the other conditions, if any), as agreed upon, does the creditor's cause of action crystallize, so that in any event, only then does the period of limitation of that right begin to run: section 6 of the Limitation Law, 5718-1958.

However, as fully explained in the opinion of my distinguished colleague, S. Levin, J., for reasons that have their origin "in the recesses of ancient English law," a departure from the above rule has taken root in English law, with regard to a monetary obligation to be satisfied "on the demand of the creditor." In days of yore, a monetary obligation was considered to be the consequence of the receipt of consideration (*a quid pro quo*), rather than the outcome of a promise to perform the obligation. Following that line of thought, notwithstanding the condition that payment will, as stated, be made "on the demand of the creditor," it was held there, that the creditor's cause of action comes into being with the giving of "the consideration." In other words, the cause of action for payment of a monetary debt is formed even without a demand, so that in any case, the period of limitation of that right also commences at the same moment. Pursuing that same line of thought, the drawer of a promissory note or the acceptor of a bill of exchange, payable "upon demand," can be called upon to honour that note immediately, so that the cause of action comes into being with the issuing of the note and the period of limitation starts to run at the same time, the reason therefore being, that the holder of the note can in any case demand its payment immediately: Zussman, *in his aforementioned book* (and if the note has been deposited with a trustee - on the day the latter is bound to deliver it to the creditor, even if he has not done so: C.A.209/40 [11]).

Within the framework of the exception, rightly described in legal literature as peculiar or extraordinary, there is an exception to the exception (which fits the rule) as regards the relationship between a bank and its customer, whose account shows a *credit balance.* In the leading judgment of *Joachimson* [16] it was held, that the bank (the borrower) need pay the customer (the lender) his money only after the latter's demand, and this approach has been adopted in Israel:

C.A.251/62 [1], at p. 77, C.A. 679/76 [7], at p. 786, and C.A.323/80 [3], at p. 679. On the other hand, the relationship between the bank and its customer, whose account is *overdrawn,* has remained within the scope of the extraordinary exception, although it is undisputed that that relationship, conversely, is also that of lender and borrower: C.A.395/67 [5], at p. 22, C.A.323/80 [3] *aforesaid,* at p. 679, and Cr.A.595/83 [8].

A similar approach (though, it would seem, not a truly identical one) may, at first sight, be discerned from the summarization of the rule in the *Restatement, Contracts,* 262, cited in *Corbin's* book at p. 77, note 53. I quote the passage as it stands:

> "Generally there can be no right of action on a contractual promise in terms conditional until all the facts stated as conditions have happened or been performed. But a peculiar rule prevails in regard to promises to pay money debts on demand. Such a promise to pay one's money debt is regarded as unconditional unless the parties by some more express language indicate a contrary intention, or unless usage as in the case of bank deposits prescribes a different rule. In other promises in terms conditional on demand, no duty of immediate performance arises without a demand, and even in such promises to pay one's own debt, interest is allowed as damages only from the making of a demand."

We perceive, therefore, that the exception is described there as "peculiar." From the language of that passage, one cannot conclude what "money debts" are being referred to. It follows from the text (*ibid.* at pp. 76-77), that the exception applied mainly to negotiable instruments payable "upon demand," since with regards to those, the assumption is (as in the passage above quoted), that the words "on demand," standing on their own, do not reveal a genuine intention to make the maturing of the debt (as distinct from charging interest) conditional on an actual demand. Accordingly, an action may be brought on such an instrument without a prior demand, and there are some who regard the action as constituting the demand. A certain degree of astonishment on the part of the author is rightly felt when he says:

"The peculiarity of the case is that the action is not thought to be premature."

With respect, I share that astonishment, even though, as regards the principal debtor on a note (the maker of the promissory note and the acceptor of a bill of exchange), that approach has been absorbed into our law (as shown in the authorities I have cited above). But I must straight away confess, that the logic of that rule has never been apparent to me. Let us assume that the same person signs a promissory note "on demand" in favour of one creditor (for instance, because there are no cheques left in his cheque-book) and a cheque to the order of another creditor, drawn on the bank where he holds a current account. As far as the cheque is concerned, at least, if the proper date of issue has been inscribed on it, there can be no doubt, that it is tantamount to a payment in cash, that is to say, that the intention is to pay the amount due immediately on its being presented to the bank. The same applies, in the example given above, to the promissory note, (unless some other condition, in addition to the "on demand," was introduced into the agreement between the parties). However, while the holder may sue on the note without previous demand, he may obviously sue on the cheque only if he has first of all presented it to the bank and it has been dishonoured. It is the dishonouring of the cheque that gives rise to the right to sue on it, so that it is presented to the bank a few weeks later, the cause of action will arise on the later date (if it is dishonoured), and the period of limitation also begins to run as from that date (see section 96(a) of the Bills of Exchange Ordinance [Revised Version]). One may wonder why the situation is different, where the debtor has (in the above example) given a promissory note payable "on demand," and the payee has taken it without demanding its payment on the spot; and where such demand is made only a few weeks later (as in the case of the holder of the cheque) and encounters a refusal, why that is not regarded as constituting the cause of action and the beginning of the period of limitation.

But the negotiable instrument is not the central feature of our present deliberations, and we may leave the case-law to be pondered on some other time; it may well be that the present rule has taken such deep root, that the intervention of the legislature is needed to alter it.

An identical exception was recognised in the United States with respect to an antecedent debt, that the debtor had promised to clear off "on demand": *Corbin, supra* at p. 77.

But for our purposes, it is important to stress - if I have fully grasped the situation - that the exception extends, particularly in the United States, to an existing debt, by way of a *quid pro quo,* or an antecedent debt, accompanied by a condition, that it is to be paid "on demand," and without any embellishment designed to reveal the parties' intention beyond that expression. Such is the situation, for example, where the debtor *has received* from the creditor the goods he ordered and in return, has given the latter a promise to pay "on demand": see the illustration quoted in the *Restatement, supra,* in which the creditor "sells and delivers" to the purchaser the vehicle he has ordered and receives in return the debtor's promise to pay the purchase price "on demand."

That, however, is not the case in point here, and I have found no contradictory case-law in Israel. In the matter in hand, the commercial transaction between the bank and its customer is one of the giving of a loan (by way of overdraft) which - so it must be assumed - is in the interests of both parties. The retention of the money in the hands of the borrower, therefore, constitutes the subject-matter of the agreement, and if you deprive it of that character, you have emptied the contract of its contents and ignored its purpose. Indeed, in 51 Am. Jur. 2d. (Rochester and San Francisco) 697, we found that -

> "...in many cases involving contracts for the payment of money on demand *(most of them loan transactions)* the view has been taken that actual demand was required and that the Statute could run merely from the time of demand."
>
> (My emphasis - M.B.-P; and see the authorities cited in footnote 9, *ibid.*)

Furthermore, it is noted in Corbin, supra at p. 77, note 55, and in the text immediately following, that in actions on *the promise* (that is to say, as distinct from the existing or antecedent debt as the cause of action), it has been held in several judgments, that the demand is an essential component, that must be pleaded and proved. Among the authorities,

I have also found English cases: see, for example, *Carter v. Ring* (1813) [22] (where it was held, on the strength of the parties' intention, as indicated by the document, that what they had in mind was an actual demand).

I want to stress, that the ancient exception I have been discussing hitherto is itself founded, as it were, on the intention attributed to the parties, whereby, the debt being presently existing or antecedent, the parties are not presumed to propose actually turning the demand, on which the undertaking to pay has, technically, been made dependent, into an integral part of the cause of action (as distinct from the basis for awarding interest). At the same time (and to my mind, this is a contradiction in terms), they admit in England, that the whole concept results from an approach long out of date. There is no doubt that the rule, under which a contract is construed in accordance with the presumed intention of the parties, was long ago adopted and has become deeply rooted in Israel, too (see, now, section 25(a) of the Contracts Law (General Part)). The intention is to be deduced from the contents of the contract and if it cannot be implied from it, then it is to be inferred from the circumstances. But as a test for determining intention nowadays, it is difficult to accept an ancient view that has become discredited. In the *current* reality of Israel, such an approach is a kind of alien concept, opposed to well-established principles, *inter alia,* the principle that the presumed intention of the parties to a contract is the determining factor. It is both *lex lata* and *ferenda,* whilst the ancient exception, described even in its native land as odd and puzzling, contradicts that test and the accepted policy in Israel, as I shall demonstrate anon. Accordingly, in my judgment, the aforementioned exception should be regarded as incompatible with the conditions in Israel, within the meaning of the proviso to Article 46 of the Palestine Order-in-Council, 1922. My view derives also from the fact, that the overriding principle of presumed intention has been absorbed, and rightly so, into our law, whereas the said exception (which is incompatible with that principle) ought to be rejected. The exception has not so far been adopted in our case-law, so that this is not a case that calls for the intervention of the legislature.

I have already hinted, that we are dealing with a commercial loan transaction, and that *it is the use of the loan monies* in the hands of the lender against profits that the borrower enjoys, within the course of his business, from that use, as long as it lasts, that constitutes the subject-matter of the loan contract. The condition, whereby the repayment shall be

"upon demand" (namely, the lender's demand), only enables him to bring the transaction to an end whenever he wishes. But as long as it is worthwhile, in his opinion, he may elect to let the transaction go on even for years on end, beyond the period of limitation (unless the borrower has returned the loan money on his own initiative). All that stands, in my view, in complete contradiction to an implied intention, is that there is an obligation to repay the loan immediately on its receipt. I see no point in distorting the intention ascribed to the parties, by relying on an old and outdated view, especially since even in the Anglo-Saxon world, the exception was not intended to apply to a commercial loan agreement between John Doe and Richard Roe, even though it is to be repaid "upon demand," as distinct from a *present or antecedent* monetary debt (see above).

Furthermore, I am inclined to think (without deciding the matter), that the demand must be accompanied by the allotment of a reasonable time to perform the obligation, the length of time to be determined according to the circumstances of each given case. This does not mean, that the passage of time necessarily postpones the course of limitation or *necessarily* prevents the creation of the cause of action, but this follows, looking at it in the light of fair behaviour, that Israeli law requires of the parties to a contract (especially since the Contracts Law (General Part)). As the case in question preceded the Contracts Law (General Part), I propose to rely, for my opinion, on the case-law relating to an entirely different subject, which nevertheless has a bearing on the accepted *general* approach.

It has long been held, that a person, who has given permission (or a "licence") to another to use his property (such as to enter upon his land for some purpose), even a permission customarily described as "bare," and who now wishes to revoke it, must give the licensee, as a *sine qua non,* notice of revocation with a reasonable period of time elapsing between that notification and the filing of the action. Otherwise (as has been decided - *perhaps* as an extraordinary step), the ground for eviction is incomplete: C.A. 160/62 [9], at p. 1779, and the authorities cited *there.* Moreover, if the permission was not "bare" only, but for a consideration, the *notice* had to state a reasonable extension of time (it was not enough that, in actual fact, the licensor allowed a reasonable time to elapse): see with respect to the distinction C.A. 96/50 [1], at p. 477, 479. Support for my line of thought, that receipt of consideration for the user (whether monetary or in land) is a matter that should be taken into account when construing intention, may be found in the English

judgment concerning a licensee in *Winter Garden Theatre v. Millenium* (1947) [23], at p. 335 (in the judgment of Lord Simon).

In my judgment, it is inconceivable that a borrower in a commercial transaction (and perhaps even in a loan granted as a favour) should not benefit from the same degree of consideration under Israeli law as a licence under a "bare" permission, as described.

I should not be understood to imply, that the status of licensee still exists after the coming into force of the Leasing and Lending Law, 5731-1971 (hereinafter called "The Lending Law," a problem that we need not resolve in this appeal.

Further support for my line of thought may be found in the provision contained in section 29(b) of the Lending Law whereby, if "the period of lending has not been agreed on or the parties have continued to maintain it after the expiration of the period agreed upon without fixing a new term, each party may bring the lending to an end *by giving the other party notice a reasonable time in advance"* (my emphasis - M. B-P). That is to say that, despite the fact that the licence to possess and use the property was granted without consideration (definition of "lending" in sec. 2b of the Lending Law), the legislator ensured that the borrower would not be evicted on the spot and that conduct towards him should be fair. I am aware that that Law is later than the period relevant to our case, but it is a continuation, or a kind of continuation, of the concept of the bare licence under the law that preceded it."

In the same spirit, section 41 of the Contracts Law (General Part) provides, where there is no agreement on the date for the performance of a contractual obligation, that it is to be performed "a reasonable time after the contract has been concluded, *on a date notified by the creditor to the debtor reasonably in advance"* (my emphasis - M. B-P). (The proviso does not appear in section 9(a) of the Law of Sale, 5728-1968, as regards the date for the delivery of the commodity, not delivered immediately on the completion of the contract).

But for our purposes, there suffices a demand on the part of the bank as an essential component for the creation of the cause of action against the customer.

My opinion is, therefore, that the bank's action was not statute-barred and in this sense, the appeal ought to be allowed. The case should be returned to the District Court for trial on the merits. I would award costs against the Respondent in both Courts in the sum of IS. 500,000.-, linked from today and until actual payment.

S. NETANYAHU, J.: As my distinguished colleagues have explained, it is a long-established rule in common law that, for the purposes of limitation, the cause of action on a loan debt repayable on demand arises without a demand, immediately on the granting of the loan. Such is also the situation in the relationship between a bank and its customer, it being regarded as a relationship between lender and borrower, except that in this case, there is an exception to that rule, namely, the exception laid down in the *Joachimson Case [16],* to the effect that whenever the customer has a credit balance and the bank is the debtor, the period of limitation commences against the bank only with the date of the demand.

The rule in the *Joachimson* Case [16] has been adopted in our case-law, too, as stated in my colleagues' opinions. As my colleague S. Levin, J. demonstrated, there exists an additional exception in the common law, in an action against guarantors, that there, too, the period of limitation starts to run only after the demand. In that respect, in our country, section 8 of the Guarantee Law, 5727-1967, applies, and this provides, that the creditor is in no way entitled to demand of the guarantor fulfilment of the guarantee, without first requiring the debtor to perform his obligation, save in the case of one of the three exceptions set out in that law.

The parties before us do not dispute that rule. The dispute between them turns only on the issue, whether the exception to that rule, laid down in the *Joachimson* Case [16], ought also to apply to the action of a bank against its customer, whose account is overdrawn. Were the dispute limited to this alone, I should be inclined to adopt the view held by my colleague, S. Levin, J., that the *ratio decidendi* of that judgment necessitates distinguishing it from the circumstances arising in cases, where the bank is suing a customer, whose account is overdrawn.

However I, too, am unhappy about that ancient rule and I, too, like my two colleagues, am dissatisfied with the degree of logic in making a loan debt repayable on demand, repayable immediately without the need for a demand for the purpose of the course of limitation. Had our case-law already absorbed such a rule, constituting an exception to the principle that no cause of action arises unless and until all the conditions for its creation have become crystallised, or were I convinced that it had become an accepted and established custom of bankers in our country, then I would accept it without demur. But as I have already remarked, in our law, it is precisely the exceptions to the rule (the rule in *Joachimson's* Case [16], as regards case-law, and as regards actions against guarantors, in

the Guarantee Law), that are compatible with the proper principle, that have in fact been accepted. The rule itself has not been adopted in the case-law and it has no application here, save in the case of a principle debtor under a promissory note (as was explained by my colleague, the Vice-President). Nor have we heard from counsel for the Respondents any submission, that a departure therefrom would bring about a change in banking practice that would harm the banking business system.

In view thereof and since that rule has not taken root in our country, even during the period when we were referred to the common law by virtue of Article 46 of the Palestine Order-in-Council, why should it have become acceptable without question and part of our law today, after we have ceased to be subject to the common law?

Although the parties have not argued against it, there is no justification for our abetting in the absorption of this alien and outlandish concept into our legal system.

I share the opinion of the Vice-President, that the appeal ought to be allowed and the case returned to the District Court for trial.

Resolved by the majority, with S. Levin, J., dissenting, to allow the appeal, to reverse the judgment of the District Court and to return the file to the District Court to be tried on the merits. The Respondent will pay the costs of the appeal in both instances in the sum of IS. 500,000.-, linked to the date of the giving of this judgment.

Given this day, 27 Ellul 5744 (24.9.84).