Privy Council Appeal No. 121 *of* 1926.

David Moyal and another - - - - - - - *Appellants*

v.

Ahmed Mohamed Halawe - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF PALESTINE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1928.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD BUCKMASTER.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* THE LORD CHANCELLOR.]

On the 5th March, 1911, the appellant Calmy, a Turkish subject, then resident at Jaffa, executed a power of attorney in wide terms in favour of the appellant Moyal, a Spanish subject. The power expressly authorised Moyal to sell all lands registered in the name of Calmy in the districts of Jaffa and Gaza.

During the war Calmy removed to Smyrna and Moyal was deported by the Turkish Government to Konia in Turkey. The Turkish Government also deported to Konia the respondent Halawe, who was also a Turkish subject.

On the 13th February, 1918, a contract was executed before the public notary in Konia between Moyal and Halawe. The contract was in the Turkish language, and a certified translation of it was before the Board. By its terms Moyal, in pursuance of his power of attorney, sold to Halawe one-half share out of $52\frac{1}{2}$ shares of land at Gaza registered in the name of Calmy. The sale was expressed to be "in consideration of a sum amounting to 3,000 Turkish pounds, which value he has taken and received in gold cash from the said Halawe." The contract went on to provide for the transfer of the land into the name of Halawe

on demand, and stipulated that if such transfer was refused or could not be effected then " he undertakes to return the 3,000 pounds aforesaid received by him in cash on demand to him or to the person or in the place he indicates, together with their legal interest from the date of this deed."

At the date of the contract Turkish law provided that paper money should circulate and be admitted as cash in all payments and expenditures in Turkey and that failure to comply with this obligation rendered the offender liable to fine or imprisonment. The land referred to in the contract was at the date situate in a part of the Turkish Empire in the occupation of the British forces.

On the 17th February, 1919, a circular letter was sent by the Senior Judicial Officer at Jerusalem to the Courts in Palestine directing *inter alia* that, in the case of debts contracted after the issue of Turkish paper currency, debts should be liquidated at the Egyptian equivalent of the Turkish paper currency on the date when the debt was contracted. This rule was stated by the letter to be subject to certain exceptions, of which the only relevant one was in the following terms :—

> " If the contract stipulates for a payment to be made in gold or in any currency other than Ottoman, and the creditor proves that the consideration for such payment was not Ottoman currency notes, the terms of the contract should be carried out as regards gold, and, as regards other currencies the sum should be paid in Egyptian currency at the rate of exchange current on the day of payment."

On the 9th March, 1921, notice was given in writing by Halawe to Moyal requiring the transfer of the land. At the date of the notice Moyal and Halawe had returned to Jaffa ; Calmy was still in Smyrna.

The notice was not complied with, and on the 3rd July, 1921, this action was commenced in the District Court of Jaffa by Halawe against Moyal and Calmy, claiming the payment of 3,000 Turkish pounds in gold with legal interest. The defendant Calmy did not appear to the writ ; the defendant Moyal appeared in person and raised an objection to the jurisdiction which was overruled by the Court. On the merits the defendant Moyal asserted that the transaction was not accurately set out in the deed. His story was that the only sum he actually received was 399 Turkish paper pounds. He said that the meeting before the public notary was, as he described it, a " legal trick " ; that what really happened was that at that meeting certain sacks containing an unspecified amount of gold were produced, but that after the meeting the parties adjourned to the shop of a neighbouring Turk where the real consideration was handed over in the shape of the 399 Turkish bank notes. Under the rules of procedure governing the Court neither the plaintiff nor the defendant were competent witnesses. The defendant Moyal challenged the plaintiff to produce his books in order to show how the transaction was recorded there, but that challenge was not accepted. A number of witnesses were called by the defendant Moyal, but

no one was produced to give any evidence as to the transaction at the shop. One witness was called who was present at the meeting before the notary, and who deposed to certain unopened sacks apparently containing gold being there produced and handed to Moyal. On the other hand there were several witnesses called who proved that at the date of the transaction the market value of this land would have been in the neighbourhood of 400 Turkish gold pounds and no more.

The Court of first instance delivered judgment on the 30th January, 1922, and decided that the defendants were liable to pay to the plaintiff 3,000 Turkish paper pounds and gave judgment for the Egyptian equivalent of that amount, calculated at the 13th February 1918, with legal interest from that date until payment. The plaintiff appealed from this judgment and cross appeals were entered by both the defendants. The Supreme Court of Palestine gave judgment on the 9th September, 1925, allowing the plaintiff's appeal and decreeing that the judgment of the Court below should be amended by substituting 3,000 gold pounds for 3,000 paper pounds, and it dismissed the cross appeals. Both defendants appeal to His Majesty in Council from this decision. Before the Board the appellants contended that the action ought to have been dismissed on the ground that the Court had no jurisdiction to entertain the claim. It was alleged that since the appellant Calmy was in Smyrna, and since the transaction took place at Konia in Turkey, Smyrna was the right Court to try the suit. The Board is satisfied that this objection is unfounded. The action was properly brought against the appellant Moyal, who was resident in Jaffa; by the rules of Court prevailing in Palestine there is power to serve one of two defendants who is out of the jurisdiction in such circumstances. But in addition it appears that, at the hearing before the Court of Appeal, Moyal expressly appeared as attorney for Calmy in addition to appearing in his own name, and the power of attorney of the 5th March, 1911, gave him full power to bind his principal by such an appearance.

It was further argued on behalf of the appellant Moyal that he only executed the contract of the 13th February, 1918, as agent for his disclosed principal Calmy, and, therefore, that he incurred no personal liability to repay the sum named in the deed. Their Lordships do not agree with this contention. Although it is true that the contract was for the sale of land registered in the name of Calmy the consideration money was paid to Moyal, and on the true construction of the contract Moyal personally undertook to repay the money if the transfer of the land was not effected. It follows that judgment was rightly recovered by the plaintiff against both defendants. There remains the question which was very fully argued, as to whether the judgment should be for 3,000 Turkish paper pounds or 3,000 Turkish gold pounds in either case with the appropriate interest. The appellants contended that on its true construction the consideration for the

transfer was only the value in gold of 3,000 Turkish pounds, and that, at the date of the contract 3,000 Turkish paper pounds were only worth 399 pounds in gold. This contention does not seem to have been raised in either of the Courts below, whose members were presumably familiar with the Turkish language and who had the original deed before them, and it was suggested that if such a contention had been raised it would have been possible to show that the words relied on in the translation did not fairly bear the meaning sought to be placed upon them. In these circumstances their Lordships would hesitate to overrule the decision of the inferior Courts upon this ground ; but, in truth, it does not appear to their Lordships that the construction suggested is consistent with the provisions of the Turkish law at the date of the contract. By that law paper money had to be received as cash in all payments, and it is difficult to see how the value of Turkish paper money in Turkey could be less than its equivalent in cash consistently with these provisions.

But a further point was taken on behalf of the appellants. They contended that, since by virtue of Turkish law, paper money had to be accepted as cash in all payments, it followed that whatever construction was put upon the deed, the defendants could have discharged their obligation by payment of 3,000 paper pounds, and, therefore, that this sum was the measure of their obligation. It was contended further that when proceedings were instituted in the Courts of Palestine to enforce the obligation the amount recoverable must be the 3,000 Turkish paper pounds which were the limit of the defendants' obligation under the contract, and that the judgment of the Palestine Court must be for the equivalent of that amount in Palestinian currency. It was pointed out that under the circular letter of the 17th February, 1919, whose validity was not disputed, this debt had to be liquidated at the Egyptian equivalent of the Turkish paper currency on the date when the debt was contracted. The respondent's answer to this contention was to rely upon the exception set out in the circular. He contended that the contract stipulated for a payment to be made in gold, and he said that by production of the deed he had proved that the consideration for the payment was not Ottoman currency notes.

In the view of this Board the appellants are right upon this point and the respondent's answer fails. Although it may be that the averments in the deed afford some evidence that the consideration was not notes but gold their Lordships do not think that the Courts are precluded by the deed from ascertaining the true facts, and the evidence adduced before the Court of first instance certainly does not satisfy them that the consideration was gold and not currency notes. It appears that the Court of first instance, who had the advantage of seeing the witnesses, reached the same conclusion. It follows that the judgment of the Court of first instance ought to be restored. There remains the question of costs. The respondent should have the costs awarded by the

Court of first instance. In the Court of Appeal all the appeals ought to have been dismissed and their Lordships think that there should be no costs of any of these appeals.

Before their Lordships' Board the appellants have succeeded in obtaining a variation of the judgment in their favour but have failed to get the action dismissed, and in these circumstances their Lordships think there should be no costs to either party of the appeal to His Majesty in Council. Their Lordships are strengthened in this conclusion by the fact that the judgment appealed against was delivered so long ago as the 9th September, 1925, and that, although invited to do so, the appellants were unable to furnish any explanation why the appeal should have taken two and a half years to reach a hearing. In their Lordships' view delays of this kind are calculated to work hardship and even injustice, and such a delay, if unexplained, is a factor which may properly be taken into consideration in dealing with the question of costs. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

DAVID MOYAL AND ANOTHER

v.

AHMED MOHAMED HALAWE.

DELIVERED BY THE LORD CHANCELLOR.

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