

*Privy Council Appeal No. 30 of 1939*

**Michel Habib Raji Ayoub and others** - - - *Appellants*

*v.*

**Sheikh Suleiman El Taji El Farouqi** - - - *Respondent*

FROM

**THE SUPREME COURT SITTING AS A COURT OF APPEAL,  
PALESTINE**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 11th MARCH, 1941

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*Present at the Hearing:*

VISCOUNT SANKEY  
LORD ATKIN  
LORD JUSTICE LUXMOORE

[*Delivered by* LORD ATKIN]

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This is an appeal from the Supreme Court of Palestine sitting as a Court of Appeal who set aside a judgment of the District Court of Jaffa in favour of the Appellants, the Plaintiffs in the suit, for £2,500 for breach of contract. The hearing in the District Court was the result of a decision of this Board on appeal in the same case, who after judgments in the two Courts in Palestine ultimately in favour of the plaintiffs remitted the case for a further and fuller hearing. The dispute between the parties arises out of a contract in writing dated November 12, 1929, under which the appellants agreed to sell to the respondent certain land in the district of Jaffa. The purchase price was to be paid as to £200 on the signing of the agreement, when the purchasers were to be let into possession, and the balance by instalments. There was a date fixed for completion and there were various stipulations by either party, as to payment of taxes, survey of the land, proof of registration and the like. The agreement was subsequently varied by correspondence as to the date of the subsequent payments with an express stipulation that the remaining stipulations of the agreement remained in force. The purchasers paid the initial £200 on signature and went into possession; but it does not appear that they have made any further payment. There was in the agreement clause 8: "The second party" (the purchaser) "shall pay to the first party £2,500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement." There was a similar stipulation by the vendor in the event of any breach on his part. By the varied agreement the purchaser was to pay £400 by the end of February 1931. On March 2, 1931, the vendors gave the purchasers written notice to pay the £400 within three days, and on July 25, 1932, delivered their statement of claim in the present action which averred the contract, averred two breaches in respect of the non-payment of taxes, and the non-payment of £400, and claimed £2,500 as the agreed damages. The District Court dismissed the action on the ground that the claim as to damages did not apply to the contract as varied. This was obviously wrong and in effect the Supreme Court so held, and treating this as the only issue gave judgment for the plaintiffs.

On appeal to the Privy Council this Board affirmed the opinion of the Supreme Court so far as it went; but as it was apparent that other points raised by the purchasers had not been disposed of, remitted the case for further hearing. In their judgment attention was called to the provisions of S. 46 of the Palestine Order in Council, 1922, and to the introduction into the jurisprudence of Palestine of the provisions of the rules of the English common law and equity as there provided. It is plain that their Lordships studiously refrained from expressing any opinion as to the effect of this clause upon the issues in this action; and in this respect it would appear that one of the Judges of the Supreme Court was under a misapprehension.

The questions that remained for consideration on the new trial, and have now been decided by the Supreme Court, arise out of the provisions of Articles 111 and 112 of the Ottoman Code of Civil Procedure. Unfortunately disputes have arisen in this and other cases as to the correct translation of this code which is in Turkish. Fortunately in the present case we have translations into Arabic by two of the learned Judges of the Supreme Court who were members of the Appeal Court, and their Lordships are able to approach this part of the case with some confidence that the English translation of the Arabic by the Court interpreter conveys the true text. There were some slight verbal differences in the Arabic translations which did not affect the substance, and for the purpose of this decision their Lordships adopt the rendering of the Senior Judge, Mr. Justice Khaldi.

Art. 111. If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded.

Art. 112. The damages to be awarded for failure to carry out the undertaking which amount to payment of money, is a judgment for the interest at the rate of 1 per cent. per month in respect of the capital amount. This interest is awarded without calling on the creditor to show that he suffered damage. If there is no agreement in the document (Sanad) regarding the interest and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim.

It is necessary now to refer to S. 46 of the Palestine Order in Council of 1922.

" 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.

" Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary."

The appellants contend that the case falls to be decided by the express provisions of Article 111 of the Code being Ottoman Law in force at the material time. It is only subject thereto that the common law and doctrines of equity are directed to be in force: and there is therefore no support for the defendant's contention that the English distinction between penalty and liquidated damages has to be applied. That the stipulation as to £2,500 would be considered a penalty according to English rules was admitted by the appellants' counsel. There could hardly be a plainer

case. For any failure to pay any of the instalments on due date, for failure to pay taxes, to take the agreed part in the appointment of a surveyor, this sum of £2,500 became payable. It was the contention of counsel, and it seems correct, that the recovery of this sum left the instalments still outstanding: and that from time to time the agreed sum would be recovered as and when there was any breach. Their Lordships cannot hold that under the present system in Palestine such harsh and oppressive terms have to be enforced by the Courts. The terms of Article III can be readily construed so as to afford the Courts the means of giving relief against a merely penal stipulation. The code speaks in a legal system which does not know penalties as such: in which an agreement to pay damages must therefore be strictly enforced "no more and no less." But when the difference between penalty and liquidated damages is introduced into the legal concepts which now owing to s. 46 of the Order in Council form the jurisprudence of Palestine the terms of the Article III can be given a plain and just meaning. Agreed liquidated damages, if to be enforced, must be the result of a "genuine pre-estimate of damages" to use the illuminating phrase of Lord Dunedin. They do not include a sum fixed in terrorem covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. It seems right therefore to conclude that now when the code is applied to contracts "damages" will be taken to mean actual damages, and the article will only apply to an agreement which represents "a genuine pre-estimate of damages." Where there is such an agreed sum "no more and no less" can be awarded. But if the Court applying well known rules has to conclude that the sum agreed was a penalty whatever it may be called in the agreement then the penal stipulation will not be enforced. It results from what has been said that it appears more correct to say that the code must be construed in the light of the doctrines of English law rather than that the English principles relieve against the code. If there is a clear and infrangible antinomy the code must of course prevail. On this point therefore the appeal fails. It nevertheless remains to consider the construction of s. 112. The action has been remitted to the District Court to assess the damage caused to the appellants by the breaches alleged, and unless the plaintiffs can claim interest under the article it seems difficult to see what other damage they could establish. The view taken by the majority of the Supreme Court was apparently that the article only applied to a single obligation to pay money. It may be supposed that a simple money bond, or a promissory note would be instances. It was not considered applicable to a contract where there were reciprocal undertakings. On this point their Lordships agree with the Acting Chief Justice that the words of the article do not appear to be as limited in this scope as appeared to the other two learned Judges. The promise to pay the purchase price in instalments is an "undertaking which amounts to the payment of money." A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments: and it would appear irrelevant that there are other obligations outstanding on either side, if once it is established that a fixed sum is due and payable. It seems difficult to see why interest should be allowed on a single payment and not on instalments: or why if in fact there has been a delay in making payment; the creditor should not be compensated because there are further and other obligations outstanding. At the hearing it would appear that the respondent contended for the construction now adopted arguing that Article 112 provided the only remedy for delay in payment; and that where it applied Article III had no operation. Their Lordships do not take this view. The two articles are independent, though when it comes to assessing the actual damages the plaintiffs may have to fall back on Article 112. What the effect may be of a suit to recover interest only and not the principal is a matter which was not discussed at the hearing, and no opinion is expressed upon it. For the reasons above given their Lordships will humbly advise His Majesty that this appeal be dismissed.

As the respondent has not appeared there will be no order respecting costs.

In the Privy Council

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MICHEL HABIB RAJI AYOUB  
and others

v.

SHEIKH SULEIMAN EL TAJI EL FAROUQI

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DELIVERED BY LORD ATKIN

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