DICKINSON, ACTING C.J. & THOMAS, ACTING P.J. 1927.

[DICKINSON, ACTING C.J. AND THOMAS, ACTING P.J.]

ZENON AND EVAGORA TH. CHRYSOSTOMIDES

v.

NICOLI PANAYI.

April 23.

PROCEDURE—USURY LAWS—MERCHANT AND FARMERS—BOND NOT DISCLOSING TRANSACTION—LAW 18 OF 1919, SECTIONS 4, 6, 7, 8, 9 AND 10—DETAILED ACCOUNT—NEW ISSUES—ACCOUNT BOOKS NOT KEPT IN COMPLIANCE WITH COMMERCIAL CODE, ARTICLES 3 AND 5—INADMISSIBLE AS EVIDENCE—"ACCOUNT STATED ON THE BOND OR MORTGAGE"—REFRESHING MEMORY ON INADMISSIBLE DOCUMENTS—FINAL ORDER.

APPEAL of plaintiffs from the judgment of a District Court.

Nicola Lanites and *Michaelides* for appellants (plaintiff).

Kakoyannis for respondent (defendant).

HELD: A witness may refresh his memory from a document which is inadmissible as evidence.

A final order is one disposing of the matter in dispute between the parties.

The facts are sufficiently set out in the judgment of the Appeal Court.

Judgment: This is an appeal from the judgment of the District Court of Limassol, dated 23rd June, 1925, dismissing an action brought to recover the sum of £137 1*s.* 4*cp.*, balance due on bond.

The plaintiffs are merchants and the defendant a farmer.

It was further admitted that the bond sued upon did not comply with Section 8 of Law 18 of 1919.

Issues were settled on November 3rd, 1924, the first issue being "Does the bond sued upon disclose the transaction for which it was given?"

It was specifically admitted by counsel for plaintiffs at the settlement of issues that the bond did not disclose the transaction for which it was given.

Three other issues were framed but these were never dealt with at the trial. The action came on for hearing on the 19th March, 1925, when again counsel for plaintiffs admitted that the bond was not framed in accordance with Section 8 of the Law. The Court then held the bond was inadmissible.

The defendant asked for the dismissal of the action. The Court refused to dismiss, holding that it was open to plaintiffs to prove the amount due by other means.

The Court ordered plaintiffs to furnish defendant with a detailed account, and adjourned for that to be done.

The case came on again before the District Court now constituted by a different President and different Cypriot Judges. Then plaintiffs' counsel submitted that a detailed account had been given to defendant, which they admitted, but every item in the account was disputed.

No new issues were framed as, in our opinion, there should have been in an account dated back to May, 1919.

One of the plaintiffs went in the witness box and sought to prove how the amount of the bond was made up, by producing his day book and ledger. It was admitted that these books had not been kept in compliance with Sections 3 and 5 of the Commercial Code, and, therefore, the Court declined to admit them in evidence by reason of Section 4 of Law 18 of 1919.

We concur in this view of the District Court. The plaintiff (witness) then asked to be allowed to refresh his memory from these two books, which, he swore, were made up by daily entries made either by himself or by his clerk under his supervision.

The defendant objected to plaintiffs being allowed to do so, and the Court heard argument thereon and retired to consider their decision, which is as follows:—

"Having now heard Mr. Kakoyannis fully argue the question as to the true interpretation of Law 18 of 1919, we are of opinion that under the general rules of evidence the witness would be allowed to refresh his memory from both the day book and the ledger. The whole difficulty, however, in this case is (1) that the action is brought on a bond; (2) that the parties are admittedly merchant and farmer; and (3) that the bond admittedly does not comply with the provisions of Law 18 of 1919.

Now it appears to be quite obvious that the whole object of the law in question was to protect farmers, and, with this object in view, to force merchants to keep certain books in a certain way, and render certain accounts to their farmer debtors. The plaintiffs having admitted that they cannot succeed on the bond now seek to continue their action as being in the nature of an account stated, but here again they must fail, as the provisions of Section 7 have not been complied with. They are thus thrown back on Section 10, but this Section would appear to be a general clause covering only cases other than those specially provided for under the law (viz: account stated, bond or mortgage) whereas the plaintiffs by their writ of summons claim on a bond and (presumably in the alternative) on an account

DICKINSON, ACTING C.J. & THOMAS, ACTING P.J.

ZENON & EVAGORA TH. CHRYSOSTOMIDES v. NICOLI PANAYI.

which appears on the back of the writ of summons but which was never presented to or acknowledged by the defendant before action. In parenthesis we should like to say that it appears to us quite possible that the word ' account ' in Section 10 should read ' amount ' or in the alternative that the word ' on ' should be ' or.'

We are of opinion that once the bond on which the plaintiffs are suing has become inadmissible by non-compliance with Section 8, the plaintiffs are precluded from adducing any other kind of evidence to prove the amount due.

If the bond were admissible but the amount was disputed by the defendant, then we are of opinion that the merchant would be allowed to produce his day book (if the same were properly kept) in order to prove the correctness of the amount.

For the above reasons we are of opinion that the plaintiffs cannot succeed in their present form of action and there will be judgment for the defendant with costs to be taxed."

We think the District Court were not quite correct in stating that " plaintiffs having admitted that they cannot succeed on the bond now seek to continue their action as being in the nature of an account stated."

We cannot find anything in the record that bears out this view. We think they were merely seeking to establish their claim by evidence outside the bond.

Defendants allege that as the action is brought on a bond and accounts have been ordered, the Court cannot give judgment based upon the accounts, and that an amendment in the writ of summons is necessary. The judgment of the District Court, in effect, seems to support this view.

Section 6 of the Law, however, makes provision for the Court in certain circumstances, to re-open the transaction and take accounts, and after examining such accounts to give judgment thereon without any amendment of the writ of summons.

We think by analogy the intention of Section 10 is that where a creditor brings an action for debt evidence by one of the following documents, namely: (1) an account stated; (2) a bond, or (3) a mortgage, which, for some reason, is inadmissible, the Court may give judgment for such amount as is proved to be due by other evidence.

The District Court held that by virtue of Section 10 of Law 18 of 1919, the plaintiffs having brought an action on a bond " were precluded from adducing any other kind of evidence to prove the amount due."

At the opening of this appeal plaintiffs claimed that their action was brought on a bond and an account as described on the back of the writ of summons, which runs as follows:—

> " £137 1*s.* 4*cp.* by virtue of a bond for £132 16*s.* 3*cp.*, dated 15th March, 1924, and due on demand of plaintiffs and payable to the order and demand of plaintiffs, and by virtue of an account as appears at the back of the writ of summons; interest at 12 per cent. on £132 16*s.* 3*cp.* from 25th August, 1924, to judgment, and 9 per cent. on £137 1*s.* 4*cp.* from judgment to payment, costs of action."

We find the claim is " for the balance of a bond." We place no importance on the so-called account on the back of the writ of summons; it in no way purports to be an account showing how the amount of the bond was made up, but it is merely an account of transactions between the parties after the date the bond was given, in order to arrive at the balance really due on the bond.

Now Sections 7, 8 and 9 of Law 18 of 1919 provide that no " account stated," " bond " or " mortgage " between farmer and merchant shall be admissible in evidence unless they contain certain requirements specified in these three sections.

Section 10 runs as follows:—

> " Nothing in this Law shall prevent the merchant from recovering the amount proved to be due by the evidence other than the account stated on the bond or mortgage or shall apply to debts incurred before this Law came into force."

The District Court held that the effect of this section was to allow proof of the amount due by other means, only in cases other than actions brought on (1) an account stated, (2) a bond, and (3) a mortgage, that is to say, where there had been any failure, however slight, to comply with any of the requirements laid down in Sections 7, 8 and 9.

The debt or debts evidenced by those documents were incapable of proof and, therefore, the creditor was denied any means of recovering his debt.

Although this section is very badly drafted, and its meaning not free from obscurity, we do not think such was the intention of the legislature. We think, on the contrary, that this Section was expressly put in to save the rights of a creditor who, for any reason, could not put in evidence the document to prove his debt, and had

DICKINSON, ACTING C.J. & THOMAS, ACTING P.J.

ZENON & EVAGORA TH. CHRYSOSTOMIDES v. NICOLI PANAYI.

other legal means of establishing the proof. The very wording of the section is material, where it expressly says " Nothing is to prevent a merchant from recovering his debt by evidence other than the account stated on the bond or mortgage." The word " on " after the words " account stated " is clearly a printer's error for the word " or." This appears clear from the three preceding sections dealing separately with " accounts stated," bonds and mortgages.

Further the phrase " account stated on the bond " is unintelligible. We therefore, hold that plaintiffs are not prevented from recovering the amount due by evidence " other than the bond."

Upon authority it is quite clear that witnesses are allowed to refresh their memory from inadmissible or unstamped documents. (*Vide Birchall* v. *Bullough*, 1896, 1 Q.B., p. 325.) In the present case the documents, which the witness desires to use to refresh his memory, are books, which, he deposes, were kept, by daily entries, either by himself or under his supervision. (*Vide* Phipson on Evidence, 6th Ed., p. 469.)

We hold that the witness may refresh his memory from these books, but subject always to the right of the defendant to adduce evidence, if he can, showing that these books were not kept as deposed to by the plaintiff.

During the discussion we were impressed by the arguments for the appellants that once the Court had refused to dismiss the action, the bond being admittedly inadmissible, it had given a final judgment in the matter, which it was not competent for the Court at the latter hearing to vary in any way. The appellants contended that defendant should have appealed from that order refusing to dismiss.

Upon further examination we find that this order can not be considered as a final order. (*Vide* in *re Page, Hill* v. *Fladgate,* 1910, 1 Chancery, p. 489 C.A.) The authorities all seem clear that a " final judgment " must be one that " disposes of the matter in dispute between the parties." The order refusing to dismiss the action cannot be said to come within this definition.

We, therefore, allow the appeal, and remit the case to the District Court for rehearing. The party finally successful in the action now remitted to be reheard shall be paid his costs in the Court below, in this Court and for the rehearing.