1927.
March 12.

CHAKARIAN
v.
OTTOMAN
BANK.

[BELCHER, C.J., SERTSIOS AND FUAD, JJ.]

ETIENNE CHAKARIAN

v.

THE OTTOMAN BANK.

Contract—Master and servant—Wrongful dismissal—Special provisions in contract—Employers to be judge—Discretion—Fairness in exercise—Disobedience to order—Reasonableness of order—Danger to employee's life—Measure of damages—Foreign currency—Exchange—Material time.

Plaintiff, an employee of the defendant Bank in Turkey, during a time of political disturbance left his post owing to justified fears for his life. The Bank dismissed him as for "abandonment of service" and because it alleged this was a repetition of previous similar conduct. The previous conduct alleged had, if it occurred, been pardoned. By a term in the contract of service the management of the Bank were to be sole judges in deciding whether an employee's conduct warranted dismissal.

Held, by a majority of the Court (Fuad J., dissenting), that the leaving of his post by an employee in such circumstances was not misconduct: that the management in adjudicating on an employee's conduct must proceed upon principles of natural justice, and in this case had not done so.

Held, also, that the measure of damages was the capitalised value of the pension which plaintiff lost by his dismissal, and that the rate of exchange on which this should be calculated was that current at date of the judgment. The Privy Council, to which both parties appealed, dismissed the defendant's appeal against liability, but held on plaintiff's cross-appeal that the exchange rate must be that current at time of plaintiff's dismissal.

Appeal by defendant from the judgment of the District Court of Nicosia (473/26).

The relevant articles of the printed contract of employment, entitled "Caisse de Pensions et de Retraites," are as follows :—

"*Article* 2.—La Direction Générale a le droit, en toutes circonstances et à toute époque de l'année, de licencier un employé par suppresion d'emploi, mesure d'economie, ou toutes autres considérations dont elle est seule juge. Elle n'est tenue de fournir aucune explication quelconque sur le motif de cette décision.

"*Article* 3.—L'employé licencié a droit à un avertissement de trois mois. Il reçoit une indemnité supportée par la Caisse de Pensions et de Retraites et qui est reglée suivant les dispositions spéciales de l'article 21 du présent Réglement. Il n'a droit à aucune autre indemnité quelconque.

" *Article* 5.—La Direction Générale a le droit de revoquer les employés pour faute grave ou abus commis dans leurs fonctions, ou pour violation du secret qu'ils doivent garder sur les affaires de la Banque. La Direction Générale est seule juge d'apprécier le caractère de gravité de la faute. Elle a le droit de révocation pour fautes légères successives et répétées malgré avertissement des supérieurs.

" *Article* 14.—Le montant de la pension est établi d'après le traitement dont jouissait l'employé au 31 Décembre de l'année qui précéde celle de sa mise à la retraite.

" *Article* 15.—Le montant de la pension sera calculé sur la base suivante : (1) pour 10 années pleines de service 30% du traitement fixe annuel ; (2) 2% pour chacune des années suivantes.

" *Article* 21 (3).—Un employé ayant plus de 15 ans de service qui serait licencié sans faute de sa part, aura droit à une pension établie comme il est dit à l'article 15."

The facts appear from the judgments.

Artemis (with him *Stavrinakis*) for appellant.

N. G. Chryssafinis (with him *Clerides*) for respondent.

JUDGMENT :—

BELCHER, C.J. : This was an action by a servant for wrongful dismissal. The facts are simple if unusual. Plaintiff (now respondent), an Armenian, had been for many years in the service of the appellant Bank, and was working in the Smyrna branch at the time of the great Turkish military recovery in September, 1922. Just before the Turks entered Smyrna he obtained short leave of absence proposing to go to Mytilene. His chief at Smyrna asked him instead to take a letter to the Constantinople office, and this he did. Meantime Smyrna was destroyed. He was given temporary work in the Constantinople office. Having been condemned to death by a Turkish tribunal at Adana in 1919, he was in no mind to await the coming, which then (just before the Treaty of Mudania was arranged) appeared imminent, of the Kemalist troops to Constantinople, and every day for the 20 days he was there he preferred to his immediate superiors requests to be allowed to go to Athens. They paid no attention to him ; laughed at him. He was unwilling to write to the Direction Générale a letter detailing his position with regard to the Kemalists ; it would be fixing his identity on paper, he says in effect, and in any case the managers knew all the facts from his dossier. At all events his orders as they stood were to remain at Constantinople. Finally he was recognised by a Turkish officer who had been at Adana and who gave him to understand that he would

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inform about him. He tried again to see his chiefs on the next day but one (the Bank being closed on the intervening day), but could not up to 10.30, when there was a boat leaving for Athens and he took it, being in fear of his life. Immediately he left, the Direction Générale telegraphed to the Athens manager, under whose instructions respondent had placed himself, ordering him to notify respondent of his dismissal. This the Athens manager did. There were subsequent negotiations which came to nothing.

A book of regulations called "Caisse de Pensions et de Retraites" is part of the respondent's contract of service.

Clause 5 gives the Bank the right to dismiss for serious misconduct in the course of the employment, or for repeated acts of minor misconduct. The former is the important provision; it has not been disputed that we are to interpret this contract in the light of the principles of English Law, and the contract seems in this clause to extend the Common Law right which a master has to dismiss a servant for misconduct, by providing that the Direction Générale, which represents the Bank in dealings with the staff, is to be the sole judge of whether the misconduct warrants or does not warrant dismissal. In the particular case, as the Direction Générale did in fact dismiss the respondent, it must be taken that they also did in fact consider the conduct of his which was in question and decide that it warranted dismissal.

To see exactly the cause for which the Bank purported to dismiss the respondent we must look at the correspondence between the parties which followed the Bank's communication to their Athens manager directing him to notify appellant of his dismissal; this communication would doubtless be more explicit, but it was not in evidence. In their letter of the 29th November, 1922, they put the cause of the dismissal on two grounds (*a*) His hasty departure from Constantinople and his (consequent) "abandon de service"; (*b*) The fact that this was a repetition of similar conduct on his part at Adana in 1920.

Now assuming that the Bank's powers of dismissal are by reason of their reserving to themselves the right to adjudge what is misconduct, wider than those of an employer without such special rights, it is clear and it was admitted by the Bank's counsel that the judgment must be exercised in a fair manner; it must be a judicial act in the ordinary meaning of those words.

The Court below found that in fact respondent was not actually working in any post in the Bank at Constantinople, but that even if he had been he was justified in disobeying, in the particular circumstances, the order (which no doubt must be inferred) that he should continue working

there, and that, therefore, there was (apart, as I read the judgment, from the effect of Clause 5) no justification for dismissing him when he refused to obey it. As to Clause 5, the Court found that the Direction Générale did not come to any judicial conclusion that the leaving Constantinople was a "faute grave," for they did not say that they had so considered it, in itself, but when regarded as a repetition of the Adana incident; the two taken together, as it seems, constituting in the eyes of the Direction Générale a faute grave. The Court found that the Bank had waived any rights they may have had to treat that earlier incident as a faute grave, by, in fact, pardoning respondent and employing him for two years thereafter. Finally the Court below found that the dismissal of the respondent was actuated by ulterior motives, namely to get rid of a clerk whose salary was a burden on them, and whose pension would later become a burden on diminished pension funds.

I will deal with the latter point first, and I do so by saying that I see nothing in the evidence on which a finding could be based, if that were material, that the Bank had any ulterior motives or object of the kind suggested.

But as to the dismissal in general, and without reference to Clause 5, there was evidence on which the lower Court could find that the order was unreasonable and I do not think we ought to disturb that finding. There was evidence that the respondent was in justified fear that his life was in danger if he stayed in Constantinople; he by no means did anything evincing an intention to terminate his contract of service, but on the contrary placed himself at once under the Bank's orders in the nearest place in which he could be safe and where the Bank had a branch.

As to the effect of Clause 5, here, too, it was a matter of fact whether the Bank exercised its functions in determining the question, faute grave or not, in accordance with ordinary principles of justice. I cannot say that there was no evidence on which the Court could find, as it did, that they failed to do so. Perhaps it was not very strong evidence, but it does appear that the Bank did not judge the Constantinople incident, as it should have done, by itself, but took it in connection with another matter no longer open to it by reason of earlier waiver; also it is clear that before the Direction could act as judge at all, it must have before it something capable of being reasonably considered as a "faute grave .... commis dans leur fonction." Could this be said of a case where the act had nothing whatever to do with the functions of a bank officer, but was the instinctive reaction to the impulse every man feels to preserve his own life? The Court below found that the Bank did not exercise its functions under Clause 5 properly; that was

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matter of fact and it has decided it against the Bank. There was in my opinion evidence to warrant that finding and for that reason I think the appeal must be dismissed.

On the question of damages, the measure must be the payments which would have been made to respondent if his contract had been terminated under Article 2, by reason of Article 3 which provides for three months notice, and Article 21 which provides in certain cases, of which it is admitted respondent's was one, for pension. As to both heads of payment, difficulty is caused by the fluctuations in the value of the Turkish currency; salaries were from time to time altered by the Bank to meet the fluctuations; it is suggested out of benevolence but possibly also in order to get the Bank's work done. At the material time, October, 1922, salaries were regulated in Turkey, where respondent was last employed, by a decision of the Committee of Management of the Bank dated 18th May, 1921. This, and other previous decisions of the same character, show that the method of adjusting salaries to meet exchange fluctuations was to take the English pound as a basis. The amount of the annual salary, in Turkish pounds, was first converted, in order to arrive at this sterling basis, into English pounds at the rate of 110 pounds Turkish to 100 pounds English; then the number of pounds English so found was multiplied by 451 as representing the exchange value in Turkish piastres of the pound English, 10 per cent. was added to the total and the product was paid over to the employee in Turkish paper in which of course 100 piastres made one Turkish pound. From Mr. Reid's evidence, given for the Bank, it appears that the figures in this case on the basis indicated would be salary £25 Turkish = £22.75 English. This × 451 = £102.51 Turkish. Add 10 per cent., and the total is £112.75 Turkish. The pension is half of this, and I make it £56.375 Turkish.

There was no evidence to show that respondent would have received a higher monthly pension than that had he resigned and stayed in Turkey, even though the rate of the piastre to the pound English has since fallen from 451 to 925, as it appears in evidence to have done. Cyprus Courts can only award damages in Cyprus money, but I think the Court below adopted a wrong basis when it found as it did that the pension was equivalent to £11 7*s.* 2*cp.* a month. That was arrived at by substituting the present ratio of Turkish piastres to sterling for the rate at which respondent would have been paid, and the latter is what must be proceeded upon. The monthly pension would be £56.375 divided by 9.25 or between £5 and £7 English per month. The contract is at an end and the damages must be in the form of a lump sum, a sum which (apart from the salary in lieu of notice) the Court below has fixed

at £2,000. This sum having been arrived at by what this Court considers an incorrect method, the case must, unless the parties can agree, go back to the Court below for re-assessment of damages on the above basis. On the pension value as the lower Court found it, this Court cannot say that the lump sums found were unreasonable. The same re-adjustment is necessary as regards the three months' salary in lieu of notice. No doubt the parties will agree on the figures.

The judgment as to interest will stand, and the general result is that the appeal is, subject to the above-mentioned adjustments of the figure of damages, dismissed with costs.

Certify for two advocates.

SERTSIOS, J.: I concur.

FUAD, J., said (after dealing with the facts): "If the employee, by his own acts or those of a third party over which the employer has no control, prevents himself indefinitely from doing at the proper place and time what he has undertaken to do by the contract, viz., in this case expressly and impliedly to serve the Bank generally and without any reservation at the place indicated by the Bank—the employer is surely entitled to dismiss him. *Poussard v. Spiers* (1) is an authority for this. The servant is not bound to risk his safety in the service of the master, and may, if he thinks fit, decline any service from which he reasonably apprehends danger to himself; but I doubt that he may do so in respect of danger not arising out of the service itself, nor for which the master is responsible—danger, which he might be said to have brought upon himself through no fault of the master.

Authorities say "a master is no doubt bound to provide for the safety of his servant *but in the course of his employment and to the best of his knowledge and belief.*" The Direction Générale was on the spot at the time and cognisant of the state of things in Constantinople and making use of their discretion (which they undoubtedly possessed) dismissed plaintiff for abandoning his post, and after long correspondence and with full knowledge of the facts alleged by plaintiff confirmed the dismissal by letter. I would not go so far as to say that by Article 5 of the Caisse the jurisdiction of the Court is ousted, but I certainly think that some meaning is to be given to the provision constituting the Direction Générale sole judge in the matter; and I am of opinion that the function of the Court is limited to an enquiry whether the Direction had exercised the right conferred upon them genuinely and *bona fide*—in other words, the Court is to act as a Court of Appeal over a lay Court constituted by an express term of the agreement

(1) 1 Q.B.D. 410.

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and the parties themselves to be sole judge of the facts. In my view all the Court below had to do was to see whether there was any evidence to justify the Direction in the exercise of their power and whether it was a genuine decision made in good faith, and no more.

There is, however, another point. To enable an employee to maintain an action for wrongful dismissal, he must be ready and willing to continue in the service of the employer at the time he is dismissed. It might be said that in this case he never abandoned the service of the Bank; he offered to serve the Bank but certainly not in accordance with the terms of the original contract. The offer was a very limited and qualified one, namely to serve the Bank outside Turkey, a country in which he had been engaged and worked up to the time of leaving Constantinople and in which the main portion of the business of the Bank is carried out.

This was a new offer, which was not accepted. This offer was another proof—and a very clear one—of the determination of the employee to terminate the old contract to serve the Bank generally and anywhere, although it said "outside Turkey whilst awaiting the end of the present situation of things": this was too indefinite and vague a term, which might have turned out to be everlasting, because, judging from the facts disclosed before the lower Court, there is no doubt that plaintiff intended to be the sole judge of the situation, and would have paid no respect to the opinion of others with regard to the improvement of the situation in Turkey, that is to say, when the directors and others thought peace prevailed he thought the country unsafe for him.

This offer cannot possibly be interpreted to mean that he was willing to serve under the old contract: under all the circumstances what was required was not only being ready and willing in words or on paper but also a disposition, capacity and ability to serve. A conditional disposition to serve might be inferred from the so-called offer, but certainly no capacity or ability to do so.

Furthermore, if the terms of the new offer had been accepted, he would have been the employer and not the employee, the master and not the servant. To put it plainly, is not the position this: B. enters the service of A. and undertakes to serve A. generally. Then before the expiration of the term of service B. abandons A.'s service. B., who committed a breach of contract thereby, wishes to justify the breach committed by him. If he succeeds to do so he will not be liable to an action for damages; but I fail to see how he can have any claims whatsoever against A. In my opinion, he would have no claims against A.

even if A. were just as much to blame as he was for the state of affairs which made the performance of the contract impossible. But surely A. is not responsible or liable for the acts of X. (B.'s sovereign power) doing something rightly or wrongly, which incapacitated B. from doing what he had undertaken to do by his contract.

In other words, how can plaintiff in this case allege that he was wrongfully dismissed by the Bank and assign as his sole reason the impossibility of the performance of the contract on his part due to the act of a third party, without alleging even that the Bank was in any way concerned, either directly or indirectly, with the act of this third party—the act which forced him to terminate his contract? He says in so many words: "I was not able to stay where I was ordered to, because I had been sentenced to death; I could not go where the Bank wanted me to go—for the same reason; I asked the Bank to accept my services anywhere I chose to work—they refused to retain my services under the altered circumstances and in the way dictated by me; they must pay me damages and pension."

The Bank had full rights to terminate plaintiff's services under Article 2 of the Caisse de Pensions by giving three month's notice: they could do this as a measure of economy for or any other consideration, of which they are the sole judge. In such a case plaintiff would under Article 3 be entitled to his pension.

On the other hand, if the employee should wish to leave the Bank's service, though he may do so with their consent by giving three month's notice, he is not entitled to any pension or other compensation (*see* Articles 4 and 19 of the Caisse); though the Bank may, if they think fit, make him an allowance: if they do not do so, the employee, having thrown himself on the mercy of the Bank, has no right of action: (*see Taylor v. Brewer*, above).

Taking for granted the facts deposed to by plaintiff—namely that he was under sentence of death for no crime of his own, that he met Tewfik Bey in Constantinople and that he had to leave Constantinople to save his life—even so, plaintiff, though he might be justified in abandoning his post, is, however, not entitled to any damages, because it was he who put an end to his service at the place indicated to him by the Bank for an indefinite period (which really goes to the root of the contract—*Poussard v. Spiers* and for reasons not emanating from and practically unknown to them and over which they had no control, and not the Bank that dismissed him at all: it is immaterial that the Bank, instead of saying more clearly than they did—namely that plaintiff had himself terminated his contract of service by abandoning his post without present intention of

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returning—and assigning this as their sole reason for not employing him any further, stated instead that they dismissed him for the " faute grave " of abandoning his post.

In the view that I have taken of this case, plaintiff cannot maintain an action for wrongful dismissal, nor is he entitled, in view of Article 19 of the Caisse, to any allowance or compensation. In my opinion the appeal ought to be allowed.

Appeal dismissed with costs.

The judgment of the Privy Council (Lords Blanesburgh, Warrington of Clyffe, and Lord Thankerton) was delivered by Lord Thankerton on 21st January, 1930, and is as follows :—

LORD THANKERTON : In this action the plaintiff, who is respondent in the leading appeal, seeks to recover damages for wrongful dismissal from the defendant Bank, who are appellants in the leading appeal.

The Trial Judge found the appellants liable in damages, which he assessed on an alternative basis. The appellants appealed to the Supreme Court of Cyprus, who affirmed the Trial Judge on the question of liability, but directed the re-assessment of damages on a lower basis. From that judgment the leading appeal was taken by the appellants on the question of liability, and the respondent has taken a cross-appeal on the question of damages.

The respondent, who was an Armenian and a Turkish subject, became a temporary employee of the appellant Bank in 1901 at the branch office at Aidin in Turkish Asia Minor. In 1903 he entered the permanent service of the Bank, and subscribed to a book of regulations, called " Caisse de Pensions et de Retraite," which deals with conditions of service and a contributory pension fund for the staff. He continued in their service until 27th January, 1923, when he was dismissed without notice and without pension under the circumstances referred to later.

The respondent remained at the Aidin Branch until 1913, when he went to the Sokia Branch, from which he was re-transferred to Aidin in June, 1919, immediately before the destruction of Aidin by the Kemalists, by whom he was imprisoned and sentenced to death. The timely arrival of the Greek forces enabled him to avoid the execution of the sentence and to escape to Smyrna. After various changes he came back to Smyrna in July, 1920, and he remained there until 8th September, 1922, when he applied for and obtained leave, but was asked by Mr. Simmons, the branch manager, to take a confidential letter to the Head Office at Constantinople.

The respondent arrived at Constantinople on 10th September, 1922, delivered the letter, and was given temporary employment at the Head Office, which appears to have superseded his leave. Meantime Smyrna was destroyed by the Turkish forces. The respondent's story of his experiences at Constantinople, which substantially remains unchallenged, is as follows :—

"I found Constantinople in a disturbed state. I went to the Bank and saw Mr. Ungar, the sub-manager in the Direction Générale. I gave the confidential letter Mr. Simmons had given me to Mr. Ungar, I also told him what Mr. Simmons had told me confidentially. I explained to him the state of affairs in Smyrna. At this interview I asked him to allow me to leave Constantinople, because it was unsafe for me to remain. I told him I had been condemned to death at Aidin and that, therefore, I could not remain. Mr. Ungar referred me to Mr. Skanzianni, le chef du Personnel. I saw him. At the office of Mr. Skanzianni, Mr. Bouzourou happened to be present, and Mr. Skanzianni called in the Chef du Bureau, Mr. Goyar. I explained everything to Mr. Skanzianni and asked permission to leave. He laughed at me. Mr. Bouzourou was then Chef du Bureau du Personnel. I was not given leave. I stayed in Constantinople for 20 days, asking him every day to transfer me to any branch outside Turkey. They would not do so. Instead of giving me leave they gave me temporary work. On Thursday evening, on coming out of the office, I came across Tewfik Bey who had been Chief of Police at Aidin at that crucial time. He was in mufti. I could not recognise him. He questioned me. I was much perturbed and immediately changed my hotel for fear that he should betray me at any time. On the Friday (28.9.22) the Bank was closed. On the Saturday I went to relate the incident of meeting Tewfik Bey, to my Chief. The Chiefs came late, 9.30 or 10 a.m., so I saw two Sub-Chiefs, Mr. Berturucchi and Mr. Baache. I related to both of them the incident of meeting Tewfik Bey, explained to them the whole affair ; and stated that as my life was in danger I wanted to leave at once. There was a ship leaving on the Saturday morning at 10.30 a.m. for Athens. I had told these two gentlemen that I was going to Athens ; and I left by this boat."

The respondent reached Athens on 1st October, 1922, and found there Mr. Simmons and most of the Smyrna staff. On 3rd October Mr. Simmons advanced to the respondent his salary for October, but took it back from him in view of a telegram he had received from the Head Office to the effect that the respondent was dismissed, though the ground of dismissal was not then stated.

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In a letter of 2nd October, addressed to Mr. Simmons, and letters of 18th October and 15th November addressed to the Head Office, the respondent recounted the circumstances of personal danger which moved him to leave Constantinople, and again requested transfer to a branch outside Turkey. To the Head Office he protested against the dismissal. On 29th November the appellants wrote to the respondent :—

> " We can hardly take into consideration the reasons put forward by you to explain your precipitate departure and your dereliction of the service. We would besides remind you that you have behaved in an analogous manner in 1920 when you were at Adana, and your relapse fully justified the measure of revocation (dismissal) that has been applied in your case. However, we are willing to attenuate that penalty and would ask you to tender your resignation—which would enable us, on receipt of your letter, to consider the possibility of granting you pecuniary assistance. It should nevertheless be understood that this is a mere offer resulting out of extreme benevolence on our part, and that, should the same not be accepted by you, and should your acceptance of same not be notified to us within 25 days from to-day, it should be regarded as null and void."

The respondent declined that offer, and ultimately his name was struck off the list of members of the Bank's staff on 27th January, 1923.

Provision is made for dismissal in Article 5 of the " Caisse de Pensions et de Retraites " as follows :—

> " La Direction Générale a le droit de revoquer les employées pour faute grave ou abus commis dans leur fonctions, ou pour violation du secret qu'ils doivent garder sur les affaires de la Banque. La Direction Générale est seule juge d'apprécier le caractère de gravité de la faute. Elle a le droit de revocation pour fautes légères successives et repetées malgré l'avertissement des supérieurs."

Under Article 18 neither an indemnity nor a pension of any other nature is granted to an employee who has been dismissed. Under Article 19 an employee who resigns has no right to any pension or indemnity, but the Direction Générale have the faculty to grant him an amount not exceeding in capital the amount of the sums retained from his salary. Under Article 2 a discharged employee has right to three months' notice and an indemnity borne by the Pension and Superannuation Fund and to be fixed in terms of Article 21.

It was not disputed by counsel for the appellants that the risk of personal danger which caused the respondent's flight from Constantinople, in disregard of the appellants'

repeated refusals to allow him to leave, was real and justified from the point of view of his personal safety, and, in their Lordships' opinion, this is established by the evidence, and, in particular, by that of Roy McLaughlan, an Officer in the Intelligence Department attached to the High Commissioner's Office in Constantinople. He stated that an Armenian who had been condemned by the Turkish authorities to death would be in "an uncomfortable position" there at the end of September, 1922, and that if he had been in the respondent's shoes he would have left Constantinople at the first possible opportunity.

On the contrary, the appellants submitted three contentions, all of which were based on the view that the respondent incurred a permanent personal disability, which incapacitated him from further ability to perform adequately his part of the contract. These contentions were (1) that, as a condition precedent to recovery of damages, the respondent must be in a position to offer implement of the contract on his part, and that the respondent, by reason of his permanent personal disability, was not in such a position; (2) that the supervening incapacity of an employee to perform the services contracted for, was a valid ground for dismissal, even though not founded on at the time of dismissal as a justification; and (3) that by reason of the respondent's permanent personal disability the contract became incapable of further performance, and that accordingly both parties were released from its obligations, thus excluding any action based on breach of contract. This contention was based on the principles to which effect was given in *Horlick* v. *Beale* (1) and cases therein referred to.

It was not seriously maintained by the appellants that their order to the respondent to remain in Constantinople was a lawful order which the respondent was bound to obey at the grave risk of his person. In their Lordships' opinion, the risk to the respondent was such that he was not bound to obey the order, which was, therefore, not a lawful one. *Mason* v. *Turner* (2).

It follows that the respondent's refusal was not "faute grave" such as is necessary to justify dismissal under Article 5 of the regulations.

Admittedly the respondent undertook by his contract to serve the Bank in Turkey or any of its branches elsewhere, and the contentions of the appellants must all be tested as at the time of dismissal. In their Lordships' opinion the appellants have failed to establish that at the time of dismissal they were entitled to regard the respondent's disability as a permanent one. In his letter of 2nd October

(1) (1916) 2 A.C. 486.
(2) (1845) 14 M. & W. 112, per Alderson B. at p. 117, foot, and Rolfe B. at p. 118.

the respondent requested a provisional transfer to one of the agencies outside Turkey "whilst awaiting the end of the present situation." The appellants have not suggested any impossibility of compliance with that request; indeed, they probably never considered it, in the view that they took of the situation.

On the views expressed above that the order to remain in Constantinople was not a lawful order, and that at the time the disabi ity could not be regarded as a permanent one, their Lordships are of opinion that the respondent's offer of service outside Turkey is sufficient to entitle him to pursue the present suit, and that the appellants are equally unable to found on that disability as justification for the dismissal.

The failure of the appellants to establish that the disability had become permanent and that they could not employ him meantime at some place where the disability did not affect him, also disposes of the contention that the contract had become impossible of performance by the time of dismissal.

Accordingly their Lordships are of opinion that the dismissal of the respondent by the appellants was wrongful and that the respondent is entitled to recover damages.

On the question of damages, their Lordships agree with the majority of the learned Judges of the Supreme Court both as to the measure of the damages and the basis on which—for that purpose—the pension to which the respondent would have been entitled is to be calculated. Their Lordships are of opinion that the pension must be calculated, in terms of Article 14, on the basis of the salary which the respondent in fact received on 31st December, 1921, irrespective of how that salary was arrived at. On that basis parties are agreed that the respondent would have been entitled to a pension of £T.56.375, but their Lordships are of opinion that the rate of conversion for the purposes of a decree in sterling should be the rate current at the time of dismissal instead of that current at the date of the decree; parties are agreed that the former rate should be taken as 7.20. In the view that their Lordships take of the measure of damages, parties are agreed that the amount of damages should be arrived at by taking the appropriate proportion of the £2,000 awarded by the Trial Judge; on this basis, the amount of damages will be £1,378 10*s.* 6*d.*, and the judgment of the Supreme Court will fall to be modified to that extent and the cross appeal to be allowed for that purpose.

Their Lordships will, therefore, humbly advise His Majesty that the leading appeal should be dismissed with costs and that the cross appeal should be allowed without any order as to costs.