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July 8.

TRAD
v.
OTTOMAN BANK.

[STRONGE, C.J., THOMAS AND SERTSIOS, JJ.]

MITRY TRAD, *Appellant*,

v.

THE OTTOMAN BANK, *Respondent*.

(*Civil Appeal No.* 3519.)

Practice — Cause of action arising out of Jurisdiction — Accessible Court where cause of action arose — Application to strike out Action as frivolous, vexatious, and an abuse of process of the Court — Principles on which such application will be granted.

Appellant retired on pension from respondent bank in 1914 while serving in its Beyrout branch. In 1921 the bank ceased to carry on business in Syria. In November, 1932, appellant began an action in Cyprus against respondent in respect of his pension. The respondent applied to strike out the action as frivolous, vexatious, and an abuse of process on the grounds that—

(1) that the cause of action arose out of the jurisdiction;

(2) appellant was not *bona fide* on bringing his action in Cyprus because there was an accessible Court in Constantinople, where the bank had its head office, and where the cause of action arose, and where appellant would have a fair trial according to Turkish law; and

(3) the respondent bank would be under a disadvantage in defending the action in Cyprus as witnesses and experts would have to come from Turkey. At the hearing evidence was given that, although respondent bank had no branch in Syria, the Courts in Beyrout had jurisdiction to entertain an action against respondent bank by one of its employees, but a judgment would have to be executed in one of the neighbouring countries where the bank carried on business.

Held: by Thomas, J., and Sertsios, J., (Stronge, C.J., dissenting) allowing the appeal and setting aside the order of Fuad, J., striking out the action—

(1) that the jurisdiction of the Court to stay proceedings that are frivolous, vexatious, and an abuse of process, is a jurisdiction to be made use of with the greatest care and caution, in exceptional cases, and only when a clear case is made out;

(2) that it is not sufficient to show plaintiff had an accessible Court in the jurisdiction where the cause of action arose; to show plaintiff was not *bona fide* defendant must establish that plaintiff brought his action not for the purpose of obtaining justice, but for a wrongful purpose of harassing and annoying defendant;

(3) that an application to stay proceedings cannot be decided on considerations of expense or on the balance of convenience to the parties, but depends upon whether injustice will result to the defendant if proceedings not stayed, and whether plaintiff has made an oppressive or improper use of the process of the Court; and

(4) if defendant establishes action was brought to vex or oppress, and that its continuance will cause him an injustice, the Court will not stay the action unless it is satisfied that by so doing no injustice will result to the plaintiff.

Appeal from an order of Fuad, J., sitting as a Divisional Court, dismissing the action as an abuse of the process of the Court.

FUAD, J.: The writ in this action was issued out of the District Court on the 22nd November, 1932; the action was transferred to the Divisional Court on the 19th December, 1932; pleadings were ordered on the 14th January, 1933, when Messrs. Artemis and Clerides appeared for the defendants under protest for want of jurisdiction in the Court; on 1st February, 1933, an application was made to the Court on behalf of the defendants to strike out or dismiss the action on the following grounds:—

(*a*) The Court has no jurisdiction to entertain the action;

(*b*) The action is frivolous and vexatious and/or embarrassing to the defendants; and

(*c*) The action is an abuse of the process of the Court.

This application was fixed for hearing on 21st March, 1933; on that day the parties appeared before me in chambers through their respective advocates and by consent of all parties it was agreed that, in order that the Court should have all the necessary facts before it, the application should be adjourned until the close of the pleadings.

The statement of claim was delivered on 13th March, 1933, and the statement of defence on 20th May, 1933. The plaintiff died on 25th March, 1933, and an application was filed by his advocate, Mr. Triantafyllides, on 31st May, 1933, to amend the title and claim in consequence of the plaintiff's death. This application was granted on 6th June, 1933, and on that day Mr. Triantafyllides filed another application for leave to deliver subsequent pleadings and a supplementary statement of claim and reply to the defence. By consent of all parties subsequent pleadings were ordered to be delivered within 15 days and the statement of defence to them within 45 days from their delivery. The subsequent pleadings and reply to the defence were delivered by Mr. Triantafyllides on 12th June, 1933, and the defence thereto on 24th July, 1933.

On 5th October, 1933, an application was filed to fix a date for the hearing of the action. The action and the application for it to be struck out were fixed for hearing on 24th January, 1934. On that day Mr. G. Chrysafinis appeared for the plaintiffs and applied for an adjournment on two grounds—

(1) Mr. Triantafyllides who was to appear for the plaintiffs was dead and no one had been briefed by them in his stead; and

(2) There was a case before the Privy Council on appeal from the Supreme Court, and the decision in that case would dispose of the main issue in this one.

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No objection was raised by Mr. Paschalis, counsel for the defendants, to this application for adjournment. The case before the Privy Council was disposed of in the summer of 1934. Then by arrangement with all parties concerned the action and the application for it to be struck out were fixed for hearing on 2nd November, 1934.

On that day the application to strike out the action was taken first. A question arose as to the possible desirability of obtaining an order of the Court to amend the title of the application. After discussion the hearing of the application was adjourned to 18th December, 1934, as Mr. Chrysafinis who appeared for the plaintiffs wanted to have an opportunity of communicating with his clients, who were in Beirut; at the same time the other side also wanted an opportunity of consulting its own clients and of considering the position. The application was actually heard on the 19th, instead of the 18th December, 1934, to enable the parties to consult their expert witnesses from Beirut.

On 19th December the expert witness on behalf of the defendants appeared before the Court and gave his evidence. He was cross-examined by the plaintiffs' counsel and the case was adjourned to the 20th December for the plaintiffs to consider their position and call their expert witness, who I was given to understand was in Cyprus, to give rebutting evidence, if necessary, in support of the affidavit filed on their part. On the 20th counsel for plaintiffs made a statement to the effect that, in view of the evidence of the expert called by the defendants and the statements contained in the affidavit filed by them, he would not call any further expert evidence. The case was at the request of the parties adjourned to the 2nd January for addresses, which were heard and recorded on that day.

The present plaintiffs are the wife and children of the original plaintiff (deceased) Mitry Trad of Beirut; he was an ex-employee of the defendant Bank; according to the statement of claim he entered their service in Beirut in 1872 and was pensioned off there on 1st March, 1914, his last post being in their Beirut Branch. The claim is for a declaration that the deceased was entitled to a monthly pension of 33.75 Turkish pounds gold; that one of the substitutive plaintiffs—the wife—is entitled as from 1.4.33 to a monthly pension of 16.88 Turkish pounds gold; and they claim £3,928 as the difference between the amount of pension to which the deceased was entitled from 1920-1932 and that which he actually received, plus damages, etc.

It is clear from paragraph 5 of the statement of claim that the deceased received from 1921 to 1932 his pension not on a gold basis but at what he calls an arbitrary rate of exchange; and his excuse for not doing anything during twelve years to vindicate his legal rights appears from

paragraph 9 to be that ill-health, poverty and old age prevented him from going to another country to sue the Bank, which he could not do in the country he lived in during all this period. It is further alleged in paragraph 10 that he never consented to the Bank's arbitrary rate of converting his pension, but always protested and reserved his rights.

The application to strike out the action was filed on the 1st February, 1933, and supported by an affidavit of the Bank's regional manager for Cyprus, Mr. H. L. Jones, in which he deposed that the deceased plaintiff had never served the Bank in Cyprus and that he, as regional manager of the Bank's branches in Cyprus, knew nothing about the plaintiff's service with the defendants or his claim in the action; that his cause of action, if any, arose out of the jurisdiction of this Court; that there was an accessible Court for him at Constantinople, where the defendant Bank had their central office and where the cause of action, if any, arose, and where he could have a fair trial in accordance with the local law which governs the rights of the parties; and further that the defendants would be under a disadvantage in having to defend themselves in Cyprus as their witnesses and the Direction Generale with whom the deceased plaintiff's dealings had been, were at Constantinople; that the local laws—and particularly those relating to currency—governing the rights of the parties would have to be proved as questions of fact by experts from Turkey, etc. The deceased plaintiff's affidavit in reply, sworn before the British Consul on 10th March, 1933, in Beirut, stated *inter alia* in paragraph 4 that he entered the Bank's service in Beirut in 1872 and was pensioned off there in 1914 after serving in various branches. Paragraph 9 runs as follows:—

> "For the determination of that issue, *i.e.* the basis of my salary and pension, I will simply refer the Court to certain documents, which are admitted by the Bank and appear in the file of Chakarian's case."

And paragraph 10 states that—

> "The 'local law' authorizing the issue of paper currency in Turkey, which was enacted in 1915 in Turkey, was also given in evidence in Chakarian's case and appears in that record. I am not willing to dispute the existence of that law, or any other law concerning the Turkish currency, which may be proved by a duly authenticated copy by the Bank."

Paragraph 13 reads as follows:—

> "The only other issue, which exists in my case, is my allegation that for the years 1920-1932 I was accepting payments under protest, because I was forced to accept payment of the amount offered by the Bank,

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on account to my impossibility to sue the Bank by travelling abroad by reason of poverty and ill-health. Those are facts which arose in Beirut where I was staying from 1913 until now and any evidence necessary to prove or disprove my allegation on this point will be found in Beirut, which is much nearer to Cyprus than to Constantinople."

Paragraph 16 states—

"My contract with the defendant Bank was entered into and terminated in Beirut. The alleged payments of my pension and the breach of contract committed by the Bank, all arose in Beirut."

And paragraph 18—

"After the defendant Bank left Beirut, and Syria generally, being unable to sue the Bank in the Courts of Syria, Cyprus remained the nearest or one of the nearest countries, where the Bank reside by their branches or agencies."

In paragraph 4 of the defence reference is made to a law promulgated by the High Commissioner of the mandated territory of Syria, No. 2415, which, it is alleged, entitles the defendants to pay in Syrian piastres, at the rate of 112.50 Syrian piastres to the Turkish pound, all debts owed by them in Turkish pounds. In paragraph 5 of the defence the Bank deny that the deceased ever protested against the mode in which his pension was paid or made any reservation in regard to it.

In their subsequent pleadings and reply to the defence the substitutive plaintiffs deny generally all facts and allegations in the defence directly or indirectly inconsistent with the original statement of claim; in their paragraphs 5, 6 and 7 they admit the existence of the law referred to in paragraph 4 of the defence but dispute, for reasons given, its effect on the payments made to the deceased by way of pension; in their paragraph 11 they deny that he accepted without demur all sums paid to him by way of pension in satisfaction of his pension claims; they admit, however, that the cause of action arose in Beirut, out of Cyprus.

It is apparent from the facts disclosed in the pleadings and the affidavits filed that there are a number of facts in dispute between the parties which will have to be proved by witnesses which the plaintiffs admit are in Beirut, if not in Constantinople and other parts of Turkey or Syria; and that there are laws passed in Turkey or promulgated in Syria bearing on the subject matter of the action which will have to be proved before the Court as questions of fact by expert witnesses from abroad. Besides Cyprus, the defendant Bank have branches in Turkey, Palestine and elsewhere, their head office being in Constantinople. It is admitted by the plaintiffs that since 1919 the Bank have not

had any branch in Syria or the Lebanon, of which Beirut is the capital. The action is purely a Syrian and/or Turkish action; all the transactions which have given rise to the alleged cause of action took place exclusively in Beirut, which was part of Turkey until it became French mandated territory. The defendants made this application practically on the ground to which Mr. Jones's affidavit in effect amounted, viz.: that if, as alleged by the plaintiff in the pleadings and affidavit in reply, there were no Courts in Syria which could hear the case, still there were Courts in Constantinople which could, and no legitimate advantage would accrue to him from prosecuting his action here whilst it would work a hardship on the defendants.

In *Ardaches Esmerian* v. *The Ottoman Bank*, 13 C.L.R., 93, the Supreme Court held that—

"There is in England a particular right under the Supreme Court rules to ask for the dismissal or stay of an action on the grounds that it is frivolous and vexatious and an abuse of the process of the Court.

No doubt that right can be exercised in Cyprus under the Cyprus Courts of Justice Order, 1927, Rules of Court. But there is also an inherent jurisdiction in the English Courts to see that no abuse is made of their processes, and we hold the same inherent jurisdiction exists in the Courts of Cyprus, and, therefore, there is no necessity to base our right to entertain such an application on the Cyprus Rules of Court.

We think that the Court below could have had recourse to that inherent jurisdiction and have stayed or dismissed this action.

The main thing for us now to consider is whether the Court had material on which they could rightly stay or dismiss it.

The burden of proving such a state existed rests on the party making the application, *i.e.* defendants.

Here we wish to say that on this point we do not desire to lay down any general rule as to the nature of the facts to be proved, before a Court is justified in making an order of stay or dismissal. Each case must be judged on its own merits.

Now dealing with this case there are two matters on which we must be satisfied before such an application can be granted:—

(1) That by not granting such an application an injustice will be done to the applicants (defendants);

(2) That by granting it no injustice will be done to the plaintiff;

the reason being that the Court must do justice to both parties."

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The judgment of Warrington, J., in *Egbert* v. *Short*, 2 Ch. Div., 1907, p. 212, is referred to as laying down this principle.

In *Esmerian's case* the application of the Bank was dismissed and the question before the Supreme Court on appeal was, had the Bank established affirmatively the proposition that, on the facts before it, the Court ought not to have refused to grant the application ? Esmerian was a Turkish subject, a former employee of the Bank, suing in respect of an alleged breach in Turkey of a contract to be performed in Turkey. The judgment on appeal stated further—

> " Now the Bank has established that the trial of this case in Cyprus would be highly inconvenient to them . . .
>
> But even allowing that it would be easier and cheaper for the bank to defend an action on the present claim in Constantinople, that by no means proves that this case is frivolous and vexatious, although it does show that Cyprus is not most convenient place for the trial; and we think that we should have been prepared to allow the appeal had we been satisfied that no injustice would have been done to the plaintiff."

In that case it was admitted that, whether or not the Bank may have had lawful cause to dismiss plaintiff, they purported to have done so solely owing to the action of the Turkish Government: a Turkish official, called the Commissioner of the Ministry of Finance, ordered the Bank to dismiss plaintiff; the Bank was in effect the State Bank of Turkey and they consequently had to obey the order given to them. It was also proved that for political reasons resulting from the war the plaintiff was not a *persona grata* with the Turkish Government. The Court was of opinion that the burden was on the Bank to prove that under the law of Turkey the plaintiff was, *under the peculiar circumstances surrounding that case, able to obtain his rights or a fair trial in Turkey.* The Bank had not discharged that onus and their appeal was therefore dismissed.

In another case, that of *René de Sumerer* v. *Ottoman Bank*, 13 C.L.R., 123, the Supreme Court by majority allowed the Bank's appeal and stayed the action. The majority decision, after finding that the case was a purely Turkish case and that all the transactions which had given rise to it had taken place in Turkey and that all the parties to the action were residing there, stayed the action. The Chief Justice dissented on the ground that the question involved was the interpretation of a contract between the parties and plaintiff was not going to call any witnesses. The Chief Justice stated:—

> " Both sides relied on *Logan* v. *The Bank of Scotland*, 1906, 1 K.B., 141. There was there thus much similarity,

that it was only the existence of the Bank in London which gave jurisdiction, while all the matters in question related to Scotland.

But in that case it was clear that a large number of Scottish witnesses would have to be brought to England, and also many documents would probably have to be kept a long time in London; while in the case now before us it is at least probable that very few (if any) witnesses will have to be called and that the case will turn on matters of interpretation rather than of evidence, which have already, and quite recently, been before our Courts."

I quite realize that the English and Cyprus cases do not go so far as the American case of *Collard* v. *Beach*, where the Court refused jurisdiction on the ground that it would not " allow its time to be taken up with the burden and expense of trying actions in that Court which could be tried before the home Courts of the litigants "; and on the English principles I would, as I have already intimated to the parties, have extended the hospitality of the Cyprus Courts to the plaintiff in spite of the fact that he waited twelve years to institute these proceedings, and did so only after a pensioner who retired in Cyprus had succeeded against the Bank on a claim for the payment of his pension on a gold basis, if, as he stated in the pleadings and affidavit, he could not sue the Bank in Beirut—the place where the contract was entered into, where it was partly performed and executed, where undoubtedly the breach took place, and where he actually resided.

There is, however, uncontradicted evidence before the Court—that of the expert witness, who was not even cross-examined on this point—that the Courts in Beirut had, without any shadow of doubt, jurisdiction to entertain the action at the time it was instituted in Cyprus. For the plaintiffs it was pointed out by Mr. G. Chrysafinis that Mr. Jones, the regional manager of the Bank in Cyprus, had stated in his affidavit that Constantinople was the place where this action should be tried; he submitted that, if the Bank did not object to its being tried there, then why not in Cyprus ? Mr. Jones clearly stated in his affidavit that he did not know anything about the plaintiff or his case, and evidently basing himself on the statements in the plaintiff's pleadings, said that Constantinople, where the Bank's head office was, should be the place of trial. Later, when other facts and allegations were disclosed by the plaintiffs, the Bank filed a further affidavit sworn by an expert who appeared before the Court and definitely stated that the Beirut Courts, contrary to the submissions and allegations of the original plaintiff and his affidavit in support thereof, had jurisdiction to entertain his action. He gave his evidence in a very frank, honest and able manner, and

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produced the laws on which he based his views. He referred to two similar cases against the Bank by its employees in which the Courts in Syria had decided, in spite of the Bank's objection in those cases that they had no jurisdiction, that they had jurisdiction to try them. In dealing with this point Mr. G. Chrysafinis in his address stated that at the time this action in Cyprus was instituted the Bank had submitted before the Courts in Syria that they had no jurisdiction. But the fact that the Bank so submitted does not alter the position. It is admitted by the plaintiffs that the Syrian Courts ruled they had jurisdiction; from the law and practice of those Courts it is clear that they had—in fact Mr. Chrysafinis did not cross-examine the expert witness on this point. He tried to get out of the witness that, in view of the amendment of the law effected on 12th October, 1934, the Courts in the Lebanon now may not have jurisdiction; also that the plaintiffs would encounter great difficulties in executing a Syrian judgment against the Bank. Neither of these points can possibly affect this case because, as Mr. Chrysafinis himself stated before the Court on the 2nd November, 1934, "in every action or application the rights of the parties should be determined according to the circumstances which prevailed at the time the writ was issued, etc."; and the difficulty of execution is not a matter which can be taken into account at this stage.

The fate of this application should not depend on what took place some two years after the action was begun. Assuming for a moment that the Courts in the Lebanon had no jurisdiction to try this case at the time the plaintiff decided to vindicate his legal rights and he came here to do so, and that some months later a change was effected there which gave them jurisdiction to try it, would this subsequent change have entitled the Bank to apply for the stay or dismissal of the action? On that ground, I should say, certainly not. The Court is not concerned with what happened two years after the writ of summons was issued; but if it were necessary for the purposes of the present application to decide whether the Lebanon Courts still have jurisdiction to entertain this action even after the 12th October, 1934, then I would on the evidence before me and after a careful study of the laws referred to by the expert witness hold that they still have it.

I find as a fact that the Courts in the Lebanon (Beirut) had jurisdiction to try this case (at the time it was begun here). The contract was entered into there; the breach alleged, if any, occurred there; it was there that the deceased plaintiff for twelve years—according to himself under protest, and according to the Bank without demur—received his pension on a non-gold basis; it is there that he resided and it is there that his wife and children, the

substitutive plaintiffs, reside; the expert witnesses to prove the laws applicable to his case and their possible effect on the contract between him and the Bank could be found there, but not here; the witnesses required to prove facts which, according to the plaintiff's pleadings and affidavit, are essential are in Beirut, and this Court therefore could not compel them to come, which might give rise to orders for evidence on commission; the pension which might be found to be due to the plaintiffs would have to be paid to them there and perhaps have to be translated into Syrian currency for purposes of payment. Is there any conceivable reason why this case should be tried here ? Bearing in mind the formula laid down by the Supreme Court in *Esmerian's case*, I am of the view that the refusal of this application will work an injustice to the Bank and that the granting of it will not work any to the plaintiffs; and I therefore order that the action be struck out as vexatious and an abuse of the process of the Court, with costs.

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The plaintiff appealed to the Supreme Court.

G. Chrysafinis, Jr., for appellant.

J. Clerides for respondent Bank.

The facts are fully set out in the judgments.

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Thomas, J.

THOMAS, J.: This is an appeal from an order of the Divisional Court, Nicosia, dismissing an action as vexatious and an abuse of the process of the Court. No difficult question of law is raised here, as that is clearly laid down by the decided cases, but, nevertheless, the point involved is one of considerable importance as it relates to the exercise of an altogether exceptional power of the Court to dismiss an action before it is heard. The question for determination by this Court is whether or not in dismissing the action the learned Judge exercised his discretion in accordance with the principles laid down in decisions of the Courts in England that have never been questioned.

The plaintiff, a native of Beirut, after forty-two years' service in the defendant Bank in different parts of the former Turkish Empire and elsewhere retired on pension, and in November, 1932, brought an action in Cyprus against the respondent claiming payment of his pension in Turkish pounds gold payable in currency constituting legal tender after conversion at the actual rate of exchange of the date of payment of each monthly instalment. He states in an affidavit that upon the Bank ceasing to carry on business in Syria he could not sue there, and therefore brought his action in Cyprus.

The first ground relied upon by the defendant, as appears from the affidavit of Mr. Jones, the Regional Manager for Cyprus, is that plaintiff is not *bona fide* in bringing his action in Cyprus, and the particular bad faith complained

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of is not that the plaintiff was actuated by any wrongful motive, but because he had "an accessible Court in Constantinople where the defendant Bank has its Central Office, and where the cause of action, if any, arose, and where he could have a fair trial in accordance with the local law which governs the rights of the parties." The bad faith imputed to the appellant consists in his bringing an action in a place other than that in which the cause of action arose and where he has an accessible Court. This certainly does not constitute bad faith. To show that a plaintiff is not *bona fide* there must be evidence proving that he has brought his action not for the purpose of obtaining justice, but for the wrongful purpose of harassing or annoying the defendant under cover of asking for justice, so that he may obtain some illegitimate advantage over him. In my opinion there is not a particle of evidence of plaintiff's bad faith. The Court below was of the same opinion since it made no finding in its judgment that plaintiff was guilty of bad faith.

With regard to the allegation in Mr. Jones's affidavit that plaintiff could have a fair trial in Constantinople counsel for the defendant Bank in his argument before this Court stated that Esmerian could not have a fair trial in Constantinople because he was not on good terms with the Turkish Government. That means, in the view of counsel well acquainted with conditions in the Near East, that the only persons who can obtain a fair trial before the Turkish Courts are those on good terms with the Government. The Oriental conception of what is the impartial administration of justice being so fundamentally different from and repugnant to our own, I should require very strong evidence indeed—supposing such could be found at all—to be convinced that the plaintiff could in an action in Constantinople against the defendant Bank, stated in the reported cases to be a State Bank of Turkey, and so claimed by the Bank itself, obtain a fair trial, as that term is understood in English law.

As to the second ground alleged, viz.: that the action is brought to embarrass and to obtain an undue advantage over defendant Bank, I need only say that I see no evidence on the record to support this allegation, nor did the learned Judge in the Court below.

The next ground urged in support of the stay is that in defending the action in Cyprus the defendant Bank will be under a disadvantage because (1) its witnesses are in Constantinople; (2) the headquarters of the Bank are there; and (3) it will have to incur trouble and expense in bringing witnesses to prove Turkish law (paragraph 8 of Mr. Jones's affidavit). Whether the witnesses must come from Constantinople, as the Bank itself contends in their Manager's affidavit, or whether from Beirut, as its counsel has argued,

makes little difference. As no particulars are given the Court was not in a position to form any opinion as to the extent of the disadvantage alleged. By saying that its witnesses were in Constantinople the Bank showed that it regarded the question in dispute in the action to be whether or not plaintiff's pension was payable in gold. This is borne out by the admission of defendant's counsel that the present case depended upon the case of *Dascalopoulos* v. *Ottoman Bank* then before the Privy Council (Record, p. 35) defendant's allegation, it is important to note, is not that he will be unable to call his witnesses and thus suffer injustice if the action is heard in Cyprus, but merely that he will incur greater expense and trouble. In *Norton* v. *Norton* (1) Vaughan Williams, L.J., says towards the end of his judgment: " I have gone into the matter at this length in order to make it quite clear that questions of expense or inconvenience are not sufficient to justify the Court in staying proceedings. It must be shown, further, that the expense and inconvenience are of such a character that to allow the action to go on would result in real injustice to the other litigant." Kennedy, L.J., concurred in these views.

The plaintiff in his affidavit in reply says that five other actions in which the same issue was raised were heard before the Courts in Cyprus without any signs of embarrassment to the defendant Bank. In two recent actions before the District Court of Nicosia, one of which is on appeal to this Court, the defendant Bank called witnesses from Constantinople without any suggestion of embarrassment.

The learned Judge finds that the continuance of the action will work an injustice to the defendant, but he does not indicate what he considers the injustice to be. One is left to infer from the passage immediately preceding that the injustice consists in having to defend the action here rather than in a place in every way more suitable to the defendant. As I read the judgment, the main reason for holding the action to be vexatious is because he considered there was an accessible Court in Beirut which had jurisdiction to hear the action. The evidence of experienced counsel practising in Beirut shows that it is open to serious doubt whether the Courts in Beirut can entertain an action against the defendant Bank, and this doubt is shared by the Bank itself. Before this Court the Bank's main argument has been that the proper place for the trial of this action is Beirut, while in another part of Syria under the same laws as Beirut the Bank is energetically denying that the Courts there have jurisdiction in the case of a defendant not carrying on business and having no property in the jurisdiction. When a Court is contemplating staying an action it is

(1) (1908) 1 Ch. 471.

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essential for it to know whether plaintiff can pursue his action in another place. The question in my view is not whether there was an accessible Court when the action began, as the Court below has held, but whether at the time the doors of the Court in one jurisdiction are being closed to a plaintiff he has another Court open to him.

The first case to which I wish to refer is *Logan* v. *Bank of Scotland* (*No.* 2).(1) The plaintiff was a domiciled Scotsman living in Inverary, the defendant Bank a Scottish corporation having one branch in England, viz.: in London. The action was brought to recover damages for alleged misrepresentations contained in a prospectus of a company registered in Scotland. All the transactions giving rise to the cause of action took place in Scotland. If the action were tried in London a large number of witnesses, all resident in Scotland, would have to be called, and a great quantity of books and documents all of which were in Scotland would have to be produced. The defendants alleged that the action was a purely Scotch one, and that the object of taking proceedings in England could only be to vex and harass the defendants, and to force them to pay money to get rid of the claim. The decision of the Court of Appeal was delivered by Sir John Gorell Barnes, President of the Probate, Divorce, and Admiralty Division. He says that he cannot bring himself to find that the action was brought *bona fide*, which means that he accepted the defendant's contention that the action was brought not for the purpose of obtaining justice but with the wrongful motive of harassing the defendants so as to force them to settle. In the circumstances the Court stayed the action as vexatious. In *de Sumerer* v. *Ottoman Bank* (2) the majority of the Court founded their decision upon *Logan* v. *Bank of Scotland*. They considered that "all the grounds for granting the application set out in the judgment of the Court of Appeal in *Logan* v. *Bank of Scotland* are present." In the latter case the chief reason for ordering a stay was that the plaintiff had brought his action *mala fide* to harass the defendant and force him to settle. As there was in *de Sumerer* v. *Ottoman Bank* no proof that plaintiff brought his action *mala fide*, I think the judgment of the majority of the Court was wrong and would certainly have been reversed if the plaintiff had continued his appeal to the Privy Council.

In the following year the case of *Egbert* v. *Short* (3) was decided by Warrington, J. In this case the plaintiff who had been residing in India served a writ upon the defendant, her solicitor in Madras, who was on a month's leave in

(1) (1906) 1 K.B. 141.
(2) 13 C.L.R. 123.
(3) (1907) 2 Ch. 205.

England, in respect of proceedings between herself and her husband in India. The facts showed that the cause of action arose in India, and that the witnesses were in India. Towards the end of his judgment the learned Judge says: " On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not *bona fide* for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled." In referring to *Logan* v. *Bank of Scotland* (*No.* 2) the learned Judge says: " there is one circumstance, and one only, which distinguishes that case from the present, and that is that at the moment of the issue of the writ the plaintiff was physically in England . . ." It is clear from this that Warrington, J., was of opinion that one of the reasons for the decision in *Logan* v. *Bank of Scotland* (*No.* 2) was that the action was brought not *bona fide*.

In *in re Norton's Settlement*, *Norton* v. *Norton*, (1) the parties were resident in India, and the action was a claim for an account under a marriage settlement made in India relating to property in India. Defendants were served with the writ while temporarily in England. The Court held that the action must be stayed on the grounds that (1) " the plaintiff had in fact brought the action in England not for any *bona fide* purpose, but in order to obtain an undue advantage over the defendants, and that the continuance of the proceedings in England would necessarily be productive of injustice to the defendants." Vaughan Williams, L.J., says at p. 479: " As I have already pointed out, in order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of the trial in this country are so great that injustice will be done in this sense, that it will be very difficult, or practically impossible; for the litigant who is applying for the stay to get justice in this country. Speaking generally, one may say that a litigant must shew that some injustice will be done to him. There is also another consideration to be borne in mind. If the Court, taking all the facts into consideration, comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then, apart from any question as to expense or inconvenience, in my opinion not only has the Court jurisdiction, but it is its duty, to stay the proceedings."

(1) (1908) 1 Ch. 471.

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Farwell, L.J., at p. 482, says: "Now, abuse suggests to one's mind an element of wrong-doing in the party attempting so to abuse, and I think that in all the reported cases that element does appear."

"Now, in the present case, the abuse consists of the mode in which, as appears from the letter read by my Lord, the plaintiff has attempted to obtain an advantage over her husband by putting him in the dilemma of either having to give up his practice in India for a considerable period, or of submitting to her demands and settling on the best terms he can." (p. 483). On page 484 he says: "In my opinion on all these grounds it is the case in which the wife is using the process of the Court for a sinister or bye-purpose, to use a well-known phrase."

Kennedy, L.J., says at p. 486: "I entirely assent to what my Lord has said, that where one has to deal with the exercise of discretion in a case of this sort, which affects important rights, the greater convenience to the defendant in being sued in India is by itself no sufficient reason for depriving the plaintiff of her right to sue in this country. The question of staying the action cannot in my opinion be decided on considerations, more or less speculative, as to the balance of convenience; but one must inquire whether or not injustice will result if the proceedings are not stayed, and whether or not there has been an oppressive use of the process of the Court which is sought to be put in force." And towards the end of his judgment: "In these circumstances I cannot help thinking that the plaintiff has taken advantage of the presence of her husband in England in order to inflict what would be an injury upon him, if the proceedings were allowed to be continued in this country."

There is a passage in the judgment of *McHenry* v. *Lewis*, (1) which shows of what nature the vexation must be. At page 407 Lord Bowen says: "I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."

The authorities show that the jurisdiction of the Court to dismiss an action before it is heard is based upon the necessity of preventing persons making an improper use of the machinery of the Court by bringing actions under the guise of the exercise of a common right to assert a claim in a Court of law, but in fact brought with the object of vexing

(1) 22 Ch. D. 397.

or oppressing another in order to obtain some illegitimate advantage over him. "It cannot be doubted," says Lord Herschell, the Lord Chancellor, in *Lawrance* v. *Norreys* (1) "that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction that ought to be very sparingly exercised, and only in very exceptional cases." In all the leading authorities it is laid down that it is a jurisdiction to be made use of with the greatest care and caution, and only when a clear case is made out. What actions have the Courts in England held to be an abuse of the Court's process ? First, frivolous suits, where the pleadings disclose no cause of action, or those which in point of law cannot possibly succeed. Such actions may be dismissed without considering the motives for which they were brought. The only other class of actions which have been held to be an abuse of the process of the Court are vexatious actions. These are actions brought for the purpose of "perverting the administration of justice to an unjust end," to use the words of Lord Bowen in a passage I have already cited, or those brought "not *bona fide* for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendant, and of obtaining something to which the plaintiff may not in justice be entitled" (Warrington, J., in *Egbert* v. *Short*). To obtain an order staying an action the defendant must establish that the action has been brought against him for a wrongful purpose, to vex or oppress, and that the continuance of the action will cause him real injustice. Even if the defendant establishes these two things, the Court will not stay the action unless it is satisfied that by so doing no injustice will result to the plaintiff.

I wish to say a word as to the nature of the evidence on which the defendant has sought to establish that the plaintiff's action is an abuse of the process of the Court. Apart from the question of the jurisdiction of the Courts in Beirut, the evidence on which the application is founded is the affidavit of Mr. Jones, made nine weeks after the writ of summons was served upon him. There is nothing else. In his affidavit Mr. Jones says he knows nothing as to the plaintiff's service with the Bank, nor anything about the claim he is putting forward. In the next paragraph he asserts facts which show that he must have been in possession of the material facts relating to plaintiff's service and the claim he was making against the Bank. The affidavit offends against the requirements of the Rules of Court as to statements made upon information and belief (see *Young* v. *J. L. Young, Manufacturing Company*, (2) cited in *Seraphim Brothers* v. *Jacquet Frères*

(1) 15 App. Cas. 210.
(2) (1900) 2 Ch. 753.

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and Viailly; (1) it is uncorroborated, and is of an unsatisfactory nature. The case set up in the defendant's affidavit is an entirely different one from that put forward at the hearing. It fails completely to establish any bad faith on the part of the plaintiff. I am likewise of opinion that the evidence failed to establish either that the action was brought in order to embarrass or obtain an undue advantage over the defendant, or that the defendant will suffer any kind of disadvantage by the action being heard before the Courts of this Colony. In my view the proper conclusion in this connection to be drawn from all the material on the record is that defendant's complaint that he will be embarrassed and unable to obtain justice if the action is tried in Cyprus cannot be regarded as genuine, and that the only complaint he has is that he objects to the action being heard in a place where several actions involving the same issue have been decided against him.

For the reasons I have given above I am of opinion that upon the authorities no case was made out by the defendant for dismissing the action, and I think therefore that the appeal should be allowed with costs both here and in the Court below.

Sertsios, J.

SERTSIOS, J.: This is an appeal from a judgment of the Divisional Court, Nicosia-Kyrenia, granting an application by which the defendant Ottoman Bank had applied to the Court in question to strike out or dismiss plaintiff's action on the following grounds, viz.: (*a*) the Court had no jurisdiction to entertain the action; (*b*) the action is frivolous and vexatious and embarrassing to the defendant; (*c*) the case is an abuse of the process of the Court.

Before dealing with the appeal itself from the judgment in the application it may be well to state shortly the history of the plaintiff's action. The plaintiff in this action, according to his affidavit, was an employee of the defendant Bank since the year 1872, and after having served in various branches of the Bank he was retired on pension in the year 1914, when he was serving at Beirut. Plaintiff was born in Beirut in the year 1855. According to the same affidavit he had been for many years a person in bad health, and, since the time he was pensioned, he had no other means of maintaining himself and his wife and family excepting his pension. Since the year 1921 the defendant Bank ceased to have any branches in Syria and plaintiff's pension was being paid to him through the Banque de Syrie and du Grand Liban. After the defendant Bank left Beirut and Syria generally the plaintiff Mitry Trad, as stated in paragraph 18 of his affidavit, wanted to sue the defendant Bank in order to satisfy the claim he had against it, but,

(1) 14 C.L.R. 119.

being unable to do so in Syria, he found that the nearest country where he could trace the defendant was Cyprus. So the plaintiff came over to this Island and on the 22nd November, 1932, he instituted this action against the defendant Bank.

The defendant Bank on the 1st February, 1933, filed an application to strike out or dismiss this action. In support of this application Mr. Jones, the Regional Manager of the defendant Bank in Cyprus, made an affidavit on the 1st February, 1933, to which the plaintiff replied by another affidavit dated the 10th March, 1933. Now, the main and principal evidence upon which defendant Bank's application is based is the affidavit of their Regional Manager. Mr. Jones in paragraph 4 of his affidavit says that he knows nothing about the claim the plaintiff is putting forward in his action against the defendant Bank. But about two months had elapsed before the present application was filed, the action itself having been instituted in November, 1932. So by the 1st February, 1933, when this application was filed, he must have communicated with the General Management of the defendant Bank at Constantinople in the same way as he had done in other number of previous cases against the defendant Bank by other ex-employees of the Bank who had never served in any branch thereof in Cyprus. In any event, he had ample time to so communicate before preparing the affidavit in question in which he is dealing with facts concerning this case. Paragraph 7 at least of his affidavit shows that he had managed in this way to acquire a good knowledge of the facts concerning the plaintiff's case. Consequently, when Mr. Jones in his affidavit stated that he knew nothing about the plaintiff's claim, he does not seem to have been quite accurate. In paragraph 5 of his affidavit Mr. Jones states the following, viz.: " Plaintiff's cause of action arose out of the jurisdiction of this Court, and plaintiff to the best of my information and belief is not *bona fide* in bringing the action before this Court, because there was and there is an accessible Court for him at Constantinople, where the defendant Bank has its central office and where the cause of action, if any, arose and where he could have a fair trial in accordance with the local law which governs the rights of the parties."

In saying so, the Regional Manager was certainly speaking the truth, because the defendant Bank was quite convinced that the Courts in Syria had no jurisdiction to entertain this action, and that there was one competent forum for the plaintiff only, namely that at Constantinople. In the action, for instance, brought against the defendant Bank by one Antoine Boulad, ex-employee of the Bank, before the Syrian Civil Courts of Damascus on the 13th February, 1932, the defendant Bank strongly contended that the

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Syrian Courts had no jurisdiction to entertain the action, and the Court of first instance there decided that the Syrian Courts had such jurisdiction. The defendant Bank, however, being dissatisfied with that decision, appealed to the Court of Appeal, and the appeal is still pending according to Mr. Albert Achou's evidence. Nobody, of course, can know what the fate of the judgment in question will be. The same deponent Albert Achou in his affidavit states that the Syrian Courts in question decided in the same sense in a similar action instituted by a certain Cachecho against the defendant Bank. In any event, the defendant Bank, in view of the case pending on appeal before the Syrian Court of Appeal, is still of the opinion and conviction that the Syrian Courts have no jurisdiction to entertain an action against it. In the face of these doubts, how could the defendant Bank in the present case possibly have expected the plaintiff to have a settled view that the Syrian Courts have got jurisdiction to entertain this action ? Assuming that plaintiff, abiding by the decision of the trial Court in this case, goes and institutes legal proceedings against the defendant Bank at Beirut in respect of his present claim, what will happen to him if the defendant Bank objects to the jurisdiction of those Courts, or if the Syrian Court of Appeal would allow their appeal in the case of *Antoine Boulad* v. *The Ottoman Bank*, holding that the Syrian Courts have no jurisdiction to entertain an action against the defendant Bank ? It is quite obvious that his action will be dismissed, and, having already in this Colony lost his case by the decision of the Divisional Court, Nicosia, he will be altogether precluded from asserting his claim both before the Syrian Courts and those of Cyprus ! The result will thus be that plaintiff will suffer an irreparable loss or damage, and this surely ought to be prevented by all means.

In the case of *Egbert* v. *Short*, (1) having in mind a case of this sort Warrington, J., expressed himself as follows in delivering judgment in that case: " The jurisdiction I am asked to exercise is one which, as has been frequently said, is to be exercised by the Court with extreme caution; and further it is one which the Court ought not to exercise if by so doing an injustice will be caused to the plaintiff, and the real question which I have to decide is whether by preventing what, in my judgment, is a grievous injustice to the defendant, I shall at the same time be causing an injustice to the plaintiff. If I should be doing so, then I think it would be my duty to refuse this application." The same dictum was pronounced in the case of *Logan* v. *Bank of Scotland* (*No.* 2) (2) and *in re Norton's Settlement.*(3)

(1) (1907) 2 Ch. 212.
(2) (1906) 1 K.B. 141.
(3) (1908) 1 Ch. 471.

From all this it is quite clear that the Court in dealing with such actions has to consider most carefully not only the defendant's position, but also that of the plaintiff. There is no doubt, of course, that, assuming that plaintiff will not suffer any injustice, the onus will be on the defendant to show that the action is vexatious and an abuse of the process of the Court. But is there anything before this Court which would show that the defendant Bank itself will be embarrassed in any way by this action being entertained by the Courts in Cyprus ? It has been contended for the defendant Bank that they will not be able to procure the attendance of their witnesses from Beirut by any legal means, though the Regional Manager never dealt with this particular point in his affidavit. All that he said in paragraph 5 of his affidavit is this: " The defendant Bank will have to prove as a fact the local law governing the rights of the parties, and especially the currency laws in force in Turkey, and to do so it will have to bring expert witnesses from Turkey. This will mean *considerable trouble and expense* for the defendant Bank which could be avoided if plaintiff brought his action at Constantinople." From this extract of Mr. Jones's affidavit one can see that the only difficulty and complaint of the defendant Bank is that they will have to bring expert witnesses from Turkey and such a course would mean considerable trouble and expense for the defendant Bank, namely considerable inconvenience and expense, without showing that this will be productive of injustice to the defendant Bank. In *Norton* v. *Norton* (1) Vaughan Williams, L.J., as I may probably explain later at some greater length, said *inter alia* on p. 478 the following: " It appears from the judgment of Cotton, L.J., in *Thornton* v. *Thornton*, (2) that the fact that an action has been commenced in England which might more conveniently and with less expense to the defendant be tried in India is *not* of itself a sufficient reason for staying the action." The learned Judge in the same case, on p. 479, said as follows:—

" I think it is a true proposition that the mere fact of increased expense of trial in England is not of itself a sufficient reason for granting a stay." And, further below, dealing with the question of *convenience*, he states as follows: " As I have already pointed out, in order to justify a stay it is, as a rule, necessary that something more should exist than a *mere balance of convenience* in favour of proceedings in some other country."

In paragraph 6 of his affidavit Mr. Jones states that plaintiff has brought his action before the Courts in Cyprus in order to embarrass the defendant Bank in its defence and obtain undue advantage over the defendant Bank. To show that this is so the same Regional Manager in paragraph 7

(1) (1908) 1 Ch. 471 *et seq.*
(2) 11 P.D. 176.

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of his affidavit, as I have mentioned, says that the defendant Bank will have to prove the local law governing the rights of the parties, and, especially, the currency laws in force in Turkey, and, to do so, the Bank will have to bring expert witnesses from Turkey, which, as he says, will incur considerable trouble and expense for the Bank. Consequently, the only reason for which it is stated that the plaintiff will, by bringing this action in Cyprus, embarrass the defendant Bank in its defence and obtain an undue advantage over it, is because, for the grounds explained, the defendant Bank will be put to considerable trouble and expense in procuring the attendance of its expert witnesses to prove the Turkish law. But, as I have mentioned, considerations of convenience and expense were not considered sufficient to justify a stay in the case of *Thornton* v. *Thornton* referred to above. In applications of this kind the litigant must show that *some injustice will be done to him.* The defendant Bank, however, in this case complains only of expense and trouble. (Paragraphs 6 and 7 of Mr. Jones's affidavit must be read together.) Mr. Jones does not say whether by maintaining the action in Cyprus any injustice will be caused to the defendant Bank and what sort of injustice. Only, as regards the plaintiff the Regional Manager says that no injustice will be caused to him if he brings his action at Constantinople, but he does not say anything about any injustice which will be caused to the defendant Bank by prosecuting the action in Cyprus. Vaughan Williams, L.J., in his judgment in the case of *Norton* v. *Norton*, quoted above, dealing, further, with the question of expense and convenience, added the following: "In order to justify a stay it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done in this sense, that it will be very difficult or *practically impossible for the litigant who* is applying for the stay to get justice in this country. Speaking generally one may say that the litigant must *show that some injustice will be done to him.*" Coming back to the case before us, I notice that the only evidence in support of the present application is the Regional Manager's affidavit, and a careful perusal of it does not show that any evidence has been adduced for the defendant Bank in the sense that it will be very difficult or practically impossible for the applicant to get justice in this country. A great deal has been said in Court for the defendant as to the injustice which will be caused to them, but all that was but a vague talk without being supported by any evidence whatever. The learned trial Judge says in his written

judgment that he is of the view that the refusal of this application will work an injustice to the Bank. But he does not say what is the injustice nor does he say what are the facts in evidence which tend to establish such injustice. I must add here that, in the course of the hearing of the application before the Court below, the defendant Bank abandoned the first ground of the application, admitting thus that the Divisional Court, Nicosia, had jurisdiction to entertain the plaintiff's action. I may observe that it could not be open to question but that the Court had jurisdiction to entertain the suit. It was an action for debt and the defendant Bank admittedly was indebted to the plaintiff in respect of the quantity of the pension to be paid to him. It does not matter where the debt was incurred. The plaintiff may claim the money from the defendant Bank wherever he finds them. Defendant Bank since the year 1919 or 1921 has ceased to have any existence in Syria, this being clearly admitted by it, and plaintiff having found defendant Bank in Cyprus took action against it before the Courts in the Island. It is a personal action in which the plaintiff demands only what is due to him under the defendant's obligation to pay his debt. (*Vide* Story, Conflict of Laws, p. 530.) Such actions are transitory, that is to say, they can be brought in any Court having jurisdiction over the defendant. (See Story, Conflict of Laws, p. 538.) See also 9 C.L.R., pp. 1-2: *Mouzouri* v. *Kissonerghi*.

In arguing before the Court it was contended for the defendant Bank that they would not be in a position to procure the attendance of witnesses from Beirut. But, to say nothing else, the defendant Bank in support of their present application did, without the slightest difficulty, procure the attendance of the witness Albert Achou from Beirut. No doubt the defendant would procure in the same way the attendance of any other witness required for the defence at the hearing of the action itself, as they have in fact done in a number of other actions against them in Cyprus. In any event, the law distinctly enables them in an action, in which they desire to have the evidence of witnesses not residing within the jurisdiction of the Courts of this Colony, to apply and obtain an order from the Court to take evidence on commission abroad of persons to be mentioned in the application, as was done often on other occasions. In the case, for instance, of *Esmerian* v. *Ottoman Bank*, the defendant Bank in an application to have the action against them struck out or dismissed as being frivolous and vexatious and an abuse of the process of the Court, this Court on appeal, upholding the judgment of Sertsios, J., decided against the Bank refusing its application. The defendant Bank then applied twice to the Divisional Court,

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Nicosia, for an order to obtain evidence on commission at Constantinople and Rodosto of certain witnesses named in the application. The Divisional Court refused the application on both occasions, but the defendant Bank never appealed against the decision of the Court in either application. After long delays in consequence of those applications and other proceedings on the part of the defendant Bank, the case itself was eventually fixed for hearing. At the hearing of the action, however, the defendant Bank confined itself to calling one witness only, namely the Regional Manager of the Bank, Mr. Jones, without showing any intention to bring over witnesses from outside the Island, or call any other evidence. One of the points calling for the decision of the Court in the *Esmerian's case* was whether under the contract "*Caisse de pensions et de Retraites*" the salaries and pensions of these employees were payable in gold or not, namely the same as in the present case. The defendant Bank then, as mentioned, called only the Regional Manager as a witness, namely Mr. Jones, to prove the contrary, and it did not call any other witness. Consequently, this being the main point in the present action against the Bank, obviously the evidence of the one witness in question plus documentary evidence would be quite sufficient.

All the above clearly shows that the defendant Bank in this connection will not be embarrassed in any way by the proceedings instituted by the plaintiff in this country, and, that being so, one cannot say that plaintiff instituted this action against the defendant Bank with a frivolous and vexatious intent.

In previous actions against the defendant Bank before the Courts in Cyprus, *e.g.* in the cases of *Chakarian* v. *The Ottoman Bank* and *Bouzourou* v. *The Ottoman Bank*, though the plaintiffs in either case were foreigners and employed by the Bank in Smyrna and Constantinople respectively objection to the jurisdiction was never raised nor was it ever contended by the Bank that they were embarrassed on the ground that the action was frivolous and vexatious and an abuse of the process of the Court.

Mr. Jones in paragraph 5 of his affidavit deposes the following: "Plaintiff *to the best of my information and belief* is not *bona fide* in bringing this action before this Court, because there is an accessible Court for him at Constantinople, where the Bank has its central office and where the cause of action arose and where he could have a fair trial in accordance with the local law which governs the rights of the parties." In the above paragraph of this affidavit Mr. Jones states that to the best of his information and belief the plaintiff is not *bona fide* in *bringing this action before this Court*, but he does not say a word as to the source

of the information nor of the foundation of his belief, as required by Order XV, rules 14 and 15 of the Rules of Court, 1927. In the case of *Christodoulides* v. *Christodoulides* (1) it was held by this Court that in affidavits founded on information and belief the provisions of Order XV, rules 14 and 15, must be complied with and the sources of information and belief stated. (*Vide* also 14 C.L.R., p. 119, in the case of *Seraphim Bros.* v. *Jacquet Frères et Viailly.*) Consequently the Regional Manager's information and belief in this respect is next to nothing and does not in any way help the defendant's case in that they have failed to establish that the plaintiff is not *bona fide* in instituting his action before the Courts in Cyprus.

In addition I may say that the plaintiff himself in paragraph 19 of his affidavit in reply to defendant's affidavit emphatically contradicts him stating as follows: " My action in Cyprus is absolutely a *bona fide* proceeding and I have no intention in any way to embarrass the defendant Bank in their defence and obtain an undue advantage over them. I never thought that the Nicosia branch of the defendant Bank knew nothing about the issues raised in my claim. On the contrary I think and I know from information I got from my son that the defendant Bank having fought in Cyprus the same issue of the basis of the salaries and pensions of the Bank officials several times, must have a great experience and knowledge of all the facts material to that issue, and they are fully equipped to defend themselves. As to the alleged considerable expense which may be required for defending the Bank case, though I say this is not so, I am ready to give such security for costs as Court may think reasonable, to cover any such expense in addition to the amount due to me by the defendant Bank for pension after November, 1932."

From the above passage of plaintiff's affidavit which stands entirely uncontradicted by the defendant Bank, it having failed to give any reply whatsoever by means of a supplementary affidavit or the production of any other evidence to the contrary, it reasonably follows that plaintiff had been acting *bona fide* all through in proceeding before the Courts in Cyprus. Plaintiff's contention, moreover, as to his *bona fides* in proceeding against the defendant Bank in this country is very materially corroborated by his offer to supply such security for costs, as the Court would find reasonable, and by all he has stated in his affidavit, which all stand entirely uncontradicted by the defendant Bank.

The Regional Manager gives his reasons for stating that plaintiff is not *bona fide* in suing defendant Bank in Cyprus,

(1) 9 C.L.R. 16.

his reasons being because there is an accessible Court for him (*i.e.* the plaintiff) "in Constantinople where the defendant Bank has its Central Office, etc., etc., etc." From this statement one can easily see that it is not suggested that the action has been instituted vexatiously but it is only suggested that it is vexatious to proceed with the case in Cyprus and not in Constantinople. It may be harassing, no doubt, because it is very harassing to have an action brought against one in any tribunal at all, but that is not enough. It must be vexatiously harassing to the defendant on the part of the plaintiff whose action is sought to be stayed. The above view is based upon remarks to be found in the judgment delivered by Cotton, J., in the case of *McHenry* v. *Lewis* reported in (1882) 22 Ch. D., p. 397, which is only remotedly in point in the present case, but it does show that the principle is the same. In that case two actions had been brought against the defendant in respect of the same subject matter of the claim, one in England and the other in America. In an application by the defendant in that case to stay one of the suits, the Court of Appeal held that, if one of the actions is in a foreign country, there is no presumption that the multiplicity of actions is vexatious, and a *special case* must be made out to induce the Court to interfere. Cotton, J., in delivering judgment in that case said *inter alia* the following, viz.:—

> ". . . . under these circumstances it is not suggested that of these two suits the second is instituted vexatiously, but it is suggested that it is vexatious to go on with both." . . . . and further: "I cannot say here that we ought to come to the conclusion that proceeding with these two suits in the two different tribunals is vexatious. It may be harassing because it is very harassing to have an action brought against one in any tribunal at all, but that is not enough. It must be vexatiously harassing the defendant on the part of the plaintiff *whose action is sought to be stayed.*"

In *Logan* v. *Bank of Scotland,* (1) the President of the Court of Appeal gives various examples in dealing with frivolous and embarrassing tendencies of a plaintiff, but in concluding his reasoning he distinctly declares his inability to find that the action in question was brought *bona fide* in England stating as follows: "Notwithstanding what the plaintiff and his solicitor say in their affidavits, I cannot bring myself to find that in fact the action is *bona fide* brought in this country."

In the case of *Norton* v. *Norton* (2) it was held on appeal that plaintiff had in fact brought the action in England

(1) (1906) 1 K.B. 152.
(2) (1908 1 Ch. 471.

instead of in India not for any *bona fide* purpose, but in order to obtain an undue advantage over the defendants, and that the continuance of the proceedings in England would necessarily be productive of injustice to defendants, and, in these circumstances, the action ought to be stayed.

In the case of *Egbert* v. *Short* (1) it was also held that " the action was not brought *bona fide* in England, and that the injustice to the defendant in bringing the action in this country (England) instead of in India was so great that the Court would not allow the action to proceed."

In the case of *Lea* v. *Thursby*, (2) where defendant Thursby moved to dismiss the action as being frivolous and vexatious and an abuse of the process of the Court, the Court held: "The action was brought *bona fide* to try a legal point which ought to be tried, and that the motion wholly failed and must be dismissed with costs in any event."

In *McHenry* v. *Lewis* (3) Cotton, L.J., said *inter alia* the following:—

> " In the circumstances of this case, ought we to exercise a jurisdiction, which I assume we have, to make the order ? In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action against the defendant, is a jurisdiction which has to be exercised with very considerable caution."

In the case of *Massey* v. *Heynes & Co.* (4) Wills, J., stated the following: " Of course the jurisdiction must be exercised with care and forbearance, and ample power is given to the Court to prevent the abuse of the process. If there were the least ground for saying the action was brought against the brokers in this country *mala fide* and with the knowledge that they were not liable, simply to try in England a case which otherwise could not be tried here, then, although the action was against a person in this country, it would not be *properly* brought. The Court must be satisfied of the *bona fides* before the jurisdiction ought to be exercised."

In all the above-mentioned cases, and in many others, the dominating principle laid down by very distinguished Judges is that, for an action to amount to an abuse of process, it must be brought not for the purpose of claiming some right or remedy, but brought *mala fide*, that is, with an improper motive in order to vex or oppress or injure the defendant. Indeed a very strong case ought to be made out before the Court should exercise its rare power of stopping an action before it has been tried. The judgments, as

(1) (1907) 2 Ch. 207.
(2) (1904) 89 L.T. 744; 90 L.T. 265, C.A.
(3) (1882) 22 Ch. D. 397 at p. 406.
(4) (1888) 21 Q.B.D. 33.

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already mentioned, are all emphatic on this point and insist that the power should be used with the greatest caution and only when a very clear case of abuse of the Court's process is made out. Plaintiff in this case was a person in bad health and sick for a long time. When he thought of taking action against the defendant, he found that he could not get hold of the Bank, as it had long ago ceased to exist as a corporation in Syria. Following the medical advice he came over to Cyprus, being the nearest place within the jurisdiction of the Courts of which he could trace the defendant Bank, and he instituted the present action. The defendant Bank has asked the Court below to stay the action as being vexatious and an abuse of the process of the Court, but, as I have explained, the defendant Bank has failed to establish it. One thing is only clear, as regards the plaintiff, that, being a foreigner, he preferred to have the governing document *Caisse de pension et de Retraite*, being of the main issue of his claim, interpreted by the Court of a British Colony, which is already familiar with similar previous cases against the defendant Bank rather than by a foreign tribunal. In the case of *René de Sumerer* v. *The Ottoman Bank* the majority of this Bench allowed the appeal in favour of the defendant Bank, *dissentiente* Belcher, C.J., and, dealing on p. 127 of 13 C.L.R., with the question as to whether the plaintiff was *bona fide* in that case, they do not say that he had brought that action with an improper motive in order to oppress or vex or injure the defendant Bank. The only thing they say in their judgment is this: " We do not say that plaintiff in the present case is *trying anything in the nature of blackmail* as seems to have been considered in the case of *Logan* v. *Bank of Scotland*, but we do think that he thought that, as certain cases had gone against the Bank (*vide* paragraph 14 of his affidavit of 7th March, 1928), he would be in a better position to effect a settlement more satisfactory to himself than if he went before the Turkish Courts." I have been able to trace a copy of the affidavit in question in the file of the case, and I notice that all that paragraph 14 of it says is the following: " In the above five cases or some of them all necessary documents, being admitted by the parties, were put in by the Bank, and the Courts of Cyprus, after an exhaustive examination of the said issue decided against the Bank." This, however, does not show at all that plaintiff was trying to get an unfair advantage over the Bank, and, as a fact, the majority of the Bench does not say so. Surely in the Court below all these documents in respect of those cases were produced by the defendant Bank itself, and, if the Court acting upon them decided against the Bank, everybody—*and so René de Sumerer did*—would naturally like to have a similar case, turning on same points, decided

upon by the same Court, which has already dealt with such points. The fact that a plaintiff chooses his own forum, within the jurisdiction of which he finds the defendant in a transitory case like this, in order to enforce his claim, cannot be subject to any criticism on the ground that the forum in question had happened to deal with other similar cases and decided against the defendant Bank. Paragraph 14 of the affidavit in question, cited in the judgment of the majority of the Court, does not show that plaintiff in that case thought he would be in a better position to effect a settlement in this way more satisfactory than if he went before another Court, as considered in the judgment mentioned.

For the above reasons I do not agree with the judgment of the majority of the Court in the case in question. I think that the correct view was that stated by the Chief Justice in his dissenting judgment.

Now, I may deal with some parts of the written judgment of the trial Judge, having at the same time in view the corresponding material as appearing in the record. On page 35 of the record, for instance, it is stated that on the 24th January, 1934, counsel for plaintiff, Mr. Chrysafinis, applied for an adjournment, one of his reasons for this application being that there was a similar case pending on appeal before the *Privy Council* from this Court, and that the decision in that case would dispose of the main issue in the present case. Mr. Paschalis appearing at the time for the defendant Bank said: "That is so; I agree to the adjournment." The Court then decided as follows: "Ct.: Adjourned until after the decision of the Privy Council in the case of *Dascalopoullos* v. *The Ottoman Bank*." Thus it was admitted for the defendant Bank that the decision of the Privy Council in the case pending on appeal before it would decide upon the main point of the present case. That being so, what is the evidence that could be adduced by the defendant Bank in this case? How would the defendant Bank be embarrassed since the main point at issue is only one and the same as that in the case of *Dascalopoullos* v. *The Ottoman Bank*? The learned trial Judge, however, in his judgment (p. 51 of record) seems, by some oversight, not to have paid any attention to it, and the only thing he says in his judgment is this: "No objection was raised by Mr. Paschalis." On p. 56 of the record the learned Judge states also the following: "The defendant made this application practically on the ground to which Mr. Jones's affidavit in effect amounted, viz.: "that if, as alleged by the plaintiff in the pleadings and affidavit in reply, there were not Courts in Syria which could hear the case, there were still Courts at Constantinople which could . . . . ., etc." Apart from other remarks

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one could make in this connection, because there had already been given definite grounds in support of the application, it is worth noticing that at the time Mr. Jones made his affidavit neither the statement of claim nor the plaintiff's affidavit in reply were yet in existence, and naturally, he could not have had notice of something not existing.

On p. 60 of the record the learned trial Judge states also as follows: " Mr. Jones clearly states in his affidavit that he did not know anything about the plaintiff or his case, and evidently basing himself on the statements in the plaintiff's pleadings, said that Constantinople, where the Bank's Head Office was should be the place of trial." I regret to notice that in this also the trial Judge's statement is inaccurate as being contrary to fact. The affidavit was made by Mr. Jones on the 1st February, 1933, whereas the statement of claim was made by the plaintiff on the 13th March, 1933, and therefore, Mr. Jones clearly could not have based himself on plaintiff's pleadings which were not existing at the time he made his affidavit.

In the course of the hearing of this appeal counsel for the defendant Bank, Mr. Clerides, dealing with the case of *Esmerian* v. *The Ottoman Bank* reported in 13 C.L.R., p. 93, said, in reply to a question from the Bench, that Esmerian could not have had a fair trial in Turkey, because he was not a *persona grata* with the Turkish Government. In this he was repeating the opinion expressed by the Court of Appeal in that case.

The learned trial Judge in his judgment at p. 58 expresses the same view as follows: " It was also true that for political reasons resulting from the war the plaintiff was not a *persona grata* with the Turkish Government and that it was not proved that, in those particular circumstances, he was able to obtain a fair trial in Turkey." That being so, in no case can a person obtain a fair trial unless he is a *persona grata* with the Turkish Government. From this one can easily understand that Courts in Turkey in administering justice would be influenced by the Government ! That being so, how could one expect to obtain a fair trial in Turkey ? Then the learned trial Judge on p. 58 of the record in his judgment quotes a passage from the *Esmerian's case* cited above in support of his own views. The passage in question appears in 13 C.L.R., p. 95. The first part of the passage in Chief Justice's judgment beginning: " But even allowing that it would be easier and cheaper for the Bank to defend an action on the present claim in Constantinople, that by no means proves that the case is frivolous and vexatious . . . . ., etc.", is totally in conflict with the last three lines of it. Having held that an action is not vexatious by reason of inconvenience and

extra expense the learned Chief Justice goes on to state that, had there been no injustice to plaintiff they would have allowed the appeal and stayed the action, that is to say, because it would have been cheaper and more convenient to defend the action in Constantinople ! This, as I have just stated, entirely contradicts the immediately preceding sentence that the action is not vexatious because another jurisdiction is cheaper and more convenient. Consequently, the passage in question does not in any way strengthen the learned trial Judge's views expressed in his judgment. On p. 59 of the record the trial Judge, referring to the case of *René de Sumerer* v. *Ottoman Bank*, says the following as regards the Chief Justice's dissenting judgment, viz.: " The Chief Justice dissented on the ground that the question involved was the interpretation of a contract between the parties and plaintiff was not going to call any witnesses." But surely this was not the principal ground for his dissent. The principal reason for Chief Justice's dissent was because there was no proof that plaintiff had brought the action *mala fide*.

As regards the right to ask for the dismissal or stay of an action on the ground that it is frivolous and vexatious and an abuse of the process of the Court, this can be done in Cyprus only by invoking the inherent jurisdiction of the Court, and not under the Rules of Court, 1927. Order VIII, rule 42, of the Rules of Court, 1927, provides that, where no specific provision is made in the Rules of Court, 1927, the rules of the Supreme Court of judicature in force in England for the time being shall apply to all matters relating to *Pleadings*. But this provision refers only to matters relating to *Pleadings* and to nothing else. I, therefore, do not agree with the opinion of this Court in the case of *Esmerian* v. *The Ottoman Bank* that the right in question can be exercised under the Cyprus Rules of Court, 1927.

In conclusion, I say that no injustice has been proved as regards the defendant Bank, and the further finding of the Court below that the plaintiff will not suffer any injustice, if the action is dismissed here, depends almost entirely upon whether or not plaintiff can proceed against the defendant in another jurisdiction, *i.e.* in Syria. As I have already shown that it is quite possible that he could not sue in Syria, the inference that the plaintiff will not suffer any injustice would appear to be not justified, depending, as it does, on a fact of great uncertainty. As I have mentioned, the dominating principle laid down by eminent Judges in all the English cases cited above is that for an action to amount to an abuse of the process it must be brought *mala fide*, that is with an improper motive in order to vex or oppress or injure the defendant. But the trial

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Judge has made no finding of *mala fides* or lack of good faith on the part of the plaintiff in bringing the action before the Courts in Cyprus, and this alone must prove fatal to the defendant Bank's case in this appeal.

In view of the foregoing I am clearly of the view that, in the circumstances, we ought not to refuse the hospitality of our Courts in Cyprus to the foreigners who seek redress in this Colony, so long as it is honestly sought and without any fear that it may be used as a weapon of vexation or oppression.

I am, therefore, of the opinion that the Divisional Court was wrong and that this appeal should, consequently, be allowed with costs here and below.

Stronge, C.J.

STRONGE, C.J.: This is an appeal from an order of Fuad, J., sitting as a Divisional Court, striking out this action as vexatious and an abuse of the process of the Court.

The action is, in effect, one in which the original plaintiff, who died since the bringing of the action, and his widow (added as a plaintiff after his death) claim as against the defendant Bank (*a*) a declaration that the pensions, to which they are admittedly entitled, are payable on a gold basis; and (*b*) the difference between the amounts actually paid to them as pension and the amounts which they would have received had they been paid on a gold basis. With these claims is joined one for damages alleged to have been caused by defendant's breach of contract to pay the pensions on a gold basis.

The writ of summons in the action was issued on the 22nd November, 1932. Mitry Trad, the original plaintiff, died on the 25th March, 1933, and, by order made on the 6th June, 1933, the title of the action was amended by adding his heirs (his widow and five children) as plaintiffs.

The defendant Bank is a company not formed in but carrying on business in Cyprus and can therefore under section 146 (2) of the Companies (Limited Liability) Law, 1922, be served in Cyprus with a writ of summons in the manner prescribed by that section. The writ in this action has been so served. Since 1919 the defendant Bank has had no branches in Syria. It is not disputed that the Courts in Cyprus have jurisdiction to entertain the action.

Though there is no rule to be found in the Cyprus Rules of Court corresponding to the English R.S.C., Order XXV, rule 4, which authorizes the Court to stay or dismiss an action that is shown by the pleadings to be frivolous and vexatious, it is uncontested that Cyprus Courts, apart from all rules and orders, have an inherent jurisdiction to stay or dismiss proceedings on the ground that they are either frivolous or vexatious or an abuse of the process of the Court. It was so held by this Court in *Esmerian's case.* (1)

(1) 13 C.L.R. 93.

The considerations by which a Court should be influenced and guided in the exercise of this inherent jurisdiction are to be found in several reported cases of which *Logan* v. *The Bank of Scotland* (1); *Egbert* v. *Short* (2); and *Norton's Settlement* (3) appear to be the most recent. These considerations may be conveniently summarized as follows:—

(1) The jurisdiction to stay should always be exercised with great care and caution (per Vaughan Williams, L.J., in *Norton's Settlement, supra* at p. 479).

(2) Expense and inconvenience are not *per se* sufficient grounds for staying the proceedings unless of such a character that to allow the action to go on would result in real injustice to the other litigant (per Vaughan Williams, L.J., same case, at p. 481).

(3) The Court should see that in stopping an action it does not do injustice; it ought, however, to interfere whenever there is such vexation and oppression that the defendant would in defending the action be subjected to such injustice that he ought not to be sued in the Court in which the action is brought (per Sir Gorell Barnes in *Logan* v. *The Bank of Scotland, supra* at p. 150).

(4) It is competent to the Court to stay the proceedings if it appears that the plaintiff has not chosen the venue for any legitimate reason but is using the process of the Court for a sinister or bye-purpose (*Norton's case, supra*, per Vaughan Williams, L.J., at p. 482, and Farwell, L.J., at p. 484).

(5) That the tribunal selected would if the action went on have to deal with law foreign to the tribunal is a matter to be borne in mind (per Sir Gorell Barnes in *Logan* v. *The Bank of Scotland, supra* at p. 152).

The deceased plaintiff in the present action, both at the time he entered the service of the defendant Bank in Beirut in 1872 and also when he retired from it on pension on the 1st March, 1914, was employed in its Beirut branch and was resident and domiciled in Beirut where his wife and, I also gather, his five children, the present plaintiffs, are now living. Beirut was the place where the deceased plaintiff's contract with the defendant Bank was entered into and was also the place of the non-performance and breach of it in respect of which this action is brought. The matters of complaint, therefore, entirely arose in Beirut. There is no suggestion that any witness to be called for the plaintiffs resides in Cyprus, or that there is in Cyprus even a single employee of the defendant Bank who has any knowledge of the facts of this case.

(1) (1906) 1 K.B. 141.
(2) (1907) 2 Ch. 205.
(3) (1908 1 Ch. 471.

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That the Lebanon Courts had jurisdiction to entertain this action at the date when it was brought in Cyprus is, in my opinion, clear. Fuad, J., has found so as a fact and in my judgment, having regard both to the affidavit and the unshaken oral testimony of Maitre Albert Achou, ex-batonier of the Beirut bar and a practitioner for 32 years in the Courts of Lebanon and Syria, the learned Judge had before him sufficient evidence to justify him in so finding.

From paragraph 4 of the defence and paragraph 7 of the reply it is evident that one of the disputed matters which will have to be decided in the action is the applicability to the case of the law Arrêté No. 2415 of the Mandated territory of Syria because the defendant Bank claims that the rate of its liability as regards the deceased plaintiff's pension is fixed by that law, while on the other hand the plaintiffs maintain it has no application as between the Bank and them. If then this action is allowed to go on in Cyprus not only will the Cyprus Courts have to deal with and decide a question of foreign law, but both the plaintiffs and the defendant will of necessity be put to the expense and inconvenience either of examining on commission in the Lebanon or of bringing to Cyprus from that country—the *forum naturale* of the action—skilled witnesses for the purpose of proving to a Cyprus Court the meaning and applicability of this Syrian law.

I come next to consideration of the question whether the plaintiff's choice of Cyprus as the venue of the action is dictated by wholly legitimate reasons. Speaking of abuse of process, Farwell, L.J., in his judgment at p. 482 of *Norton's Settlement*, *supra* says: "Abuse suggests to one's mind an element of wrong-doing in the party attempting so to abuse and I think that in all the reported cases that element does appear." Now, in the bringing of the present action there has been a delay of at least 12 years—from 1920 to 1932. The deceased plaintiff in paragraph 9 of the statement of claim says this delay was due to his bad health, advancing years, and financial difficulties. Seeing, however, that in the *Dascalopoullos case*, the judgment of the trial Court in Cyprus in favour of the pensioner plaintiff was delivered on the 8th August, 1932, and that the writ in the present action was issued in the month of November of the same year, I think it may be fairly enough inferred that it was the judgment in favour of the plaintiff in that case which decided the plaintiff in the present action both to bring his action and to bring it in Cyprus. His employment of Mr. Triantafyllides—the plaintiff's advocate in the *Dascalopoullos case*—tends I think to confirm this view. His underlying thought was apparently that he could gain more advantage over the defendant Bank by selecting Cyprus as the venue because

the Dascalopoullos decision would in the Cyprus Courts operate as a precedent for a decision in his favour and so materially enhance his chance of success, whereas an action in the Lebanon Courts, with no such talisman available, augured considerably less likelihood of victory. The selection of the Cyprus Courts from such a motive amounts in my opinion to a use of their process for such an oblique or bye-purpose as to constitute an abuse of their hospitality and afford reasonable ground for refusing to allow the action to proceed in the Colony.

Our attention was directed by Mr. Clerides to a passage in the judgment of Sir Gorell Barnes at p. 152 of *Logan* v. *The Bank of Scotland, supra*—a passage which is also referred to in the majority judgment of this Court in *de Sumerer's* case. (1). As it appears to me to bear directly upon the case now before us I take the liberty of quoting it, pointing out in advance that in *Logan's case* the defendant Bank whose headquarters were in Scotland was served with the writ at its London Branch, and that of the three other co-defendants—Anderson, Young, and Scott—only one, Scott, resided in London. Here then is what Sir Gorell Barnes says: "Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the Bank had been served in this country which it could be, as it has been in the present instance, because it has a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action must be stayed?" Now, in the present action there is only a single defendant, a Bank, having branches in Cyprus. True, it has had no branch in Syria since 1919, but the evidence of Maitre Achou, unimpaired by cross-examination, is that at the date of its inception this action—in its nature an entirely Syrian action and admitted to be such by paragraph 16 of the deceased plaintiff's affidavit—could undoubtedly have been brought against the defendant Bank on the Lebanon Courts. If then the plaintiff, who could sue in the Lebanon where the plaintiff and his witnesses live and all the matters complained of occurred and where the law involved would be domestic law, sues the defendant Bank in Cyprus, as he can do by reason of its having a branch here, then it seems to me the passage just quoted from the judgment of Sir Gorell Barnes applies and the action should be stayed or dismissed. To hold the contrary means that any person having any transactions anywhere on the face of the glove with the defendant Bank may sue and be allowed to proceed against the defendant Bank in Cyprus although all such transactions took place outside Cyprus and although neither the plaintiff nor any of the

(1) 13 C.L.R. 127.

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witnesses for either the plaintiff or the defendant Bank is to be found in this Colony, nor even a single document relating to the transactions on which the action is based.

Portion of the plaintiff's claim for damages for breach of contract is alleged in paragraph 15 of his affidavit to be made up of losses sustained by his having been compelled to sell at low prices his furniture and other chattels at Beirut. A trial in Beirut would enable the defendant Bank to inquire on the spot into the evidence with reference to the sale of these articles as it is given at the trial and to give evidence on the point. A trial in Cyprus will, on the other hand, I think, tend to embarrass the Bank by depriving them of these facilities.

I do not think the *Esmerian case* (1) has any bearing on the facts of the case now before us. In that case the Court refused to stay the action because it was not satisfied that no injustice would be done to the plaintiff if he, a *persona non grata* with the Turkish Government, were compelled to sue in the Turkish Courts, an institution which was admittedly in effect the State Bank of Turkey and from which he had been dismissed at the instance of the Turkish Government. In the present action there is not the least suggestion of anything which would prevent the plaintiffs from having a fair hearing in the Syrian Courts. With reference to *de Sumerer's case* (2) in which the majority of this Court granted the application for a stay I shall content myself with saying that it was on the facts in my opinion a weaker case for a stay than the present one.

I enquired from learned counsel for the plaintiffs during the argument what injustice, assuming the Courts of the Lebanon to have jurisdiction to entertain the action, would be caused to the plaintiffs if this action in the Cyprus Courts were stayed. His reply was that the injustice occasioned by doing so would be the waste of the three years incurred in and about the proceedings in the present action and also the expenditure incurred by the plaintiff in bringing it. Taking into account (*a*) the fact of plaintiff's delay of twelve years in bringing the action, and (*b*) that the present plaintiffs were in no hurry to press on the action to a hearing, for on the 24th of January, 1934, their counsel applied for an adjournment pending the decision of the Privy Council in the *Dascalopoullos case*, and the action was thereby hung up for nearly a year, taking, as I say, both these facts into consideration I think the time lost to the plaintiffs as the result of staying this action can hardly be looked upon as amounting to an injustice. If, again, loss of the expenditure incurred in and about the bringing of the action sought to be

(1) 13 C.L.R. 93.
(2) 13 C.L.R. 123.

stayed is to be regarded as an injustice to the plaintiffs it would follow that no action could ever be stayed without injustice.

Both the affidavit and the oral evidence of Maitre Albert Achou are to the effect that article 101 of the new Lebanon Civil Procedure Code of 1934 empowers a plaintiff in commercial matters to bring his action at his choice either "before . . . the Courts of the place where the contract was made and the delivery ought to have taken place or before the Courts of the place of payment". He goes on to add that the present action, like that of a Bank employee against a Bank for breach of contract, is a commercial matter within the meaning of the Ottoman Commercial Code and can consequently be entertained by the Lebanon Courts under the provisions of article 101. The two cases pending on appeal in the Syrian Courts in which the Bank contends those Courts have no jurisdiction both relate to the law as it stood prior to the new Lebanon Civil Procedure Code of 1934, and even if it be eventually decided in those two cases that the Syrian Courts had no jurisdiction to entertain the actions such decisions will not rule or in any way affect actions brought after the passing of the new Civil Procedure Code. Fuad, J., has, in the penultimate paragraph of his judgment, stated that he was prepared if necessary to find on the evidence of Maitre Achou that the Syrian Courts still possess, under this article of the new Civil Procedure Code of 1934, jurisdiction to entertain the action. I, for my own part, have come to the conclusion after reading Maitre Achou's evidence that the action can even now be brought in the Syrian Courts and that any injustice to the plaintiff which might result from inability to pursue his remedy in the Syrian Courts if this action were stayed is therefore obviated.

Learned counsel for the plaintiffs stated to us that the plaintiffs were willing as a condition of the action being allowed to proceed here to deposit any sum named by the Court as security for extra costs incurred in bringing over to Cyprus professional witnesses to prove the Syrian law. The question we have to decide is whether this action is vexatious or an abuse of process, and I am unable to see in what way the plaintiff's offer, evidencing their desire to have the action tried here, assists us in determining this question.

I think this appeal fails and that the course adopted by Fuad, J., of dismissing, instead of staying, the action was right in the circumstances and in conformity with the reasons stated in the final sentences of the judgment in *Egbert* v. *Short*, *supra* at p. 214.

* *Appeal allowed; order of Fuad, J., dismissing the action set aside.*

* On 13th September, 1935, respondent Bank obtained from the Supreme Court conditional leave to appeal to the Privy Council but later abandoned the appeal.