[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, JJ.]

CYPRUS IMPORT CORPORATION LTD.,

Appellants-Defendants,

v.

ARISTOS KAISIS,

Respondent-Plaintiff.

(Civil Appeal No. 4696).

Contract—Contingent contract—Sections 31 and 32 of the Contract Law, Cap. 149—Sale of goods—Sale of a motor-lorry for cash and for part exchange—Tractor of the buyer respondent delivered as part payment of the agreed price and the balance on hire-purchase basis —Contract "subject to acceptance by Messrs. Lombard Bank, Nicosia" i.e. *subject to said bankers accepting to finance the transaction—Said Financiers ultimately refusing to finance the transaction—No enforceable contract concluded—Cf. sections 31 and 32 of Cap. 149,* supra *—Repudiation by the sellers (appellants) of the contract in question cannot be said to amount to a breach of contract rendering them liable to pay damages to the buyer (respondent) for such breach—But liable, however, to pay to the buyer compensation for the actual value of the said tractor, such value being the advantage they have received from the respondent (buyer) under the contract in question which ultimately became void (or unenforceable) as stated above—Section 65 of the Contract Law, Cap. 149, applicable—Measure of such compensation.*

Court of Appeal—Appeal—Powers of the Court of Appeal to make any order in the case which ought to have been made on the basis of the material on record—Order 35, rule 8, of the Civil Procedure Rules and section 25(3) of the Courts of Justice Law, 1960 (Law No. 14 of 1960)—Finding of trial Court that "binding agreement has been concluded between the parties" and award of damages for breach thereof, set aside on appeal—Order made by the Court of Appeal for

compensation under section 65 of the Contract Law, Cap. 149, substituted therefor—Cf. supra.

Contract—Illegality—Motor vehicles—Unregistered motor vehicle delivered in part payment of agreed price under a contract for sale of goods—Transaction a valid one entailing the appropriate legal effects—It was not the purpose of the relevant legislation requiring registration of motor vehicles to prohibit or render invalid the delivery of an unregistered vehicle in part payment of said price.

Void contract—Contract which became void—Legal effects—Liability of a person to make compensation for the advantage received under a contract which became void—Section 65 of the Contract Law, Cap. 149—Cf. further supra, passim.

Contingent contracts—See supra, passim.

Evidence preparatory to the trial of the action—Order 36, rule 5 of the Civil Procedure Rules—Whether admissibility at the trial of such evidence is governed by the considerations set out in Order 37, rule 11, dealing with evidence taken on commission—Even on the assumption that the correct answer is in the affirmative and though none of those considerations in the said rule 11 is present in this case, there can be no question of misreception at the trial of the deposition containing such preparatory evidence—Because such deposition was all along treated as evidence for the purposes of the trial with the clearly to be implied consent of the party (the defendants, now appellants) against whom it was offered—For the same reason it is immaterial that the aforesaid deposition was not formally put in.

Advocate—Conduct of the case by counsel—Consent given to reception of evidence—Binding—Admissions by counsel—Whether party estopped from withdrawing such admissions—Implied consent to admission of otherwise procedurally inadmissible evidence—Binding.

Words and Phrases—"Subject to acceptance by Messrs. Lombard Bank...."—Meaning and legal effect.

In this case the appellants, an import and trading concern, appeal from the judgment of the Full District Court of

Limassol, whereby they have been ordered to pay to the respondent (plaintiff in the action) the amount of £1,500 as damages for breach of a contract in writing concluded between the parties on November 4, 1963. The subject of this contract was an agreement for the sale by the appellants to the respondent of a motor-lorry for the sum of £2,780. It is common ground that the respondent undertook to pay the price of the motor-lorry in question by delivering to the appellants, by way of part payment, a used tractor which, as agreed between the parties, was valued at £1,500, and the balance on a hire-purchase basis; in view of the hire-purchase part of the transaction, it was expressly stated in the written contract that same was "Subject to acceptance by Messrs. Lombard Bank, Nicosia".

At the time when the aforesaid agreement was entered into between the parties a buyer had been found for the tractor in question at the price of £1,500; the buyer was a certain lady (Mrs. Aliki Kattidou) and a written contract was executed in relation to the sale to her of the tractor by the appellants; according to its terms an amount of £100 was to be paid by her at once (actually she paid only £10 initially and she was to pay the remaining £90 in a few days' time)—and the rest would be paid by monthly instalments of £50 each. There can be no doubt that this agreement between the appellants and Mrs. Kattidou was collateral to the main agreement for the sale of the motor-lorry by the appellants to the respondent as aforesaid.

The trial Court found that the Lombard Bank, Nicosia, did initially agree to finance the transaction concerned and that, also, instructions were given by the appellants to the respondent for the delivery of his said tractor to the husband of Mrs. Kattidou in accordance with the agreement between the appellants and the said lady; and that pursuant to such instructions the respondent did actually deliver the tractor to Kattides, the husband of the aforementioned Mrs. Kattidou. It should be noted here that on the same day when the deal for the sale of the motor-lorry was concluded between the appellants and the respondent, the latter addressed a letter to the Registrar of Motor Vehicles (with all the necessary documentary material attached thereto) requesting the registration of the tractor in question into the name of the appellants.

Be that as it may, it is an undisputed fact that the Lombard Bank, three or four days after the day they have been found by the trial Court to have accepted to finance the transaction in question between the appellants and the respondent, had eventually refused to do so; and the trial Court found that subsequently the appellants repudiated their agreement with the respondent; and held that, as the tractor in question had after such repudiation been abandoned by Kattides and had somehow vanished altogether without being returned to the respondent—the appellants (defendants) were liable to pay to the respondent (plaintiff) its value *i.e.* £1,500 as damages for breach of contract. It must be pointed out at this stage that by his statement of claim the respondent (plaintiff) was claiming that amount of £1,500 as, *inter alia*, being the value of the tractor which was delivered to the appellants in part payment under the said agreement between the parties of November 4, 1963 and which agreement was rescinded or repudiated by the appellants; and, also, as damages for breach of such agreement.

As it has been already stated the contract between the parties of November 4, 1963, was "subject to acceptance by Messrs. Lombard Bank, Nicosia"; it was, therefore, a contingent contract within the ambit of sections 31 and 32 of the Contract Law, Cap. 149, since its performance depended on the happening of an uncertain future event. The trial Court took the view that in this case the uncertain future event contemplated by the parties did actually happen and that the contract became thus enforceable as from the moment the Lombard Bank had initially accepted to finance the transaction in hand, no matter that shortly afterwards the said Bank had eventually refused to do so (*supra*); and that, consequently, the repudiation by the appellants of the contract as explained above amounted to a breach of contract rendering them liable to pay to the respondent damages for such breach, assessed at £1,500 (*supra*). The Supreme Court, however, taking a different view on the point, set aside the judgment of the trial Court, holding that on the true construction of the expression "subject to acceptance by Messrs. Lombard Bank, Nicosia" what did really matter was the fact that ultimately there was no financing of the transaction by the Lombard Bank; and that, therefore, as the future uncertain event, upon which the contingent contract sued on depended, did not

happen, the contract became void; which means that the appellants could not be held liable for breach of contract.

However, having thus reversed the trial Court's judgment, the Supreme Court proceeded a step further; and, using its powers under the Civil Procedure Rules, Order 35, rule 8 and section 25(3) of the Courts of Justice Law, 1960, enabling it to make any order in the case which ought to have been made on the basis of the material on record, the Supreme Court did actually make such order in accordance with the provisions of section 65 of the Contract Law, Cap. 149, as explained herebelow. Section 65 reads as follows:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

And sections 31 and 32 of the same statute (the Contract Law, Cap. 149) provide:

> "31. A 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
>
> 32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> If the event became impossible, such contracts become void."

Applying the provisions of section 65 of the Contract Law, Cap. 149 (*supra*) to the present case the Supreme Court proceeding further made an order directing the appellants to pay to the respondent the sum of £1,200 representing the actual value as assessed *ad hoc* of the tractor in question which as stated above was delivered by the respondent for the account and on the instructions of the appellants to the said Kattides, *supra*; such payment being directed by way of compensation to the respondent for the aforesaid advantage they (the appellants) had received from the respondent under their agreement of November 4, 1963, and which ultimately became void as explained hereabove (Cf. section 65, of the Contract Law, Cap 149, *supra*)

Regarding the vital issue in this case of the delivery of the used tractor by the respondent to Kattides in part payment of the agreed price of the motor-lorry agreed to be sold by the appellants to the respondent as explained hereabove, counsel for the appellants argued that in view of the undisputed fact that the tractor in question was not registered at the time of such delivery, no valid transaction could be effected in that respect between the parties. Both the trial Court and the Supreme Court rejected this argument, holding that it was not the purpose of the relevant legislation relating to registration of motor vehicles to prohibit or render invalid the delivery of unregistered motor vehicles in part payment of the price under a contract for the sale of goods.

Before concluding these introductory observations, reference should be made to a novel point of procedure and evidence raised by the appellants for the first time on appeal. In this respect it was argued by counsel for the appellants that the trial Court wrongly treated as evidence at the trial the evidence taken from the said Kattides under Order 36, rule 6, of the Civil Procedure Rules as evidence preparatory to the trial. The admissibility at the trial of such preparatory evidence, the argument went on, is governed by the considerations stipulated in Order 37, rule 11 which deals with the admissibility of evidence taken on commission; but none of those considerations is present in the instant case; consequently, the deposition containing the aforesaid preparatory evidence of Kattides ought not to have been treated as evidence at the trial of the case. (*Note*: The text of the aforesaid rules 6 and 11, respectively, is set out *post* in the judgment). The Supreme Court, assuming for the purposes of its judgment—without, however, finally deciding the point —that counsel's said submission regarding the admissibility of such preparatory evidence as stated hereabove, was right, ruled that, even on that assumption, no question of misreception of evidence arises in this case, because the evidence taken from Kattides as preparatory to the trial was all along treated as evidence for the purpose of the trial and as forming part of its record, with the clearly to be implied consent of the defendants (now appellants) against whom such evidence was offered.

Held, I. *(Reversing the judgment of the trial Court whereby the appellants were adjudged to pay to the respondents £1,500 damages for breach of contract):*

(1) Even if we were to accept, as the trial Court did, that the Lombard Bank initially agreed to finance the transaction between the appellants and the respondent, the fact remains that in the end it did not do so; and, in our view, the only proper construction which can be placed on the expression "Subject to acceptance by Messrs. Lombard Bank Nicosia" in the contract between the appellants and the respondent (*supra*), is that the Bank would *actually* provide the necessary financial facilities for the deal in question. (Cf. *Hargreaves Transport Ltd.* v. *Lynch* [1969] 1 All E.R. 455, at p. 458, per Lord Denning M.R.).

(2) In other words this is a case of a contingent contract, which did not become enforceable in law once the actual financing by Lombard Bank —(which constituted an uncertain future event on the happening of which the existence of a binding agreement between the parties depended)—did not materialize (*see* sections 31 and 32 of the Contract Law, Cap. 149).

(3)(a) We are, therefore, of the view that as the *actual* financing of the hire-purchase transaction between the appellants and the respondent, by the Lombard Bank, did not materialize, the trial Court erred in finding that an enforceable agreement had been concluded; and, in our opinion even if it could be said that an enforceable contract had, at some stage, been concluded, the contract became, for the same aforementioned reason, a void contract.

(b) It follows that the appellants were not bound by a contractual obligation towards the respondent and, therefore, they could not be held liable to pay damages to him for breach of contract.

Held, II. *(Making a new order under section 65 of the Contract Law, Cap. 149 (in variation of, or in substitution for, the reversed one) directing the appellants to pay to the respondent the value of the vanished tractor, such value being advantage received by them from the respondent under their*

agreement which ultimately became void as the uncertain future event upon which it depended did not happen):

(1) Both under Order 35, rule 8, of the Civil Procedure Rules, as well as under section 25(3) of the Courts of Justice Law, 1960 (Law No. 14 of 1960) we, as a Court of Appeal, are empowered to make any order in the case which ought to have been made on the basis of the material on record.

(2)(a) In the circumstances of this case it is obvious that under section 32 of the Contract Law, Cap. 149 (*supra*) the contingent contract regarding the said sale of the motor-lorry by the appellants to the respondent became as already stated void (or unenforceable).

(b) It follows that under section 65 of the same statute Cap. 149 (*supra*) the appellants are bound to make compensation to the respondent for the advantage they have received from him under the said agreement which ultimately became void as aforesaid.

(c) Obviously the advantage so received by the appellants is the actual value of the used tractor of the respondent which the latter on their instructions had delivered to Kattides in part payment of the agreed price of the motor-lorry which he (the respondent) agreed to buy from the appellants (*supra*).

That a sale may be for cash and part exchange is shown for example by the case *G. J. Dawson (Clapham) Ltd.* v. *H. and G. Dutfield* [1936] 2 All E.R. 232.

(3)(a) We have, therefore, to determine the exact value of the advantage so received by the appellants in the form of the tractor delivered on their instructions by the respondent to the said Kattides and award compensation for its value to the respondent.

(b) Bearing in mind that when the value of the tractor was agreed at £1,500 this was done as

part of the whole deal for the sale of a motor-lorry by the appellants to the respondent, and that, therefore, was natural for the appellants to put a quite high value on the tractor of the respondent in order to facilitate such deal; and noting further that the said tractor was sold to the wife of Kattides for £1,500 on an *instalments* basis, we have reached the conclusion that the amount to which the respondent is entitled under section 65 of the Contract Law, Cap. 149 (*supra*) is not £1,500 but a lesser amount which we assess at £1,200.

Held, III *(Regarding the alleged invalidity of the delivery of the unregistered tractor in question,* supra*)*:

(4)(a) Counsel for the appellants argued that because the tractor in question at the time of its delivery by the respondent was not registered, no valid transaction was effected in that respect between the respondent and the appellants. The trial Court rejected this argument; and it did so rightly, in our view; it may have offended against the provisions of the relevant legislation *to keep the tractor unregistered, but this is not* a sufficient ground for depriving the delivery of the tractor, in part payment, of its legal effect.

(b) The primary purpose of registering a motor-vehicle is to show who is the person liable to pay the road-fund licence tax in respect of such vehicle *(Joblin* v. *Watkins and Roseveare (Motors) Ltd., 64 T.L.R. 464);* and in *Mavromoustaki* v. *Yeroudes* (1965) 1 C.L.R. 176, at p. 187, it was stated, after a review of relevant cases, that the question to be answered (in a case such as the present one) is whether a particular contract belongs to a class which the relevant statute intends to prohibit. In view of the object of the legislation regarding registration of motor-vehicles, we are of the opinion that it cannot be said that it was the intention of such legislation to prohibit or render invalid the delivery of an unregistered motor-vehicle

in part payment of the price under a contract for the sale of goods (*see*, also, *Iosifakis* v. *Ghani* (1967) 1 C.L.R. 190).

In the circumstances we can, therefore, find no merit in the relevant contention on behalf of the appellants.

Held, IV *(Regarding the alleged misreception of the deposition containing Kattides' evidence which was taken prior to the commencement of the hearing of the action as evidence preparatory to such hearing under Order 36, rule 5, of the Civil Procedure Rules,* supra*)* :

(1) *(After reviewing the facts and the history of the relevant rules in Cyprus and in England)* :

(a) We shall assume for the purposes of this judgment, in favour of the appellants—without, however, having, because of what follows hereinafter, to decide finally that this is, indeed, so—that the admissibility of any evidence taken as preparatory to the hearing under Order 36, rule 5, of the Civil Procedure Rules, has to be governed by considerations such as those set out in rule 11 of Order 37 of the Civil Procedure Rules which deals with evidence taken on commission.

(b) It cannot be disputed on the other hand that the prerequisites under the said Order 37 rule 11, which would enable the record of the evidence taken from Kattides as evidence preparatory to the trial to be treated as evidence admissible for the purposes of the trial, are lacking in the present case. Furthermore, the said record was never formally put in at the trial.

(2) In our opinion, however, in the present instance there did not arise any need for the existence of the aforesaid prerequisites because we are satisfied that the evidence of Kattides though originally taken as preparatory to the trial, was treated, later, as evidence for the purposes of the trial, with the clearly to be implied consent of the appellants

against whom it was offered; moreover, in view of such consent, the text of his evidence did not have to be formally put in by the respondent.

(3)(a) In our view the attitude of counsel representing the defendants (now appellants) at the trial before the District Court as described above, *(note: here reference is made to the particular passages of the record)*,—shows clearly that they were treating the already previously given evidence of Kattides as being evidence of a witness at the trial and as evidence which was already part of its record. They were fully entitled to consent as aforesaid—as this was a civil case; and we think that, in the circumstances they adopted the right course.

(b) In the present case we are of the opinion that the aforementioned conduct of counsel for the defendants (now appellants) at the trial regarding the evidence of Kattides (*supra*) should be regarded as binding on them and that it is too late now to argue in a manner contrary to it. (Cf. *H. Clark (Doncaster) Ltd.* v. *Wilkinson* [1965] 2 W.L.R. 751, at p. 756, per Lord Denning M.R.; and *The Clifton, Kelly* v. *Bushby* 12 E.R. 695).

Appeal partly allowed. No order as to the costs in the appeal. Respondent should receive half of his costs in the Court below.

Cases referred to:

Hargreaves Transport Ltd. v. *Lynch* [1969] 1 All E.R. 455, at p. 458;

Warner v. *Mosses* [1880 - 1881] 16 Ch. D. 100, at p. 102;

Westcott and Lawrence Line v. *The Mayor etc. of Limassol,* 22 C.L.R. 193;

Fisher v. *C.H.T. Ltd. and Others* [1965] 2 All E.R. 601;

H. Clark (Doncaster) Ltd. v. *Wilkinson* [1965] 2 W.L.R. 751, at p. 756;

The Clifton, Kelly v *Bushby*, 12 E.R. 695;

Domsalla and Another v. *Barr (Trading as A.B. Construction) and Others* [1969] 3 All E.R. 487, at p. 493;

Duke of Beaufort v. *Crawshay* [1855 - 1866] L.R. 1 C.P. 699;

G. J. Dawson (Clapham) Ltd. v. *H. and G. Dutfield* [1936] 2 All E.R. 232;

Joblin v. *Watkins and Roseveare (Motors) Ltd.*, 64 T.L.R. 464;

Mavromoustaki v. *Yeroudes* (1965) 1 C.L.R. 176, at p. 187;

Iosifakis v. *Ghani* (1967) 1 C.L.R. 190;

Ram Nagina Singh v. *Governor General* (1952) A. Cal 306, on appeal 89, Cal. L.J. 346;

Erlanger and Others v. *The New Sombrero Phosphate Company and Others* [1877 - 78] 3 A.C 1218, at p. 1279.

Appeal.

Appeal by defendants against the judgment of the District Court of Limassol (Vassiliades and Pikis, D.JJ.) dated the 27th December, 1967 (Action No. 766/65) whereby they were ordered to pay to the plaintiff the sum of £1,500.- as damages for breach of contract.

J. Potamitis with *G. Cacoyiannis*, for the appellants.

E. Michaelides with *P. Pavlou*, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :-

TRIANTAFYLLIDES, P.: In this case the appellants, an import and trading concern, appeal against the judgment of a Full District Court in Limassol, by means of which they were ordered to pay to the respondent £1,500 as damages for breach of contract.

As found by the trial Court the contract in question was an agreement for the sale by the appellants to the respondent of a motor-lorry, for the sum of £2,780; the

deal was concluded provisionally between the parties on the 31st October, 1963, and was made final on the 4th November, 1963.

It is common ground that the respondent would pay the price of the motor-lorry by delivering to the appellants, by way of part payment, a used tractor, No. B710, which, as agreed between the parties, was valued at £1,500, and he would pay the balance on a hire-purchase basis; in view of the hire-purchase part of the transaction it was stated in the written contract, which was signed by the parties, that it was "Subject to acceptance by Messrs. Lombard Bank Nicosia".

At the time when the aforesaid agreement was entered into between the parties, a buyer had already been found for the tractor, at the price of £1,500 : she was a certain Aliki Kattidou and a written contract was executed in relation to the sale to her of the tractor by the appellants; according to its terms an amount of £100 was to be paid by her at once—(actually she paid only £10 initially and she was to pay the balance in a few days' time)—and the rest would be paid by monthly instalments of £50 each.

There can be no doubt that the agreement for the sale of the tractor to Kattidou was collateral to the main agreement for the sale of the motor-lorry by the appellants to the respondent.

The trial Court found that the Lombard Bank—(its full name being Lombard Banking (Cyprus) Ltd.)—did agree to finance the transaction concerned and that, also, instructions were given by the appellants to the respondent for the delivery of the tractor to the husband of Kattidou —Marios Kattides—in accordance with the agreement between her and the appellants; and that pursuant to such instructions the respondent did deliver the tractor to Kattides.

Furthermore, the trial Court found that subsequently the appellants repudiated their agreement with the respondent and that, as the tractor had, in the meantime, after such repudiation, been abandoned by Kattides and had somehow vanished, without being returned to the respondent, the appellants were liable to pay to the

respondent its value, namely £1,500.

It is an undisputed fact that, eventually, the Lombard Bank refused to finance the transaction between the appellants and the respondent.

Even if we were to accept that the bank originally agreed to finance such transaction, the fact remains that in the end it did not do so; and, in our view, the only proper construction which can be placed on the expression "Subject to acceptance by Messrs. Lombard Bank Nicosia", in the contract between the appellants and the respondent, is that the bank would *actually* provide the necessary financial facilities for the deal in question; in other words, this was a case of a contingent contract, which did not become enforceable in law once the actual financing by Lombard Bank—(which constituted an uncertain future event on the happening of which the existence of a binding agreement between the parties depended)—did not materialize.

It is necessary in this respect to refer to sections 31 and 32 of the Contract Law, Cap 149, which read as follows :-

> "31. A 'contingent' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
>
> 32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> If the event becomes impossible, such contracts become void."

It is, also, useful to refer to the case of *Hargreaves Transport Ltd.* v. *Lynch* [1969] 1 All E.R. 455 : There the defendant had applied for outline planning permission in respect of a piece of land, in order to erect a transport depot thereon. Whilst the application was still pending the defendant agreed to sell the site to the plaintiffs. A deposit was paid and the balance was to be paid on a future date subject, *inter alia,* to a condition that the plaintiffs would obtain planning permission to use the site as a transport depot and to develop the pro-

perty by the erection of buildings, etc. The plaintiffs submitted detailed plans for approval and outline permission was granted but as subsequently there was an outcry by the local residents the appropriate authority refused to approve the detailed plans and the plaintiffs gave notice of rescission of the contract and claimed the return of their deposit invoking the relevant condition in the agreement with the defendant. The defendant refused to return the deposit and it was decided, both in the first instance and on appeal, that he was bound to do so as the plaintiffs were entitled to rescind the contract and to have their deposit returned.

Lord Denning M.R. stated the following in delivering his judgment, on appeal (at p. 458):

> "Whilst I agree that in planning law, outline permission is the permission, nevertheless, I do not think that it is the permission required by cl. 9 of this contract. The contract must be construed sensibly. The plaintiffs wanted a planning permission which would enable them to erect buildings and use them for their transport business. An outline permission was quite insufficient for that purpose. They could not turn a sod or lay a brick until the details were approved. In order to make the condition in cl. 9 work sensibly it must mean that the plaintiffs are to receive detailed permission from the planning authority so as to be able to use the site as a transport depot and to develop it by putting buildings on it."

We are, therefore, of the view that as the *actual* financing of the hire-purchase transaction between the appellants and the respondent, by the Lombard Bank, did not materialize the trial Court erred in finding that an enforceable agreement had been concluded; and, in our opinion, even if it could be said that an enforceable contract had, at some stage, been concluded, that contract became, for the same aforementioned reason, a void contract.

It must be stated, at this stage, that, in relation to the above issue, one of us had some difficulty in agreeing that, in the light of the particular circumstances of this case, the contingency in question did not in fact mate-

rialize, but he, in the end, did not find himself prepared to dissent, in view also of the fact that he felt satisfied that, nevertheless, the outcome of the appeal results in doing substantial justice between the parties.

By the statement of claim filed in the present case the respondent has claimed the amount of £1,500 as, *inter alia,* being the value of a tractor which was delivered to the appellants in part payment under the agreement which was rescinded by them; and, also, as damages for breach of such agreement.

It is correct that the trial Court, having found that a binding agreement had been concluded, awarded the amount of £1,500 to the respondent by way of damages for breach of contract; but in view of our just stated view that no enforceable agreement was concluded, the true position, in our opinion, is that the appellants were not bound by a contractual obligation and, therefore, they could not be held to be liable to pay damages to the respondent for breach of contract.

Both under Order 35, rule 8, of the Civil Procedure Rules, as well as under the subsequently enacted section 25(3) of the Courts of Justice Law, 1960 (14/60), we, as a Court of Appeal, are empowered to make any order in this case which ought to have been made on the basis of the material on record.

We, therefore, have to decide, next, whether or not the appellants are liable to pay to the respondent the amount of £1,500, as the value of the vanished tractor.

In this connection we are faced with the fact that while on the one hand it is the contention of the respondent that he did deliver the tractor on the instructions of the appellants to Kattides (for the account of his wife who was to purchase it from the appellants), the appellants, on the other hand, deny that such delivery took place on their instructions.

The Court below having disbelieved the evidence for the appellants and believed the evidence for the respondent found that the contention of the latter was the correct one.

On this point the trial Court relied both on the evidence

of the respondent, who gave evidence as a witness during the trial, and on the evidence of Kattides, whose evidence was taken prior to the commencement of the hearing of the case, as evidence preparatory to such hearing, under rule 5 of Order 36 of the Civil Procedure Rules, which reads as follows :-

> "5. The evidence of any witness may by leave of the Court or a judge be taken at any time as preparatory to the hearing of the action or any application therein before the Court or any judge thereof, and the evidence so taken may be used at the hearing subject to just exceptions.
>
> Evidence so taken shall not be used at the hearing unless the party obtaining leave shall have given notice to all other parties to attend at the examination.
>
> Evidence so taken shall be taken in like manner, as nearly as may be, as evidence at the hearing of an action is to be taken. The note of the evidence shall be read over to the witness, and tendered to him for signature. If he refuses to sign it a note shall be made of his refusal, and the evidence may be used whether he signs it or not."

During the hearing of this appeal the legal argument was put forward, on behalf of the appellants, that the evidence of Kattides was never properly placed before the trial Court; and as it does appear that the trial Court relied on such evidence, as corroborating the evidence of the respondent, we have to deal with this issue before we proceed any further :

This legal issue regarding the evidence of Kattides was raised for the first time during the hearing of the appeal, having not been included originally in the notice of appeal as filed. On an application by counsel for the appellants we allowed the notice of appeal to be amended so that the said issue could be raised thereby; and we have reserved our decision—to be given, if necessary—on an application by the respondent seeking an order that the evidence in question should be formally admitted for the purposes of the appeal, even assuming that it was not properly placed before the Court below.

Counsel for appellants, in arguing that the evidence of Kattides should not have been treated by the trial Court as evidence properly before it, relied on rule 11 of Order 37 of the Civil Procedure Rules, which reads as follows :-

> "11. Except where by this Order otherwise provided, or directed by the Court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the Court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the Court or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence saving all just exceptions without proof of the signature to such certificate."

Order 37 relates to evidence on commission or before an examiner and corresponds to Order 37 of the English Rules of the Supreme Court, as it was before it was replaced by Orders 38 and 39 of the now in force Rules of the Supreme Court in England—(throughout this judgment any reference to the Rules of the Supreme Court in England is to be taken, unless the contrary is indicated, as a reference to the previously, and not now, in force English Rules).

The rule in the English Order 37, which corresponded to rule 11 of our own Order 37, was rule 18; the texts of English rule 18 and our rule 11 were identical.

Our rule 5 of Order 36 has existed as part of the civil procedure in force in Cyprus since at least the time when there came into force the Rules of Court of 1886: it was then rule 6 in Order 15 and included a provision about the taking of preparatory evidence before a commissioner appointed for that purpose by the Court. Then we find the same rule repeated as part of the Rules of Court of 1927, as rule 6 of Order 15; it again included a provision about evidence being taken before a commissioner.

It is to be noted that in the Civil Procedure Rules

now in force, which were first enacted in 1938, there is no mention in rule 5 of Order 36 about evidence being taken, as preparatory to the hearing, before a commissioner; but there are to be found in Order 37 provisions about evidence on commission or before an examiner.

In the English Rules there was nothing to be found which was exactly similar to rule 5 of our Order 36; on the other hand, in our own Order 37 there does not exist anything which corresponds to rule 5 of Order 37 in England, which reads as follows:-

> "5. - (1) The Court or a judge may, in any cause or matter where it appears necessary for the purpose of justice, make an order for the examination upon oath before the Court or a Judge or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give on deposition any evidence therein.
>
> (2) Any order under paragraph (1) of this Rule may be made on such terms (including, in particular, terms as to the giving of discovery before the examination takes place) as the Court or judge may think fit."

Rule 5 of Order 37 is no longer in force in England, having been replaced by what is now rule 1 of Order 39. As it is stated in the English Supreme Court Practice, 1973, vol. 1, p. 584, the said rule 1 of Order 39 embodies the ancient practice of, among others, the Superior Common Law Courts enabling the taking of the evidence of a witness before the trial, if he will be unable to attend it; it is in fact an examination of a witness *de bene esse* (see, *inter alia, Warner* v. *Mosses* [1880 - 81] 16 Ch. D. 100, at p. 102).

If our rule 5 of Order 36 was enacted in order to achieve the same object as the above rules in England then, as the similarity between the English Rules of the Supreme Court and our Civil Procedure Rules indicates forcibly that the underlying principles in both sets of Rules are similar, it may be said that it follows that, unless an express provision or the context lead to a contrary view, in interpreting our Civil Procedure Rules

preference should be given to a construction more consonant with the corresponding English Rules (see, in this respect, *Westcott & Lawrence Line* v. *The Mayor, Deputy Mayor, Councillors and Townsmen of Limassol*, 22 C.L.R. 193).

We shall assume, therefore, for the purposes of this judgment, in favour of the appellants—without, however, having, because of what follows hereinafter, to decide finally that this is, indeed, so—that the admissibility of any evidence taken as preparatory to the hearing, under our rule 5 of Order 36, has to be governed by considerations such as those set out in rule 11 of Order 37 of our Rules of Court (which is the same as the aforementioned rule 18 of Order 37 in England).

It is not in dispute that at the time of the trial before the Court below Kattides was present in Cyprus and he was not unable, due to sickness or other infirmity, to attend such trial; actually, as it will appear from what is stated later on, he did give some further evidence during the trial. It has, therefore, been argued by counsel for the appellants that there did not exist the prerequisites enabling the record of the evidence taken from Kattides, as evidence preparatory to the trial, to be treated as being evidence admissible for the purposes of the trial; and counsel for the appellants submitted, further, that, in any case, the said record was never formally put in at the trial; in this respect he has relied on the case of *Fisher* v. *C.H.T., Ltd. and Others* [1965] 2 All E.R., 601, in which Edmund Davies J., after referring to the above-quoted rule 5 of Order 37 in England, held that a deposition taken before an examiner prior to the hearing has to be bespoken, in other words to be formally put in by the party wishing to rely on such evidence.

It is common ground that at no stage did the respondent attempt to put in formally the record of the evidence of Kattides which was given as evidence preparatory to the trial.

Both in the English rule 18 of Order 37 and in our own rule 11 of Order 37 there are to be found the words "no deposition shall be given in evidence at the hearing or trial of the cause or matter without the con-

sent of the party against whom the same may be offered"; and, then, there are set out therein the prerequisities for the giving in evidence of a deposition, at the hearing, *without the consent* of the party against whom it is to be offered.

In our opinion, in the present instance there did not arise any need for the existence of the aforesaid prerequisites because we are satisfied that the evidence of Kattides, though originally taken as preparatory to the hearing, was treated, later, as evidence for the purposes of the trial, with the clearly to be implied consent of the appellants, against whom it was offered; moreover, in view of such consent, the text of his evidence did not have to be formally put in by the respondent. We have reached our conclusion as to the existence of consent of the appellants on the basis of the conduct of the appellants in the course of the proceedings :-

On the 4th February, 1967, counsel for the respondent—the plaintiff in the action—applied, under rule 5 of Order 36, for leave to have the evidence of Kattides taken as preparatory to the hearing of the action, for use at the hearing. In an affidavit in support of the application it was stated that Kattides was leaving Cyprus in about fifteen days' time and that he was likely to stay abroad for a considerable period of time.

On the 9th February, 1967, the record of the Court reads as follows :-

> "For plaintiff-applicant P. Pavlou.
>
> For defendants-respondents Potamitis.
>
> *Potamitis :* I have no objection to the granting of the application and I claim no costs.
>
> *COURT :* Case fixed for hearing the evidence of Marios Kattides on 14.2.67. No order as to costs."

On the 14th February, 1967, the evidence of Kattides was given before the, at the time, District Judge V. Vassiliades, who is one of the two trial judges who have decided this case in the first instance. There appeared for the defendants—the present appellants—Mr. J. Potamitis (who has also appeared at the trial of the action and in the appeal) and he cross-examined Kattides

at quite some length; the evidence of Kattides was reduced into writing, it was read over to him and he signed his deposition in the presence of judge Vassiliades; then, the record of the Court, on that date, ends as follows:

> "*Court:* The case has already been fixed for hearing on 3.4.67. It is adjourned till then."

On the 3rd April, 1967, the trial commenced; the same counsel, Mr. Potamitis, appeared again for the appellants. The first witness to be called was the respondent. While giving evidence he produced a copy of the agreement for the sale of the motor-lorry and it was maked as "*exhibit* 2" (because Kattides during his evidence on the 14th February, 1967, had produced a photo-copy of the agreement for the purchase of the tractor from the appellants and it had been marked as "*exhibit* 1").

After the respondent had finished his evidence, and a witness called by the respondent had given evidence, too, the further hearing of the case was adjourned to the 11th April, 1967.

On that date the appellants were represented by Mr. Potamitis, and, also, by Mr. G. Cacoyiannis (who has appeared, together with Mr. Potamitis, before us, in this appeal); as soon as the hearing before the court below was resumed the following was stated, according to the record, by counsel for the parties:-

> "*Potamitis:* I apply for leave to cross-examine Marios Kattides or to put questions to him through the Court. His deposition was taken on the 14.2.67 because he was to leave Cyprus. He did not however and is now available. The Court has discretion to allow this.
>
> *Michaelides:* I object. Kattides is not a witness before the Court any longer. When examined by the Court on the 14.2.67 all relevant facts were within the knowledge of defendants. No new facts have arisen since to justify defendants' application.
>
> *Potamitis:* We only want this witness to be examined as to two letters written to defendants by his wife whom he represented."

The trial Court ruled that there were no sufficient grounds for recalling Kattides, as a witness, for further cross-examination, but that it would allow such questions to be put to him through the Court as it would consider proper.

There was never raised any objection at all, on the part of the appellants, that Kattides should not be treated as a witness for the purposes of the trial, on the ground that his deposition had not been formally put in or that the requirements of rule 11 of Order 37 had not been satisfied.

On the contrary, as it appears from the record, Kattides was "re-called" and "re-sworn", and on being questioned by counsel for the appellants he identified two letters, signed by his wife, which were put in, as evidence, by consent.

After that the plaintiff's case was closed and the defendants started calling their own witnesses.

In our view the attitude of counsel representing the appellants-defendants, as described above, shows clearly that they were treating the already previously given evidence of Kattides as being evidence of a witness at the trial; and, as evidence which was already part of its record. They were fully entitled to consent—as this was a civil case—to such a course and we had no difficulty in holding that from their conduct it is to be clearly implied that they did so consent; and, we think, that, in the circumstances, they adopted the right course.

Of course, we have not lost sight of the fact that consent by counsel to a certain course, like an admission made by him on behalf of his client, may, in a proper case, be allowed to be withdrawn: In the case of *H. Clark (Doncaster) Ltd.* v. *Wilkinson* [1965] 2 W.L.R., 751, Lord Denning M.R. stated in his judgment (at p. 756) the following:-

> "An admission made by counsel in the course of proceedings can be withdrawn unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of it, it may not be allowed to be withdrawn: See *The Clifton, Kelly* v. *Bushby*."

In the *Clifton* case, *supra*, 12 E.R., 695, the Privy Council held that the conduct of counsel appearing for a party was such so as to lead the opposite party to believe that the party for whom the said counsel was appearing had per-empted an appeal previously lodged in the matter and observed that even if there was no intention of doing any act by which the right of appeal should be per-empted there had been such conduct as to induce the Court and the opposing party to believe that there was no intention of appealing and to act upon that supposition; and that such conduct was binding.

Likewise, in the present case we are of the opinion that the aforementioned conduct of counsel for the appellants, at the trial, regarding the evidence of Kattides, should be regarded as binding and that it is too late now, on appeal, to argue in a manner contrary to it.

Useful guidance regarding the matter of the admission, by means of implied consent, of otherwise procedurally inadmissible evidence, may be derived, by analogy, from the case of *Domsalla and Another* v. *Barr (Trading as A.B. Construction) and Others* [1969] 3 All E.R. 487. Edmund Davies L.J. said the following (at p. 493):-

> "By adverting to the plaintiff's intention to set up in business on his own account, there was being introduced into the case an entirely new element which had received no adumbration at all in the statement of claim. For that reason, in my judgment, the plaintiff was going outside his pleading, and objection might properly have been taken to the leading of such evidence. The objection, however, was not made, and accordingly it is not right, in my judgment, for this Court to say now it will not have regard to such evidence as was called in support of this new, unpleaded matter; but that in no way relieves the Court from the duty of carefully assessing such evidence as was adduced in support of this entirely novel allegation."

Before concluding this part of our judgment, which deals with the issue regarding the evidence of Kattides, we would like to make three observations:-

First, that the case of *Fisher, supra,* is clearly distinguishable from the present one. In that case, in an action for personal injuries sustained by the plaintiff, one of several defendants sought and obtained an order that the evidence of a witness be taken on examination before one of the examiners of the Court; at the trial that defendant was not represented and did not appear and the question arose, on a submission by counsel for another of the defendants, whether the evidence so taken was *per se* before the Court; it was ruled that without the deposition of the witness having been bespoken such deposition was not evidence before the Court; it is obvious that there did not arise, and there could not in the circumstances have arisen, on that occasion, any question of the deposition being made by consent part of the evidence at the trial.

Secondly, had we not found that the evidence of Kattides was treated by consent as evidence for the purposes of the trial of this case, we would be definitely inclined to grant an application, made to us, by counsel for the respondent, for leave to produce formally such evidence before us, for the purposes of the appeal; and we would follow such a course in view of the attitude to the matter (which has been already referred to in this connection) of counsel for the appellants before the trial Court.

Thirdly, we would not be prepared, in any event, to allow this appeal (even to the extent of ordering a new trial) on the ground that the deposition of Kattides was not properly put in, because we are not satisfied, in the light of all relevant considerations, that any injustice has resulted in this connection. In *The Duke of Beaufort* v. *Crawshay* [1865 - 66] L.R. 1 C.P. 699, an appeal was lodged on the ground that the deposition of a witness obtained prior to the trial was put in without sufficient evidence to satisfy the trial judge that the deponent was unable to attend due to sickness or other infirmity; in his judgment (at p. 710) Willes J. observed: "... the jurisdiction of the Court in granting a new trial ought not to be exercised, even though we should be dissatisfied with that which satisfied the judge, unless it be clearly made out that injustice will be done by withholding it."

Having decided that the evidence of Kattides was properly considered as part of the record of the trial before the Court below (and that, consequently, it is part of the record before us) we shall proceed now to deal with the matter of the delivery by the respondent to Kattides of his tractor No. B710:

In this respect the trial Court found, having accepted as correct the testimony of the respondent and of Kattides, that, as a result of the transaction, concerning a motor-lorry, between the appellants and the respondent, instructions were given by the appellants for the delivery by the respondent of his tractor to Kattides, and that this was done by way of part payment, by the respondent to the appellants, towards the price of the motor-lorry, of the sum of £1,500, which was the agreed between the parties value of the said tractor.

On the basis of the material before us we do not think that there exists any valid reason for interfering with the above finding of the trial Court:

It is to be borne in mind that in the contract of sale for the motor-lorry, which was entered into by the appellants and the respondent, the following was stated under the heading of "Settlement of the balance of the agreed price":- "A Kaisis"—the respondent—"sells tractor No. B710, International, to Mrs. Aliki M. Kattidou at £1,500 which money will be paid to us as first payment"—"to us" meaning the appellants.

On the same day when the deal for the sale of the motor-lorry was concluded between the parties, the respondent prepared a letter, addressed to the appropriate authority, requesting the transfer of the tractor in the name of the appellants and he attached to such letter the necessary documentary material.

Furthermore, a hire-purchase agreement in respect of the sale of the tractor by the appellants to the wife of Kattides was entered into and it was stated therein that there would be paid in advance by her an amount of £100 and that the balance would be paid at the rate of £50 per month; as a result £10 were paid at once by Kattides and £90 were to be paid within the next few days; also, thirty-three promissory notes, correspond-

ing to the monthly instalments, were signed by the wife of Kattides, with her father as surety.

It was stated in evidence by Kattides that Nicolaou, the at the time agent in Limassol of the appellants, and Zachariades, a director of the appellants, authorized him to obtain possession of the tractor from the respondent and that, after doing so, he took the tractor to a place where he was loading shingle and that there he started repairing it; he, also, stated that he was informed, three or four days later, by Nicolaou, that the transaction had fallen through and upon that he told Nicolaou where the tractor was, so that Nicolaou could take it back; he said that he asked Nicolaou to refund to him what had already been paid against the price of the tractor.

The respondent in his evidence stated that the appellants, through Zachariades, asked him to deliver his tractor to Kattides, whose wife had purchased it from the appellants; that, later on, he was approached by Zachariades and was requested to take back the tractor but that he had refused to do so, replying that he had in the meantime bought another tractor. The respondent insisted, at the trial, that he never took possession of the tractor after he had delivered it to Kattides; and that, though he delivered the tractor to Kattides on the instructions of the appellants, by way of part payment of the price of the motor-lorry which he was to purchase from them, the appellants did not ever attempt to put him in possession of the tractor after the transaction regarding the motor-lorry had not materialized, nor did they pay him anything for the value of the tractor, which had vanished in the meantime.

Zachariades—(though he insisted that he did not have in mind that the tractor was handed over to Kattides when the deal for the sale of the motor-lorry was concluded)—conceded that the respondent did tell him that he made arrangements to sell his tractor to Kattides.

According to Nicolaou, the respondent had, originally, informed him that he had found a buyer for his tractor; and Nicolaou said, in this respect, in his evidence, the following: "We were to finance the buyer and credit plaintiff"—the respondent—"with the purchase price of his tractor as part payment for the purchase by him of

the new lorry"; then (according to his own evidence) Nicolaou, a few days later, notified both the respondent and Kattides that, due to the refusal of the Lombard Bank to finance the transaction for the sale of the motor-lorry, the whole deal had been nullified and that he had instructions to return to them all relevant documents, but, as they refused to accept them, he posted them to the appellants in Nicosia, including the cheque for the £10 which he had received from Kattides, the hire-purchase agreement between the wife of Kattides and the appellants and the thirty-three promissory notes which were signed by her, as aforementioned. All these remained in the possession of the appellants until they were produced by them at the trial of the action. No attempt whatsoever was made by the appellants to send them to Kattides or his wife, after they were received by them in Nicosia, from Nicolaou.

It is, we think, necessary to refer, too, at this stage, to some rather significant correspondence:

On the 15th November, 1963, the appellants informed the respondent that the deal for the motor-lorry had become void, because Lombard Bank had refused to finance it, and they forwarded to him the documents which he had handed to their agent, Nicolaou, for the transfer in their name of the tractor.

The lawyer of the respondent replied on the 22nd November, 1963, stating, among other things, that the appellants had given instructions to the respondent to deliver the tractor to the person who had purchased it from them, and that he had in fact done so; and the respondent's lawyer, while insisting on the validity of the contract for the sale of the motor-lorry, proceeded, at the same time, to inform the appellants that if they insisted on avoiding such contract they should pay to respondent the sum of £1,500, which they had received by way of part payment through the delivery of the tractor as aforesaid.

In reply to this letter the lawyer of the appellants wrote, on the 29th November, 1963, denying in only general terms the claim of the respondent.

On the 13th December, 1963, the wife of Kattides

wrote to the appellants requesting to have back the agreement and promissory notes which she had signed for the purchase of the tractor, as well as the money which she had paid (that is, £10), because she had been informed through Nicolaou that the sale of the tractor was no longer valid.

The appellants did not reply to this letter nor to a further letter of hers, of the 26th January, 1965, and on the 18th February, 1965, she had to write again and ask for the said agreement, the promissory notes and the £10.

On the 23rd February, 1965, a letter was written to her by the appellants asking her to inform them when she had returned the tractor to the respondent. This reply does show, in our view, that the appellants knew that the tractor was delivered to her by the respondent; and there can be, really, no doubt, in the light of all relevant considerations, that this was done on the instructions of the appellants, who had accepted it from the respondent by way of part payment of the price of the motor-lorry, which he was to buy from them; that a sale may be for cash and part exchange is shown, for example, by the case of *G. J. Dawson (Clapham) Ltd.* v. *H. & G. Dutfield* [1936] 2 All E.R. 232.

In view of all the foregoing we are of the already stated, in this judgment, opinion that the trial Court correctly found that the tractor was delivered, in part payment, by the respondent.

It is convenient to deal, next, with the argument of the appellants that because the tractor, at the time of its delivery by the respondent, was not registered, no valid transaction was effected, in that respect, between the respondent and the appellants. The trial Court rejected this argument; and it did so rightly, in our view; it may have offended against the provisions of the relevant legislation to keep the tractor unregistered, but this is not a sufficient ground for depriving the delivery of the tractor, in part payment, of its legal effect.

As was pointed out in *Joblin* v. *Watkins and Roseveare (Motors), Limited*, 64 T.L.R. 464, the primary purpose of registering a motor-vehicle is to show who

is the person liable to pay the road-fund licence tax in respect of such vehicle. In *Mavromoustaki* v. *Yeroudes* (1965) 1 C.L.R. 176, it was stated (at p. 187), after a review of relevant case-law, that the question to be answered (in a case such as the present one) is whether a particular contract belongs to a class which the relevant statute intends to prohibit. In view of the object of the legislation regarding registration of motor-vehicles, we are of the opinion that it cannot be said that it was the intention of such legislation to prohibit or render invalid the delivery of an unregistered motor-vehicle in part payment of the price under a contract for the sale of goods (see, also, *Iosifakis* v. *Ghani* (1967) 1 C.L.R. 190). In the circumstances we can, therefore, find no merit in the relevant contention of the appellants.

The question that remains to be determined is whether, and how, the respondent is entitled to be compensated in respect of the tractor, as claimed by his statement of claim; as already stated in this judgment the tractor vanished without having been delivered back to him.

Under section 32 of Cap. 149 the contingent contract regarding the sale of the motor-lorry became, as already mentioned, void.

Section 65 of Cap. 149 reads as follows :-

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it".

Our section 65 is the same as section 65 of the Indian Contract Act, 1872, (see Pollock & Mulla on the Indian Contract and Specific Relief Acts, 9th ed., p. 460); and it is to be noted, too, that our section 32 of Cap. 149—which has been quoted earlier—is the same as section 32 of the Indian Contract Act, 1872.

According to Pollock & Mulla (*supra* at p. 477) the Calcutta High Court in *Ram Nagina Singh* v. *Governor General* ([1952] A. Cal. 306, on appeal 89 Cal. L.J. 346)

has held that section 65 is "compensatory in principle" and "for prevention of unjust enrichment".

We have, therefore, to determine the exact value of the advantage received by the appellants in the form of the tractor and award compensation for its value to the respondent.

Bearing in mind that when the value of the tractor was agreed at £1,500 this was done as part of the whole deal, for the sale of a motor-lorry by the appellants to the respondent, and that, therefore, it was natural for the appellants to put a quite high value on the tractor of the respondent in order to facilitate such deal, and noting, further, that it was sold to the wife of Kattides for £1,500 on an instalments basis—a course entailing, normally, the fixing of a higher sale price than what it would have been in case of a sale on a cash basis—we have reached the conclusion that the amount to which the respondent is entitled under section 65 is not £1,500, but a smaller amount.

Before we proceed to decide what that amount should be it appears useful to refer to the case of *Erlanger and Others* v. *The New Sombrero Phosphate Company and Others* [1877 - 78] 3 A.C. 1218, where (at p. 1279) Lord Blackburn, after pointing out that it has always been the practice for a Court of equity to give relief whenever by the exercise of its powers it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract, proceeded to say:

> "And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party in mora, than a similar change before he was in *mora* should do".

The *Erlanger* case is referred to in Pollock & Mulla (*supra*, at p. 462) in the commentary about section 65.

There is nö doubt in our minds, on the basis of the material on record, that though the appellants took no steps, as they ought to have done, to restore the tractor to the respondent, he, on the other hand, chose not to be interested any more in its fate, even after he knew or ought to have known that it had been abandoned in the open by Kattides.

In the light of the foregoing considerations, coupled with the very special circumstances of this case, we have decided that it is proper for an amount of £1,200, instead of the £1,500, to be awarded to respondent, for the value of the tractor, and, thus, the judgment appealed from is varied accordingly.

The respondent should receive half of his costs in the Court below and there shall be no order as to the costs in the proceedings before us.

Appeal partly allowed, order for costs as above.