1983 April 4

[TRIANTAFYLLIDIS, P., DEMETRIADES, SAVVIDES, JJ.]

PANAYIOTIS STELLA,

Appellant-Plaintiff.

v.

CONSTANTINOS SAYIAS,

Respondent-Defendant.

(*Civil Appeal No.* 6364)

Practice—Jurisdiction—Stay of proceedings—Foreign plaintiff suing defendant who is residing within the jurisdiction—Court vested with discretion to refuse exercise of jurisdiction—Principles on which such discretion may be exercised—Application for security of costs, after entry of conditional appearance, does not amount to a waiver of the objection as to jurisdiction.

Approbation and reprobation—Doctrine of.

The appellant-plaintiff, who was residing in Athens brought an action before the District Court of Limassol, against the respondent-defendant, who was residing in Limassol, claiming 85,590 Greek drachmas or their equivalent in Cyprus pounds which amount was paid by the appellant to a third person in Athens in settlement of 13 bills of exchange signed by the respondent as principal debtor and the appellant as guarantor.

When service of the writ of summons was effected on the respondent, he entered a conditional appearance and on 16.9.1981 he filed an application praying for an order of the Court, setting aside the writ of summons on the ground that there was no jurisdiction in the District Court of Limassol and also that the action was frivolous and vexatious and/or in abuse of the process of the Court. Respondent alleged that all the witnesses and other substantial evidence in the case were in Athens and therefore it would have been more convenient and just if the action was tried in Athens. He also contended that if the action was allowed to proceed, respondent would be in a disadvantageous position to defend himself as he could not summon

witnesses who are outside the jurisdiction of this Court, one of whom was the daughter of the appellant, and force them to attend the Court to give evidence. He lastly alleged that the District Court of Limassol had no jurisdiction to try the case as the whole transaction took place outside the jurisdiction of this Court. On 21.9.1981 the respondent filed another application asking for security for costs, on the ground that the appellant was residing outside the jurisdiction of the Court.

By his opposition counsel for appellant maintained that the Court had jurisdiction in view of the fact that respondent resided and/or carried business in Limassol within the jurisdiction of the Court and that in any event respondent's application of 21.9.1981 for security for costs amounts to a waiver of his objection to the jurisdiction. Furthermore, that the respondent by his two applications the one disputing the jurisdiction and the other applying for security for costs, approbates and reprobates in the same action. The natural forum of conveniens is, according to counsel for appellant, the Court of Limassol, where the respondent resides and can attend the Court.

The trial Judge came to the conclusion that the case was one which not only would have been more conveniently tried in Greece but also that if the proceedings were allowed to continue in Cyprus, then very likely, irreparable loss and injustice would have been caused to respondent and found that his discretion should be exercised in favour of the respondent and as a result he granted the application and dismissed the action. The trial Judge further found that the fact that defendant submitted an application for security for costs after he had entered a conditional appearance does not amount to a waiver of any objection as to jurisdiction.

Upon appeal by the plaintiff the following issues arose for consideration.

(a) Whether the trial Court had any discretion to refuse the exercise of jurisdiction;

(b) whether such discretion was properly exercised;

(c) whether the application of the respondent for security for costs amounts to a waiver of any objection as to jurisdiction.

Held, (1) that the Court is vested with a discretion to refuse the exercise of jurisdiction in a proper case and has inherent jurisdiction to stay an action brought within the jurisdiction in respect of a cause of action which arose out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he should not be subjected if he were sued in another accessible Court where the cause of action arose (after stating the principles on which such discretion may be exercised—vide pp 196–201 post) that the trial Court properly exercised its discretion in the case and that in the circumstances the continuance of the action would have worked injustice on the respondent because it would be oppressive or vexatious to him whereas no injustice would result to the appellant if he pursues his claim in Greece

(2) That from the mere fact that the respondent, after having filed an application to set aside the writ of summons for want of jurisdiction, he applied for security for costs an inference cannot be drawn that he abandoned his intention to object to the jurisdiction; and that, therefore, the finding of the learned trial Judge in this respect is upheld

Held, further (*on the question whether the respondent by having acted as he did, he both approbated and reprobated*) that the principle of approbation and reprobation is not applicable in the present case as the respondent has not made an election for which he later sought to resile, or derived any material benefit precluding him from disputing the validity of a transaction still in the enjoyment of the benefit

Appeal dismissed

Cases referred to

Logan v. *Bank of Scotland and Others* (No 2) [1906] 1 K.B 141 at pp. 150, 151, 152;

Maharanee of Baroda v. *Wildenstein* [1972] 2 All E.R. 689 at p. 693,

Atlantic Star [1973] 2 All E R. 175 at p. 181, [1974] A C. 436 at p. 454;

Longworth v. *Hope*, 3 M. 1049 (Scottish case),

Egbert v. *Short* [1907] 2 Ch. 205 at pp 212 and 214;

McHenry v. *Lewis* [1883] 22 Ch. D. 397 at p. 408;

Ewing v. *Orr Ewing* [1885] 10 A.C. 453 at p. 506;

Jadranska Slobodna Plovidba v. *Photos Photiades & Co.* [1965] 1 C.L.R. 58 at p. 70;

Guendjian v. *Societe Tunisienne de Banque S.A.* (Civil Appeal 5120 delivered on 22.2.1983 but not reported yet);

Norton's Settlement v. *Norton* [1908] 1 Ch. 471 at pp. 479, 480;

St. Pierre v. *South American Stores* (Gath & Chaves) Ltd. [1936] 1 K.B.D. 382 at p. 398;

MacShannon v. *Rockware Glass Ltd.* [1978] 1 All E.R. 625 at pp. 630, 636;

Tanagba and Others v. *Pipinos Shipping Co. Ltd.* (1981) 1 C.L.R 255;

Castanho v. *Brown & Root* (U.K.) Ltd. [1981] 1 All E.R. 143;

Assunta [1902] P. 150;

Carpantina Societe Anonyme v. *The Firm P. Ioannou & Co.* (1942) XVIII C.L.R. 30 at p. 43;

Cyprus Hotels Co. Ltd. v. *Hotel Plaza Enterprises Ltd. and Others* (1968) 1 C.L.R. 423;

A. De L'honeux Linon Et Cie v. Hong Kong & c., Banking Corporation, [1886] Law Times Vol. LIV N.S. 863;

Rein v. *Stein* [1892] Law Times Vol. LXVI N.S. 469;

Banque de Moscou v. *Kindersley and Another* [1950] 2 All E.R. 549 at p. 559;

Evans v. *Bartlam* [1937] 2 All E.R. 649 at p. 652.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Limassol (Artemis, D.J.) dated 23rd December, 1981, (Action No. 807/81) whereby his action for 85,590 Greek Drachmas or their equivalent in Cyprus pounds as money paid by him and at the request of the defendant and for his account was dismissed.

H. Solomonides, for the appellant.

Chr. Pourghourides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the judgment of a

Judge of the District Court of Limassol, whereby appellant's Action No. 807/81 was dismissed.

The appellant is residing in Athens and from what is stated in an affidavit sworn by the respondent, the appellant was his father-in-law. The marriage of respondent to appellant's daughter was dissolved in July, 1980. The appellant's claim against the defendant was for 85,590 Greek Drachmas or their equivalent in Cyprus Pounds as money paid by the appellant at the request of the respondent and for his account. According to the statement of claim which was endorsed on the writ of summons this amount was paid by the appellant to a third person in Athens in settlement of 13 bills of exchange signed by the respondent as principal debtor and the appellant as guarantor. It is alleged by the appellant that he signed the said bills as guarantor, at the request of the respondent. The third person, the holder of the bills of exchange, brought an action in Athens against both the appellant and the respondent. The appellant contested such action in which finally, a judgment was entered against him for the sum of 63,000 Drachmas, plus 3,390 Drachmas interest and 9,200 Drachmas costs.

The appellant paid the said judgment debt and he also paid a further sum of 10,000 Drachmas costs for defending the action, thus making a total of 85,590 Drachmas which was the amount claimed by him against the respondent.

When service of the writ of summons was effected on the respondent, he entered a conditional appearance and on 16.9.1981 he filed an application praying for an order of the Court, setting aside the writ of summons on the ground that there was no jurisdiction in the District Court of Limassol and also that the action was frivolous and vexatious and/or in abuse of the process of the Court. By his affidavit in support of the application, the respondent alleged that the action was brought against him in revenge for having divorced the appellant's daughter. He further alleged that all the witnesses and other substantial evidence in the case were in Athens and therefore it would have been more convenient and just if the action was tried in Athens. He also contended that the decision on which the action is based, was given in Athens and all records of the proceedings are in Athens. Further, that if the action was allowed to proceed, respondent would be in a disadvantageous

position to defend himself as he could not summon witnesses who are outside the jurisdiction of this Court, one of whom was the daughter of the appellant and force them to attend the Court to give evidence. He lastly alleged that the District Court of Limassol had no jurisdiction to try the case as the whole transaction took place outside the jurisdiction of this Court. On 21.9.1981 the respondent filed another application asking for security for costs, on the ground that the appellant was residing outside the jurisdiction of the Court.

By his opposition counsel for appellant maintained that the Court had jurisdiction in view of the fact that respondent resided and/or carried business in Limassol within the jurisdiction of the Court and that in any event respondent's application of 21.9.1981 for security for costs amounts to a waiver of his objection to the jurisdiction. Furthermore, that the respondent by his two applications the one disputing the jurisdiction and the other applying for security for costs, approbates and reprobates in the same action. The natural forum of conveniens is, according to counsel for appellant, the Court of Limassol, where the respondent resides and can attend the Court.

The learned trial Judge though in his elaborate judgment went at some length in drawing a distinction between territorial jurisdiction and material jurisdiction, considered the case on the assumption that the Court had jurisdiction to try the case and proceeded to determine whether, in the circumstances of the case, the Court could deny jurisdiction and stay the proceedings, irrespective as to whether the rules concerning jurisdiction are satisfied. After considering the circumstances surrounding the case, the learned trial Judge came to the conclusion that the case was one which not only would have been more conveniently tried in Greece but also that if the proceedings were allowed to continue in Cyprus, then very likely, irreparable loss and injustice would have been caused to respondent and found that his discretion should be exercised in favour of the respondent and as a result he granted the application and dismissed the action.

The learned trial Judge then proceeded to examine the contention that the application of the respondent for security for costs filed after he had entered a conditional appearance and had applied to have the writ of summons set aside, amounted to

a fresh step taken in the action, whereby his right to dispute the validity of the writ of summons was waived.

In dismissing such contention the learned trial Judge had this to say:

> "In the present case the objection is not for a mere irregularity, but is a substantial one and it concerns doing justice to the defendant. Furthermore, security for costs is not only essential on the assumption that the objection is abandoned. If, for example, this Court decides against the defendant and he appeals and succeeds in his appeal, then there will be no security for the costs and he will be running a risk of not recovering them. Therefore, I find that by the fact of submitting an application for security for costs, he does not abandon his objection and the steps taken by him in this respect should not be considered as preventing him to proceed with his objection, once the existence of security for costs is necessary, as explained above, for the very trial of the objection itself and it does not amount to abandoning it".

The grounds of appeal relied upon and argued by counsel for appellant were that the findings of the trial Court -

(a) that it had any discretion on the question of exercise of jurisdiction;

(b) that the Court as a Court of the natural forum of the defendant had no jurisdiction;

(c) that the application of the defendant for security for costs did not amount to a waiver of the objection to the jurisdiction,

were wrong in law.

Also, that the Court relied on case law which it misinterpreted (ground (d)), that it did not take into consideration the existence of procedure abroad whereby evidence may be taken in a foreign country in accordance with International Conventions (ground (e)) and, finally, that the judgment violates all principles of Private International Law (ground (f)).

As to the second ground of appeal that the Court decided that it had no jurisdiction, we find ourselves unable to agree

with such contention. The learned trial Judge did not deny the existence of jurisdiction. On the contrary, he proceeded to decide the case on the assumption that there was jurisdiction, and whether in the circumstances, he could refuse jurisdiction and discontinue the proceedings.

Therefore, the questions which pose for consideration in this appeal are -

(a) whether the trial Court had any discretion to refuse the exercise of jurisdiction;

(b) whether such discretion was properly exercised;

(c) whether the application of the respondent for security for costs amounts to a waiver of any objection as to jurisdiction.

The Court has inherent jurisdiction to stay an action brought within the jurisdiction in respect of a cause of action which arose out of jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression to which he should not be subjected if he were sued in another accessible Court where the cause of action arose. See *Logan* v. *Bank of Scotland & Others* (No. 2) [1906] 1 K.B. 141. In that case, the President of the Court of Appeal had this to say at page 150:

> "The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to

be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court."

And at pages 151, 152:

"Now, it is true that the Courts of this country have not gone so far as to express themselves upon the question of convenience in terms similar to those used in the Scotch cases, though, as I have already noticed, it may be doubted whether there is any substantial difference between the two. Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are. If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it."

The dictum of Sir Gorell Barnes, P. in the last paragraph of the above citation was referred to and explained in *Maharanee of Baroda* v. *Wildenstein* [1972] 2 All E.R. 689 by Lord Denning M.R. at p. 693, as follows:

".... If a defendant is properly served with a writ whilst he is in this country, albeit on a short visit, the plaintiff

is prima facie entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's courts; and he is entitled to require those courts to proceed to adjudicate on his claim. The courts should not strike it out unless it comes within one of the acknowledged grounds, such as that it is vexatious or oppressive, or otherwise an abuse of the process of the court; see RSC Ord. 18, r. 19. It does not become within those grounds simply because the writ is served on the defendant whilst he is on a visit to this country. If his statement of claim discloses a reasonable cause of action, he is entitled to pursue it here, even though it did arise in a foreign country. It is not to be stayed unless it would plainly be unjust to the defendant to require him to come here to fight it, and that injustice is so great as to outweigh the right of the plaintiff to continue it here."

(see, also *Atlantic Star* [1973] 2 All E.R. 175).

In the Scottish case of *Longworth* v. *Hope*, 3 M. 1049, Lord Deas, had this to say in respect of such discretion.

"It is a valuable discretion, which is vested in every Court, not to exercise its jurisdiction if there are grounds for holding that, by an exercise of that jurisdiction, the defender, who objects to it, will be put to an unfair disadvantage which he would not be subjected to in another accessible and competent court."

In *Egbert* v. *Short* [1907] 2 Ch. 205, at 212, Warrington, J. expressed the following opinion:

"The jurisdiction which 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. That is the point that I must therefore consider."

And in *McHenry* v. *Lewis* [1883] 22 Ch. D. 397 at p. 408, it was held:

> ".... 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 doctrine of forum conveniens is often met in Scottish decisions though in England such doctrine very seldom comes into consideration when jurisdiction exists. In *Ewing* v. *Orr Ewing* [1885] 10 A. C. 453 at p. 506, Earl of Selborne stated:

> "It appears also that the doctrine of forum conveniens, which in England seldom comes into consideration when jurisdiction exists apart from service of process abroad, unless there is an actual competition of suits, is in Scotland carried further, and may prevent the exercise of jurisdiction when the Court is satisfied that the suit might have been brought and effectively prosecuted in a more convenient forum, although this may not actually have been done."

In *Jadranska Slobodna Plovidba* v. *Photos Photiades & Co.* (1965) 1 C.L.R. 58 at p. 70 our Supreme Court referred to the aspect of "forum conveniens" without however deciding whether such doctrine is acceptable in our Private International Law. In the recent case of *Charles Guendjian* v. *Societe Tunisienne de Banque, S.A.* (C.A. 5120, the judgment in which was delivered on 22.2.1983 and is not yet reported) our Supreme Court after making reference to the above case, does not appear to have treated, unlike the position in Scotland and in the U.S.A., the doctrine of "forum conveniens" as forming part of the Cypriot Private International Law.

It is clear from the above authorities that the Court is vested with a discretion to refuse the exercise of jurisdiction in a proper case. Having found so, we are now coming to consider the circumstances under which such discretion may be exercised.

The circumstances in which such discretion may be exercised, have been considered in a number of cases, in addition to the cases already referred to.

In *Norton's Settlement* v. *Norton* [1908] 1 Ch. 471, Vaughan

Williams L.J. adopted what was said by Sir Gorell Barnes in *Logan* v. *Bank of Scotland* (*No.* 2) (supra) and went on to add the following at pp. 479, 480:

"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 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 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."

In *Atlantic Star* [1973] 2 All E.R. 175, at p. 181, [1974] A.C. 436 at p. 454, the following is stated:

"I think that a key to the solution of the problem may be found in a liberal interpretation of what is oppressive on the part of the plaintiff. The position of the defendant must be put in the scales. In the end it must be left to the discretion of the court in each case where a stay is sought, and the question would be whether the defendants have clearly shown that to allow the case to proceed in England would in a reasonable sense be oppressive looking to all the circumstances including the personal position of the defendants. That appears to me to be a proper development of the existing law."

In that case it was held, inter alia, that -

"Although a foreign plaintiff was not lightly to be refused the right to sue in an English court if jurisdiction had been

properly founded, the right was not absolute and the Court had a discretion to grant a stay. That discretion was to be exercised by taking into account (i) any advantage to the plaintiff and (ii) any disadvantage to the defendant. The advantage to the plaintiff of allowing the suit to proceed had to be substantial, and not merely fanciful; a bona fide advantage was a solid weight in the scale, often decisive, but not necessarily so.

. . . . . On the other hand the disadvantage to the defendant had to be even more substantial to justify a stay of the action; the words 'oppressive' and 'vexatious' were indicative of the degree and character of the prejudice to the defendant but those words were to be interpreted liberally nor given too restricted or technical an application."

In *St. Pierre* v. *South American Stores (Gath & Chaves), Ltd.* [1936] 1 K.B.D. 382 at p. 398, Scott, L.J. summarised the rule as to the exercise of discretion as follows:

"The true rule about a stay . . . may I think be stated thus: (I.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied- one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. These propositions are, I think, consistent with and supported by the following cases: *McHenry* v. *Lewis*[1]; *Peruvian Guaco Co.* v. *Bockwoldt*[2]; *Hyman* v. *Helm*[3]; *Thornton* v. *Thornton*[4]; *and Logan* v. *Bank of Scotland (No. 2)*.[5]".

1. 22 Ch. D. 397
2. [1883] 23 Ch. D. 225.
3. [1883] 24 Ch. D. 531.
4. 11 P.D. 176.
5. [1906] 1 K.B. 141, 150, 151.

The above dictum was applied in the case of *Maharanee of Baroda* v. *Wildenstein* (supra) and followed and explained in the *Atlantic Star* (supra) and in *MacShannon* v. *Rockware Glass Ltd.* [1978] 1 All E.R. 625 where Lord Diplock at p. 630 after interpreting the majority speeches in the *Atlantic Star* (supra) formulated and restated the principle as follows:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

And Lord Salmon at p. 636, had this to add:

> "In an action brought in England when its natural forum is Scotland, I consider the question as to whether it should be stayed depends on whether the defendants can establish that to refuse a stay would produce injustice. Clearly if the trial of the action in England would afford the Scottish plaintiff no real advantage and would be substantially more expensive and inconvenient than if it were tried in Scotland, it would be unjust to refuse a stay. If, on the other hand, a trial in England would offer the plaintiff some real personal advantage, e.g. if he had come to live in England, a balance would have to be struck and the court might in its discretion consider that justice demanded that the trial should be allowed to proceed in England (see e.g. *Devine* v. *Cementation Co. Ltd.*)[1] To my mind, the real test of stay depends on what the court in its discretion considers that justice demands. I prefer this test to the test of whether the plaintiff has behaved 'vexatiously' or 'oppressively' on a so-called liberal interpretation of these words. I do not, with respect, believe that it is possible to interpret them liberally without emasculating them and completely destroying their true meaning. Surely if a man genuinely but wrongly believes that it is to his advantage for his action to

1. (1963) N.I. 65.

be tried in England rather than in Scotland, and accepts his solicitor's advice that this will cause the defendants no unnecessary expense or inconvenience, he cannot properly be called vexatious or oppressive if he oppose a stay of the action in England. Nevertheless, the court will impose a stay if, in their discretion, they decide that the defendants have proved that it would be unjust to refuse to do so." (see, also, the case of *Tanagba and others v. Pipinos Shipping Co. Ltd.* (1981) 1 C.L.R. 255).

The dictum of Lord Diplock in the above case and its restatement of the principle was adopted in *Castanho v. Brown & Root (U.K.) Ltd.* [1981] 1 All E.R. 143. See, also, the recent judgment in *Charles Guendjian v. Societe Tunisiene etc.* (supra) in which our Supreme Court upheld the decision of the trial Court to accept the preliminary objection raised as to jurisdiction.

With the above principles in mind we are now coming to consider whether in the circumstances of the present case the trial Court properly exercised its discretion in refusing to exercise its jurisdiction.

The learned trial Judge in refusing jurisdiction had this to say in his judgment:

"Considering the circumstances which surround the present case, I find that it is clear that both the cause of this action arose entirely in Greece, and the judgment of the Court against the plaintiff, is a judgment of the first instance Court of Athens. There is no evidence about the legal provisions which govern the case under the Greek Law and, therefore, this Court must treat the Greek Law as being identical with Cyprus Law on the issue. In his affidavit, as mentioned above, the defendant alleges that his main witness is the daughter of the plaintiff to whom he paid the whole amount due for the account of the plaintiff. It is, therefore, apparent that this witness is an essential witness in the case of the defendant. If this case is allowed to be tried ir Cyprus, the defendant will be deprived of his right to summon such witness and have the chance to examine her to prove his case. This, most probably, would cause tremendous injustice to the defendant and will be oppressive

and vexatious. Therefore, I am satisfied that the present case is not only a case which would have more conveniently been tried in Greece, but a case in which, if the proceedings are allowed to continue in Cyprus, then, very likely, irreparable loss and injustice will be caused to the defendant. In the circumstances, I find that the discretionary power of the Court must be exercised in favour of the defendant."

Having considered the circumstances of the present case which the trial Court took into consideration before it reached its conclusion, we are satisfied that the Court properly exercised its discretion in the case and that in the circumstances the continuance of the action would have worked injustice on the respondent because it would be oppressive or vexatious to him whereas no injustice would result to the appellant if he pursues his claim in Greece. In the result, this ground of appeal fails.

We are now coming to consider the last ground of appeal as to whether the application of the appellant for security for costs amounts to a waiver of his objection to the jurisdiction. We have already mentioned the reasons given by the trial Court in concluding that respondent's application for security for costs did not amount to a waiver of his objection regarding jurisdiction.

Counsel for appellant in arguing this ground of appeal submitted that the trial Judge was wrong in finding that respondent's application for security for costs did not amount to a submission to the jurisdiction of the Court and a waiver of his objection in that respect. Counsel contended that respondent could not on the one hand object to the jurisdiction of the Court and on the other hand invoke the jurisdiction of the Court by applying for an order for costs as by acting so on the one hand he approbated and on the other hand he reprobated. In support of his argument he relied on the *Assunta* case [1902] P. at p. 150 and Order 64, rule 2 of the Civil Procedure Rules and its corresponding English Order 70, rule 2 (of the old Rules). Order 64, rule 2 which incorporates similar provisions of English Order 70, rule 2, reads:

"No application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time,

nor if the party applying has taken any fresh step after knowledge of the irregularity."

It is clear from the wording of the rule and the examples given in the notes in the Annual Practice 1960 at p. 1988 that the rule is intended to apply where an irregularity arises and specifies the conditions which have to be satisfied to enable a litigant to apply to have the writ of summons set aside. It does not extend to cases where the jurisdiction of the Court is involved and in respect of which an objection may be raised not only by an application to have the writ of summons set aside but also by raising it in the defence (see *Carpantina Societe Anonyme* v. *The Firm P. Ioannou & Co.* (1942) C.L.R. Vol. XVIII p. 30, *Cyprus Hotels Co Ltd.* v. *Hotel Plaza Enterprises Ltd. and Others* (1968) 1 C.L.R. 423), and *Guendjian's case* supra).

In the first case, the following appears in the judgment at page 33:

"The learned President, District Court, in his judgment held that by their action the appellants had waived any irregularity in the proceedings. He pointed out that they had not applied to set aside service of the writ, and enumerated the steps they had taken after their entry of appearance. There is however a distinction between a mere irregularity in the proceedings which gives a right to have the proceedings set aside or amended within a reasonable time, and a lack of jurisdiction, which is fundamental and prevents the Court from hearing the action. A defendant by filing an unconditional appearance, is considered to have submitted to the jurisdiction of the Court, in the same way as he might have done by prior express agreement. If, however, as in the present case, he files an appearance under protest, or a conditional appearance, he is at liberty either to apply to have service on him set aside or to plead in his defence the Court's lack of jurisdiction. This was established in the cases of *Mayer* v. *Claretie*, [1890] T.L.R., 40, E.E.D. P. & P., 974, and *Firth* v. *De Las Rivas* [1893] 1 Q.B., 768.

As, then, the appellants filed an appearance under protest and put in a defence under protest pleading lack of

jurisdiction as a ground on which they relied, it seems to me that the acts they did, which were mentioned by the learned President, District Court, in his judgment, were merely such as were necessary for properly defending their action. They could not, therefore, on account of doing such acts be held to have submitted to the jurisdiction of the Court." (per Griffith Williams J.).

In the second, Triantafyllides, J. as he then was, said at page 436:

"The case should proceed to trial in the ordinary course and it is always open to the District Court, once the pleadings have been closed and the trial has commenced (the matters to which this action relates being then clearly defined) to take, if need be, such a course, for want of territorial jurisdiction, as it may deem fit–possibly under Order 33, rule 10, of the Civil Procedure Rules, or under its inherent jurisdiction for the purpose".

In the third case the defendants entered a conditional appearance but as the application to set aside the writ of summons for lack of jurisdiction of the Court was filed after the lapse of the time prescribed for the purpose, it was withdrawn and dismissed, and after an application for extension of the said time had also been dismissed and the trial Judge expressed the view that the defendants were still entitled to raise an objection to the jurisdiction by their statement of defence, the conditional appearance became unconditional. The defendants, however, by their defence raised a preliminary objection as to the jurisdiction which was upheld by the trial Court. On appeal, the Supreme Court found that in the circumstances of the case they were not prepared to find that the respondents had waived their right to object to the jurisdiction of the trial Court and affirmed the decision of the trial Court.

In the *Assunta* case (supra) on which counsel for appellant sought to rely in support of his contention the particular issue was one concerning irregularity under Order 70, rule 2 of the Rules of the Supreme Court and not of jurisdiction of the Court. The facts of the case were shortly as follows: A writ of summons in an Admiralty action in rem was issued at the suit of "Louis Dreyfus & Co." against the owners and parties interested

in the carrying ship, and the indorsement ran: "The plaintiffs, as owners of goods laden on board the steamship Assunta on a voyage from the river Plate to England, claim compensation for damage done to the said goods during such voyage". The writ was served with the warrant the same day and the vessel arrested. On the following day the defendants' solicitor gave an undertaking to appear, and on March 26 an appearance was entered. On April 10 bail was given by the defendants and the vessel released. On April 15 the plaintiffs, pursuant to the demand of the defendants, furnished the following particulars of the name and address of the plaintiffs: "Leopold Louis Dreyfus, 42, Rue du Louvre, Paris, trading as Louis Dreyfus & Co., 194, Bishopsgate Street Without, E.C." On the same day the defendants took out a summons for security for costs on the ground that the action was brought by a foreigner residing abroad. This summons was dismissed, and the defendants thereupon moved to set aside the writ, contending that the writ was improperly issued in the name of a firm which did not consist of two or more persons but only of one person in whose name the action should have been brought. The President of the Court, in the circumstances of the case, concluded as follows at page 155:

> " but having regard to the Admiralty practice in this Court, which, I think is not abrogated, and having regard to the indorsement on the writ, I am of opinion that in the Admiralty Court, where the only mistake made is that of not putting on the face of the writ what has been put on the back, and what if put on the face of the writ would have made it good, *there is a mere irregularity*. I therefore think under the circumstances that the mistake made is a mere irregularity, and that Order LXX., r. 1, applies, and an amendment may be allowed. It follows from this, that Order LXX., r. 2, applies also, for the defendants have taken a step, namely, asking for security for costs, after they knew the facts of the real composition of the firm of Louis Dreyfus & Co. and of their ownership of the goods. That enables me to say that I think *in this case all that has happened is mere irregularity, which can be cured by an amendment, and that I am prepared to allow*". (the underlining is ours).

In *A. De Lhoneux Linon EtCie* v. *Hong Kong & c., Banking*

Corporation, The Law Times 1886, Vol. LIV, N.S. 863 to which reference was also made by counsel for appellant, the plaintiffs, a Belgian Company at Namur instituted on 26th May, 1886 an action against the defendants in respect of transactions which took place in Japan, out of the jurisdiction of the Court. The writ of summons was served upon the Manager in London. On the 2nd June, 1886 the defendant issued a summons requiring the plaintiffs to give security for costs. On the 3rd June, 1886 notice of motion on the part of the defendants was given to set aside the writ and service on the ground that the cause of action arose out of the jurisdiction and that service of the writ of summons was not made upon the head officer, clerk, treasurer or secretary of the corporation. Bacon V.C. found that there was no ground whatever in the application neither in respect of the objection as to jurisdiction nor as to the service. In dealing, however, with the objection as to service, expressed the following opinion:

> "This company has set up its business in London, and has been carrying on business in London, as has been most distinctly proved. They hire a house, they write up their name, and send out cheques and other documents in which their London address also appears, and beyond all question they stamped upon themselves and upon their place of business the assumption that they were carrying on their business at that place. I cannot entertain any doubt about that being the case. If I had any doubt about it, however, I should say that the application which the defendants made for security for costs is a waiver of any objection to the service of the writ that could have been taken".

The above opinion was however expressed in respect of the service of the writ of summons, which was objected as irregular and not on matters touching the jurisdiction of the Court.

The present case is distinguishable from both the above cases, in that the objection raised and which was accepted by the Court was an objection as to the jurisdiction and not for any irregularity or defective service and the application for security for costs was made after the respondent had entered a conditional appearance and had filed an application to set aside the writ of summons for want of jurisdiction.

The question as to whether a fresh step taken in an action amounts to a waiver of jurisdiction was considered in *Rein* v. *Stein*, Law Times 1892 Vol. LXVI, N.S. 469. The facts of that case were as follows: The defendant on being served with notice of the writ, applied for and obtained an order to inspect the documents annexed to the affidavit upon which the order for service was granted. The defendant then entered a conditional appearance and after successfully resisting an attempt to strike it out, applied for and obtained on two occasions an extension of time within which to deliver the defence on the ground that he intended to object to the jurisdiction. This the defendant subsequently did by summons and obtained an order setting aside the previous order made ex-parte whereby leave was granted to the plaintiff to issue the writ for service out of the jurisdiction and to serve the defendant with notice of same, and also setting aside all subsequent proceedings on the ground that the Court had no jurisdiction. The plaintiffs appealed to the Divisional Court and argued that the defendant by applying to see the documents and also for extension of time within which to defend, had waived his right to object to the jurisdiction. Cave J. in delivering the judgment of the Divisional Court, which was affirmed on appeal, though allowing the appeal on the ground that the Court had jurisdiction, had this to say in respect of the argument on waiver, at page 471:

> "It seems to me that, in order to establish a waiver, you must show that the party alleged to have waived his objection has taken some step which is only necessary or only useful if the objection has been actually waived, or if the objection has never been entertained at all. If, for instance, after leave to issue a writ an ordinary appearance is entered, that is a matter which indicates that the defendant either never has entertained the notion, or, if he did entertain it, he abandoned it. Such a step would be unnecessary and useless if the intention of insisting on his objection still held good".

And further down at the same page:

> "But here it is obvious that the defendant was still insisting on and intending to proceed with his notice of motion. He did no more, it seems to me, than he had a right to do; that is to say,

take steps to procure a sight of the affidavit which he had got to answer, and upon which the leave to issue the writ had been obtained. With regard to the conditional appearance and with regard to obtaining time to put in a statement of defence, whatever that might amount to under ordinary circumstances, and where no notice of motion has been given, I think there is this: looking at what had been done, even assuming that those steps were not strictly necessary, yet looking at the position in which matters were, that a conditional appearance had been entered, that an application to strike out that conditional appearance had been resisted, and that on Dec. 5 this summons was taken out to discharge the order for issuing the writ, it seems to me it would be quite an unfair inference to draw from what had been done that the defendant had abandoned his intention to object to the jurisdiction by applying to set aside this writ. On those grounds it seems to me that that objection cannot be supported". (See also *Guendjian's case* (supra) on the question as to whether an application for security for costs amounts to a waiver to an objection as to jurisdiction.

In the circumstances of the present case from the mere fact that the respondent, after having filed an application to set aside the writ of summons for want of jurisdiction, he applied for security for costs an inference cannot be drawn that he abandoned his intention to object to the jurisdiction. We, therefore, agree with the finding of the learned trial Judge in this respect and with the reasons for which he arrived at his conclusion. The practice of applying for security for costs whilst proceedings for setting aside the writ of summons for want of jurisdiction were pending, is not unknown under the English practice. In *Egbert* v. *Short* (supra) there was such an application and the Court in dismissing the action made an order for payment of the costs of the successful defendant out of the fund which had been paid into Court as security for costs.

We shall next deal briefly with the contention of counsel for appellant that the respondent by having acted as he did, he both approbated and reprobated. The principle of approbation and reprobation has been explained in *Banque de Moscou*

v. *Kindersley and Another* [1950] 2 All E.R. 549 at p. 552 by Evershed M.R. as follows:

> "The phrases 'approbating and reprobating' or 'blowing hot and cold' are expressive and useful, but if they are used to signify a valid answer to a claim or allegation they must be defined. Otherwise the claim or allegation would be liable to be rejected on the mere ground that the conduct of the party making it was regarded by the court as unmeritorious.
>
> From the authorities cited to us it seems to me to be clear that these phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, secondly, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent. These requirements appear to me to be inherent. for example, in *Smith* v. *Baker and Ex parte Robertson, Re Morton.* (See also in *Evans* v. *Bartlam* the speech of Lord Atkin [1937] 2 All E.R. 649):
>
> > 'I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor, who asks for and receives a stay of execution, approbates the judgment, so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election':
>
> and the speech of Lord Russell of Killowen (ibid., 652):
>
> > 'The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit' ".

Such principle is not applicable in the present case as the

respondent has not made an election for which he later sought to resile, or derived any material benefit precluding him from disputing the validity of a transaction while still in the enjoyment of the benefit.

Before concluding we wish to add that in examining the various cases referred to in this judgment, we have noticed that in the majority of them the order made by the Court was one for stay of the proceedings, whereas in the present case the Court made an order dismissing the action. It has not been raised by this appeal and has not been argued as to whether the proper order in the circumstances should have been one of staying the proceedings, or dismissing the action.

In *Egbert* v. *Short* (supra) Warrington J. in granting the application, had this to say at page 214:

> "In my judgment there is no reason for staying the action. It is true that the action was stayed in *Logan* v. *Bank of Scotland* (*No. 2*) but for the reason which I have pointed out in the course of the argument, namely, that the application there was made on behalf only of certain defendants. The proper order will be to dismiss the action and order the defendant's costs to be paid out of the fund which has been paid into Court as security for costs, and the balance of the fund to be paid to the plaintiff".

We are inclined to agree with the above dictum but we leave the matter open to be decided when such issue may properly be raised before this Court.

In the result, this appeal fails with costs in favour of the respondent against the appellant.

Appeal dismissed with costs.