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MAVROVOUNIOTIS
v.
NICOLAIDOU.

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

MILTIADES MAVROVOUNIOTIS, *Appellant,*

v.

ESTATE OF CHRYSTALLENI CH. NICOLAIDOU,

Respondent.

Contract—Sale of immovable property—Power of attorney—Fraud —Misrepresentation—Undue influence—Mejellé, Articles 17, 18, 103, 164, 165, 356, 357, 358, 361, 945, 957, 960—*Application of Equity—Findings of fact—Principles applied in hearing appeals from decision of a Judge.*

C.N., a woman of 65, was the owner of a house in Larnaca which she had offered to sell to the appellant who had lived in it for some years. She was suffering from cancer in its last stages, and went to the clinic of Dr. I. in Nicosia where she underwent a serious operation. Ten days after the operation she sent a message to appellant at Larnaca offering to sell him the house. He visited C.N. but they could not agree on the price. A few days later in response to another message he went to see her at the clinic of Dr. I. when she accepted appellant's offer of £430. Dr. I. told the Certifying Officer that C.N. was in a fit state to sign a document, whereupon after reading it she signed a power of attorney authorizing her cousin N.I. to transfer her house into appellant's name. On the same day after obtaining registration of the house in his name appellant returned to the clinic and paid C.N. the purchase money, £430. Of this sum C.N. paid £50 to her cousin N.I. as a gift and £50 to appellant for the right to live in the house until her death, and £10 to her nurse F. C.N. decided to give £50 to appellant to give to her god-child A., but before this sum was paid to appellant Mr. Nicolaides, nephew of C.N. and co-plaintiff with her in the action, arrived at the clinic. He scolded C.N. for throwing away her money: there was a heated discussion and C.N. thereupon changed her mind and authorized Mr. Nicolaides to cancel the sale. Action was brought alleging that appellant in collusion with N.I. and F. had procured the power of attorney by the exercise of fraud, misrepresentation and undue influence upon C.N. whom plaintiffs alleged to be of unsound mind. The trial Court rescinded the contract of sale.

Held (Stronge, C.J., dissenting except as to (3)) that—

(1) That the evidence did not establish that any fraud had been practised upon the deceased, or that the power of attorney had been procured by any undue influence, deceit, or trick; and further that the trial Court's findings of fact were inconsistent with and contrary to the evidence.

(2) The only kind of fraud known to Ottoman law is that contained in Articles 164, 165, 356 and 357 of the Mejellé.

(3) Under Ottoman law fraud by itself is not a ground for setting aside a contract of sale; such a contract can only be set aside when excessive injury (*ghaben fahish*) is proved.

(4) As no excessive damage was sustained by the deceased she had no right to rescind the contract of sale, even if it had been induced by fraud (*tagrir*).

(5) The principle of undue influence is unknown to the law in force in Cyprus.*

(6) The rule that an appellate Court will not disturb a trial Court's finding of fact if they are such as could have been reasonably arrived at upon the evidence, applies only to verdicts of a jury. An appeal from the decision of a Judge is in the nature of a rehearing and it is the duty of the appellate Court to weigh the conflicting evidence and draw its own inferences and conclusions.

(7) Where a Judge's findings of fact depend upon the credibility of witnesses an appellate Court has power to set such findings aside where the trial Judge has failed to take account of circumstances material to an estimate of the evidence, or where he has believed testimony which is inconsistent with itself, or with indisputable fact.

(8) The application of principles of equity is contrary to Clause 27 of the Cyprus Courts of Justice Order, 1927, which provides that the only law to be applied by the Courts in Cyprus is " Ottoman law as modified by Cyprus Statute law."

(9) The right to set aside a contract of sale on the ground of fraud does not pass to the heirs of the person defrauded, and therefore plaintiff had no cause of action. (Mejellé, Art. 358).

(10) The action was wrongly instituted ; the deceased, alleged to be of unsound mind, sued personally in her own name and also through her advocate as her next friend.

Held per Stronge, C.J. :

(1) There was evidence before the trial Judge which entitled him to set aside the contract of sale either on the ground that the deceased when entering into it was not of sound memory and discretion within the meaning of Article 361 of the Mejellé, or that, being satisfied that there was fraud in the sense of unconscientious dealing, he had jurisdiction to grant relief in accordance with equitable powers long applied by the Courts in Cyprus in cases of inequitable and unconscionable conduct.

(2) The Courts in Cyprus have always regarded Articles 17 and 18 of the Mejellé as conferring wide powers to apply equitable principles extending to every class of case where a party has sought to gain an unconscientious advantage.

Appeal from a decision of Fuad, J., sitting in the Divisional Court at Larnaca.

The deceased Chrystalleni Nicolaides, a widow of about 65 years of age, suffering from cancer in the uterus, was admitted in September, 1929, into the private clinic of Dr. Christakis Ieronymides of Nicosia for an operation. She was the owner of a house and some other real property at Larnaca. Long before she came to Nicosia for the operation she wanted to sell the house in dispute. At the

* The present action was heard before the Contract Law, 1930, came into force.

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clinic in Nicosia she again expressed her desire to sell the house, as she was anxious to pay certain debts and particularly to release her jewellery which was pledged to Mr. Nicolaides (co-plaintiff), and at the same time to help financially her cousin Nicolaos Ieronymides, and one Angeliki, her god-child.

The defendant and his wife were living in the same house with the deceased who was fond of both of them as they were kind to her and used to look after her when her relations were away from Larnaca in summer. She wished to sell her house to defendant even for less than its real value. At the clinic in Nicosia deceased promised Nicolaos Ieronymides to assist him as soon as she sold her house. In response to a message from deceased that she wanted to sell the house to him defendant visited her at the clinic, when she offered to sell it for £500. Defendant offered £400, consequently no agreement was reached, and defendant returned to Larnaca. About the end of September deceased sent her nurse Flourenzou to Larnaca to tell defendant to come to Nicosia as she had finally decided to sell the house to him. On 1st October defendant came to Nicosia with Nicolaos Ieronymides and Flourenzou. On the same day deceased agreed to sell the house to defendant for £430. A power of attorney was prepared, signed by the deceased and certified by the Certifying Officer, Mr. Joseph Braggioti, by which her cousin Nicolaos Ieronymides was empowered to effect registration of the house in defendant's name on her behalf. After registration of the house in defendant's name on 1st October defendant at the clinic paid deceased the purchase money, £430. £50 of this was paid by the deceased as a gift to Nicolaos Ieronymides, and £10 to Flourenzou in settlement of a debt due. Deceased further paid £50 to defendant for the right to live in defendant's house until she died. Before making a further payment of £50 to appellant for one Angeliki Mr. Nicolaides (co-plaintiff) and his wife arrived from Larnaca. A heated discussion took place in consequence of which the deceased changed her mind and clearly authorized Mr. Nicolaides to rescind the contract of sale, and she later signed a letter and a telegram drafted for her by Mr. Nicolaides. On 16th October the action was begun in the names of the deceased personally as plaintiff, and of Mr. Nicolaides, as her next friend. The plaintiff died before the hearing and the action was continued by Michael N. Nicolaides, her executor.

The relief claimed in the Writ of Summons was for cancellation of a declaration of sale and registration in defendant's name of a house and shop, sold by virtue of a power of attorney on the ground that the said power and

sale were obtained by the exercise of fraud, undue influence and misrepresentation upon the deceased who was mentally incapable.

The Statement of Claim alleged, paragraph 4: "On 1.10.29, while plaintiff was at Nicosia attended at the clinic of surgeon Christaki Ieronymides after a serious operation, defendant, in collusion with a certain Nicolaos Ieronymides, and one Flourenzou Patsalou, who was looking after plaintiff and exercised influence upon her, especially by means of narcotic enemas which she used on the sick woman—visited plaintiff unawares, who was in a bad condition, and by false representations and through the influence they used to exercise on the sick [woman], they took advantage of her mental confusion and she signed a power of attorney authorizing the above-mentioned Nicolaos Ieronymides to make the necessary declaration of sale of the properties in dispute."

Paragraph 5 alleges that by virtue of the power of attorney a declaration of sale was made with the object of buying the properties at much less than their real value, which exceeded £600.

Paragraph 6 alleges that the sale price declared at the Land Registration Office was £430 while the actual price was £380.

The defendant in his defence denied that plaintiff was suffering from any mental confusion or that she was incapable of administering her estate. He alleged that before going to Nicosia for the operation the deceased had offered to sell him her properties and had repeatedly asked him to go to Nicosia to arrange for the sale. He denied there had been any collusion or the exercise of any undue influence, and alleged that the properties were sold in pursuance of a power of attorney drawn up in the presence of and at the request of the deceased in favour of her cousin in whom she had confidence.

After reviewing the evidence the learned trial Judge said:

"I find therefore as a fact that the so-called contract of sale was based on fraud and misrepresentation and obtained by undue influence and also at the time the deceased's mind was so deranged by suffering disease and age that she was not in a position to understand the nature and the consequence of her acts.

The Law presumes that any person who is of age is capable of and competent to enter into contractual relations unless it is proved that his mind is so deranged by age or disease as not to be able to understand the nature and the consequence of the transaction; the onus of proof being upon the person who alleges the existence of such a condition. There is also an inherent jurisdiction in the Court to come to the relief of any person who has been tricked or misled

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to enter into contracts either by fraud, misrepresentation or mistake or in cases where advantage has been taken of the weakness of the mind or body of the person concerned. It is quite clear that the Courts in exercising this jurisdiction require clear evidence in order to give the relief asked for. The Courts will not come to the assistance of a person who on account of carelessness, recklessness or lack of foresight enters into a contract which might prove disastrous later. It is only the people who are the victims of unlawful acts on the part of others who will be relieved."

After an examination of the evidence the learned Judge concludes his judgment:

"In addition to provisions in the Mejellé dealing with contracts of this kind—entered into by weak-minded persons—fraud vitiates everything to which it attaches. Article 1610 of the Mejellé mentions fraud as a cause invalidating a bond. The words of the Article mean fraud in the document itself. But if fraud were shown not in the document itself, but in the transaction which was the basis of the document, it would equally invalidate it, inasmuch as apart from any Statutory provision, fraud vitiates everything to which it attaches." *Sotiri* v. *Sotiri* (2 C.L.R. 179).

Judgment was entered for the plaintiff with costs.

The defendant appealed.

Clerides for appellant.

Triantafyllides and *M. N. Nicolaides* for respondent.

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JUDGMENT:—

Stronge, C.J.

STRONGE, C.J.: This was an action to set aside (1) a contract of sale and (2) the registration (consequent thereon) in the defendant's name of a house and shop in Scala owned by one Chrystalleni Nicolaidou who was the plaintiff when this action was begun but died on the 11th February, 1930, shortly after the pleadings were closed. I shall for brevity's sake refer to her throughout this judgment as the patient.

The learned Judge (Fuad, J.) who tried the case found on the evidence first that the contract of sale was based on fraud and misrepresentation, secondly that it was obtained by undue influence, and thirdly that the mind of the patient at the time the contract of sale was made was so deranged by suffering, disease and age that she was not in a position to understand the nature and consequence of her acts. As regards two sums of £50 and £10 paid by the patient immediately after completion of the contract of sale, the former amount to Nicolaos Ieronymides, a relative by marriage, and the latter to Flourenzou, the patient's nurse, the learned Judge held that these were really amounts paid by or procured by the defendant to be paid as reward

for the assistance given by Nicolaos and Flourenzou in the carrying out of the fraud upon the deceased, and that neither the estate of the patient nor her heirs should be called upon to repay these amounts, and he decided, consequently, that on repayment to the defendant of £320, being £60 less than the purchase price paid by the defendant to the patient, the contract of sale should be rescinded.

Against that decision the defendant has appealed to this Court. The grounds of his appeal are, in effect, (1) that there was no evidence of fraud or undue influence which would justify the setting aside of the sale and transfer, (2) that the inferences of the Court on the facts were against the weight of evidence, and (3) that the trial Court was not justified in depriving the defendant of any part of the purchase price he had paid as was done by its direction that on the repayment of £320 to the defendant the transaction should be set aside.

The first two grounds of appeal render it necessary to see whether there was evidence upon which the trial Judge could properly find as he did. Although the Rules of Court in Cyprus dealing with appeals do not *expressly* provide as does O. LVIII, r. 1 of the English Rules that an appeal is to be a rehearing, the Court of Appeal is empowered by O. XXI, r. 20 (corresponding to part of Eng. O.LVIII, r. 4) " to draw inferences of fact, and to give any judgment or make any order which it shall appear to the Court should have been given or made and to make such further or other order as the nature of the case may require."

In view of the wide powers thus conferred on the Cyprus Court of Appeal, I think that in dealing with appeals from a Judge where the veracity of the witnesses is in question it is in much the same position as the Court of Appeal in England in regard to reviewing the evidence. That position is stated in the following well-known passage from the judgment of Lord Sumner in the *S.S. Hontestroom* v. *S.S. Sagaporack* (1) where, after pointing out that an appeal is by O.LVIII, r. 1 made a rehearing, the noble lord proceeds to say :— " None the less not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge and, unless it can be shown that he has failed to use, or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at merely on the results of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the Judge to

(1) (1927) A.C. 37.

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be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone."

In the instant case the trial Judge had evidence before him of the following facts—the patient was a woman, 65 years of age. For some months prior to September, 1929, she had been suffering from cancer in the uterus, to alleviate the intense pain of which, Flourenzou, her nurse, one of the persons who took part in the transaction assailed in the action, had been in the habit of administering narcotic enemas. The patient when removed on 16th September, 1929, to the clinic of Dr. Ieronymides at Nicosia was in the final stage of the disease. On 21st September she underwent a serious operation—the removal of her uterus and its appurtenances. Ten days later, on 1st October, she entered into the contract of sale the validity of which is in this action impugned. She was then so feeble in body that in order to sign the power of attorney enabling the declaration of transfer to be made she had to be propped up in bed with pillows and a chair, her wound being still open.

As to her mental condition on that date, Dr. Ieronymides says: "I knew she was not in a fit condition to sign any document or transact any business whatever." He admitted, however, that although that was the condition to his knowledge he, nevertheless, told Mr. Braggioti, the Certifying Officer, that she *was* fit to sign a document and explained to the Judge at the trial that he did so because he thought the patient was only going to sign a document making a small gift of £20 or £30 to his cousin Nicolaos Ieronymides and actuated by a desire to help his cousin whom he understood to be in a bad way financially, he made this false statement to Braggioti. That Dr. Ieronymides should so seriously abuse the confidence reposed in him as a member of an ancient and honourable profession by deliberately stating that which he knew to be false is, beyond all question, deserving of the severest censure. Whether, however, his statement to Mr. Braggioti was in fact the truth and the patient was at the time of sound mind and discretion or whether his sworn evidence to the Court to the directly opposite effect was faithworthy, was, I think, a matter as to which the trial Judge, who had the advantage—which we have not—of seeing and hearing the witness, was in a better position to decide than we are. The trial Judge, for reasons which he states in his judgment, came to the conclusion that the evidence of Dr. Ieronymides was to be believed, and the fact that Dr. Ieronymides having informed Braggioti that the patient was mentally capable of executing a document telegraphed very shortly afterwards on the same day to Nicolaides to come to

Nicosia would seem to be a circumstance more in keeping with his sworn evidence than with his statement to Braggioti.

(After considering the evidence the learned Chief Justice proceeds):

I have twice read over very carefully the evidence relating to this transaction given for the defence, and I have also tabulated in parallel columns those portions of the evidence of the first five witnesses for the defence which deal with the striking of the bargain and the execution of the power of attorney. A careful comparison of their evidence thus tabulated brings to light such numerous inconsistencies and contradictions regarding matters not only of detail but of substance as lead me to the conclusion that the trial Judge was amply justified in declining to believe that their account of what took place was either accurate or truthful. To set out *seriatim* all the contradictions and inconsistencies thus revealed would prolong this judgment to an inordinate length, and I shall content myself with mentioning two or three instances as illustrations. (After setting out examples of inconsistencies in the evidence the judgment continues):

The position, therefore, at the close of the case was that the Judge had before him, if he considered it reliable, evidence of a bargain and sale of realty made for inadequate consideration with a woman sixty-five years of age, in the last stages of a painful and deadly disease, the wound from her operation still open, so feeble bodily that she had to be propped up in bed, her mind in such a state of weakness that she was not fully competent to form an independent judgment or to arrive at any steadfast decision. There was also evidence from which he could infer some haste to have the transaction finally completed on that morning. He came to the conlusion that this evidence was reliable and that the parties to the bargain were not on equal terms; that the patient was in effect as clay in the hands of the potter, and that the account of the occurrence given by the witnesses for the defence was unreliable. I have always understood that in cases where the foregoing circumstances were proved, an English Court of Equity, if it came to the conclusion that the person prejudicially affected by them had not acted as a free and reasonable agent but had been imposed on, would declare the transaction void as being an unconscionable and overreaching bargain, that is to say, a fraud (*Longmate* v. *Ledger* (1); *Clark* v. *Malpas*). The learned trial Judge did come to such a conclusion in this case for reasons which are stated in his judgment, and in my opinion he could justifiably, on the evidence before him, have arrived at that conclusion.

(1) (1860) 2 Giff. 157.

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It was, however, forcibly argued for the appellant that Cyprus Courts have no such powers of dealing with cases of unconscionable bargains as are possessed by English Courts because, it was said, Clause 27 of the (Imperial) Cyprus Courts of Justice Order, 1927, ordains that the law to be applied by Courts in Cyprus is Ottoman Law as modified by Cyprus Statute Law, and therefore those principles which an English Court applies in setting aside those fraudulent dealings termed unconscionable bargains do not apply in Cyprus save and except in so far as they are to be found expressly stated in, or are inferentially deducible from, the provisions of the Mejellé. This contention appears to me to be well-founded notwithstanding the fact that it would not be difficult to find in the Cyprus Law Reports cases to show that in actual practice (*e.g.*, the admission of dying declarations in murder cases which, so far as I am aware, has no place in Ottoman Law) the Supreme Court has not always been content to apply Ottoman Law alone.

I shall proceed, therefore, to state those provisions of the Mejellé which appear *prima facie* to have any bearing on the matter in hand, merely observing *in limine* that it is rather extraordinary to find that, though this code has been discarded as out-of-date in Turkey, its country of origin, portions of it which have, I am glad to say, diminished steadily in the last few years, are still in force in this British Colony. Dealing first of all with "excessive deception" and "Cheating" or "Fraud", the provisions of the Mejellé are as follows :—

Article 164—*Tagrir* is to cheat.

Article 165—*Ghabn Fahish* (excessive deception) is to be deceived in respect of (*inter alia*) real property to the extent of one-fifth or to any greater amount.

In other words deception as to the price or value of realty does not amount to excessive deception unless it amounts to at least one-fifth of the actual value.

Article 356—If there is an excessive deception (*ghabn fahish*) without fraud (*tagrir*) in a sale, the person deceived cannot annul the sale.

Article 357—When one of the parties to a sale has defrauded (*tagrir*) the other and it has been ascertained that there has been excessive deception (*ghabn fahish*) the person who is deceived can avoid the sale.

The meaning of these two Articles would seem to be that where there is fraud (*tagrir*) accompanied by *ghabn fahish* (excessive deception as to price) the sale can be avoided ; where there is *ghabn fahish* alone it cannot.

In my opinion, judging from the context, the "cheating" or "fraud" mentioned in these Articles does not mean the unconscientious use of the power arising from the

circumstances or conditions of the parties contracting, which is a fraud in equity, but means deceit or circumvention in the ordinary or popular sense of the term. These Articles have, consequently, in my judgment, no application to the present case.

Next, as regards Mental Capacity.

Article 945—" *Ma'tuh* is the person being so deranged in mind that his understanding is small, his speech confused and his plan of action bad."

Article 957—" Infants, madmen and people of unsound mind (*ma'tuh*) are of themselves prohibited from dealing with their property."

Article 960—" Verbal dispositions, like buying and selling made by the prohibited persons mentioned in (*inter alia*) Article 957 are not held good."

Dealing next with " Contracts of Sale or barter " (*buyu*) I come to Article 103.

Article 103—" Concluded bargain is the two parties taking upon themselves and undertaking to do something. It is composed of the combination of an offer (*Ijab*) and an acceptance (*Qabul*)."

As Article 361 seemed to me to have a very important bearing on this case, I have considered it advisable to have a careful and exact translation of it made direct from the Turkish by the Chief Registrar and Interpreter. It reads as follows—

" In the making of a contract of sale it is imperative that its essential element should emanate from competent persons that is to say persons of sound mind and discretion (*Akil* and *mumeyiz*) and that it should relate to a subject matter admitting of its operation."

Ali Hydar in his Commentary on the Mejellé explains " Essential element " as meaning offer and acceptance. (Commentary on Articles 149, 197–199, 362, 363 and 369).

As I understand Article 361 a contract of sale in order to be valid must comply with the requirements of the article and if it fails to do so it is not a valid contract. In the case before us there was evidence, believed by the trial Judge, that the patient was in a state of mental confusion and he has upon the whole of the evidence as to her mental state come to the conclusion that her mind was at the time deranged by suffering, disease and age. I fail to see how a contract of sale made by a person in such a state of mental infirmity can be said to emanate from a person of sound mind and discretion, and I am of opinion, consequently, that the contract was invalid on this ground.

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I now come to the equitable principles to be found in the Mejellé. In the 100 maxims which form part of and are set out in the forefront of this code, there are two which appear to be statements in broad and general terms of equitable principles; these are Articles 17 and 18. Art. 17 says—

"Hardship (*meshaqqat*) causes the giving of facility. That is to say, difficulty becomes a cause of facility, and in time of embarrassment it becomes necessary that latitude should be shown."

Article 18 says—

"Where a matter is narrow, it becomes wide. That is to say, so far as hardship is experienced in a business latitude and indulgence are shown."

"*Meshaqqat*" is given by Redhouse's Dictionary as meaning "Hardship, suffering, trouble." That these two maxims have been looked upon by the Cyprus Courts as embodying equitable principles appears from the case of *Najem Houry* v. *ex-King Hussein* (1) where the question was whether a lease to the defendant ex-monarch expressed to be "for such period as His Majesty shall live or reside in Cyprus" was of sufficiently certain duration to be valid having regard to the conflicting provisions of the Mejellé and the Reglement of 10 Rebi-ul-Evvel, 1291. Belcher, C.J., in the course of his judgment referred to Article 17 saying: "If the fundamental principles which are to be found at the beginning of the Mejellé are given a natural interpretation, it would appear to be the duty of the Court to do substantial justice between the parties in such a case as this in the way of obliging the lessee to carry out his express contract. Article 17, for instance, says 'difficulty calls for facility.' In other words, the need of clearing up an embarrassing situation is a legitimate motive for taking to that end measures proper to resolve the difficulties and for showing oneself tolerant." The learned Chief Justice went on to say: "There can in my view be no straining of these fundamental articles in utilizing them to support a contract which is nowhere expressly forbidden in other parts of the same code."

Dickinson, J., in the same case after referring to the origin of the Mejellé said (p. 57) that the Commission responsible for its production "at the commencement of their work set down certain articles which appear to be maxims of equity for the guidance of the Courts. These maxims purport to give the widest powers to the Courts to see that substantial justice is done."

In addition to the case just referred to, a number of cases were cited to us on behalf of the respondent in which the Supreme Court, without expressly mentioning Articles 17 and 18 of the Mejellé, has granted or withheld relief upon

(1) 13 C.L.R. 49.

equitable principles. These cases were all, so far as I am aware, excepting possibly *Haralambo* v. *Ashmore & another*, termed "Ottoman actions", that is actions in which all the defendants were Ottoman subjects, and at the time they were decided the law to be applied in such actions was Ottoman Law as modified by Cyprus Statute Law (Clause 23 of the Imperial Courts of Justice Order, 1882). To the facts and relevant portions of the judgments in these cases I think it necessary to refer.

In *Hadji Yanni Papa Nicola* v. *Christodoulo Yanni* the parties on the death of the wife of the defendant, in ignorance of their legal rights, entered into an agreement as to the division of her immovable property, and the defendant, an ignorant peasant, bound himself in a penalty of £150 to abide by the terms of that agreement. He was relieved by the Court from the obligation thus incurred. Smith, C.J. (acting), after stating (p. 55) that there was nothing to be found in the Mejellé to help to a solution of the question before the Court, says: "We must therefore decide this case on general principles," and at the foot of the same page goes on to say: "Again there is a well known class of cases decided by the Courts in England on principles somewhat analogous. We allude to that class of cases where the Courts have decided it would be inequitable to enforce transfers or agreements relating to property made or entered into by a party in ignorance or misconception of his own right to the property." After stating the principles on which a Court of Equity will grant relief in such cases, he says: "The present case seems to us to be one to which the principles above stated should apply."

Zenobio v. Meirem Osman (1) was a case of a sale of immovable property, which with the object of evading the law was not registered and remained, consequently, registered in the vendor's name. After the purchaser had been in undisputed occupation for eight years, the property was sold by order of the Court in satisfaction of a judgment debt of the vendor.

Held: The heirs of the purchaser were not entitled to recover back the purchase price as the purchaser by allowing the property to remain registered in the vendor's name must be taken to have acquiesced in any consequences which might ensue amongst which was the liability of the property to be sold by the vendor's creditors.

The Court in this case acted (p. 172) "on principles of general equity which forbid a vendor to take a wrongful advantage of his own share in a transaction which he knows is without any legal effect." Smith, C.J., says (p. 172) that in such a case to allow the vendor to retain the purchase

(1) (1893) 2 C.L.R. 168.

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money and possession of the land as well would be a species of fraud upon the purchaser which it would be inequitable to allow.

In *Georghio Anastassi* v. *Haji Kyriako and another* (1) it was decided that a vendor who sells Mulk property registered in his name—no change in the registration being made—is entitled to recover possession unless the purchaser has acquired a prescriptive title. It was not admitted and not proved that the purchase moneys had been paid. Smith, C.J., (p. 244) says: "The Supreme Court has in several cases laid down the principle that a person who has affected to dispose of property in a manner not recognized by law should not on equitable grounds be allowed to recover the possession of his property and retain the money too."

In *Chakalli* v. *Kallourena* which decided that an action for damages for breach of a verbal agreement to sell Arazi Mirié was maintainable, the Supreme Court said (p. 249): "We will now proceed to enquire whether a valid contract has been proved to exist, and secondly whether there is anything in the Ottoman Law which either expressly provides that an action for damages for the breach of it cannot be sustained, or, if nothing specific be contained in the law, whether there is anything impliedly forbidding the application of that fundamental legal maxim *ubi jus ibi remedium*. After pointing out (p. 252) that the Mejellé contains no statement to the effect that the breach of every agreement imports a damage, the Court went on to say (p. 253): "In both classes of cases we have mentioned above (viz., vendees' claims for damages for non-delivery and lessees' claims for damages for non-delivery of possession by lessors) considerable pecuniary loss might be inflicted by the breach of the agreement and it seems to us to be contrary to natural justice and equity that the person who has suffered the loss should not have a legal remedy. The law cannot intend that a man should be able to take advantage of his own wrong."

In *Haralambo* v. *Ashmore & another* one of the questions raised for decision was whether the plaintiffs, the vendors of immovable property—no change of registration having been made—could maintain an action to recover possession without re-paying the purchase money. Hutchinson, C.J., (p. 23) says: "I am of opinion that there are no equities between these parties which would make it right for the Court to refuse to grant their legal rights to the plaintiffs."

The next case I shall refer to is *Savva Haji Paschali & another* v. *Panayi Haji Togli* (2); the defendant in that case had agreed that in consideration of Savva Haji Paschali

(1) (1895) 3 C.L.R. 243.
(2) (1907) 7 C.L.R. 76.

marrying his daughter, he should have the use and enjoyment of certain property during the defendant's lifetime, but that it should not be registered in Savva Haji Paschali's name. After the marriage the defendant resumed possession of the property and repudiated the agreement. Tyser, C.J., in referring to the rule acted on in the Cyprus Courts that it would be inequitable to allow a vendor to recover possession of the land and at the same time retain the purchase money, says that " this rule was no doubt based upon the old English principle that he who invoked the aid of equity to obtain an equitable remedy should not be allowed to retain it except on terms of doing equity to the person against whom he sought it." In dealing with the nature of the damages to be awarded in such cases he says (p. 79): " The Court, therefore, in such cases will award damages but . . . . . these damages are not damages for breach of contract nor are they damages of the kind that are awarded as compensation for injury to person or property. They represent a sum of money which on equitable principles apart from either contract or tort the Court declares the defendant liable to pay."

In *Koukoulli* v. *Hamid Bey* (1) land was leased verbally and consequently invalidly by the defendant to the plaintiffs to cultivate it and enjoy the produce until the following year's harvest. The plaintiffs double-ploughed the land and expended other labour on it, but before they had derived any benefit from the land the defendant lessor sold it and the purchaser ejected the plaintiffs. Tyser, C.J., (p. 88) says: " it would be inequitable for the defendant lessor to take a wrongful advantage of his own share in a transaction which he knows is without legal effect." Bertram, J., considered it would be inequitable to allow the defendant to repudiate the agreement and at the same time reap the benefit of the expenditure which, in reliance on that agreement, the plaintiffs had incurred and held that the plaintiffs were entitled to relief on an equitable principle analogous to that on which the Courts in *Zenovio* v. *Osman* (*supra*) and *Haralambo* v. *Ashmore* (*supra*) had ordered the return of the purchase money.

In *Christofi Haji Nicola* v. *Haji Pavlou* (2) the defendant could not agree with his co-heirs as to the division of their father's estate, and not desiring to go to law with members of his own family he adopted the expedient of giving the bond sued on in the action to the plaintiff on the understanding that the plaintiff should recover judgment on it, issue execution against defendant's immovables, obtain a partition marking off the defendant's share, buy in that

(1) (1907) 7 C.L.R. 85.
(2) (1911) 10 C.L.R. 41.

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share at the sale and register it in the name of the defendant's daughter. The plaintiff in fraud of the arrangement sought to enforce the bond as being an acknowledgment of a personal debt due to him.

Held: That the bond had been obtained under such circumstances as to render it fraudulent or at least inequitable for him to take the present proceedings. The headnote reads: "An acknowledgment of debt, though in customary form so as to be conclusive under Article 1610 of the Mejellé, will not be enforced if given under such circumstances as to render it fraudulent or inequitable for the person to whom it was given to sue for its enforcement."

In the case *re N. Ch. Tavernaris & Brothers, Bankrupts*, the question was whether the actions of a certain person rendered her liable for the debts of the bankrupt firm on the ground of her having thereby held herself out as a member. The Supreme Court in intimating that there had been sufficient compliance with Article 12 of the Ottoman Commercial Code said (p. 47): "Even if it were not so, it would be altogether against the spirit of equity to allow an omission on the part of a partnership firm to comply strictly with the provisions of the law affecting firm names to operate to the injury of creditors whose confidence it has invited and then abused."

From the foregoing decisions, extending over the period 1888 to 1927, it is, I think, clear that the Supreme Court of Cyprus has always regarded Articles 17 and 18 of the Mejellé as conferring wide powers in regard to the application of equitable principles and has constantly and consistently exercised those powers, not limiting their exercise to a single class of case, viz., those cases requiring merely alteration of registration of lands to the name of a purchaser from the name of a vendor who has sought to take advantage of the registration remaining in his name to resume possession retaining at the same time the purchase money, but extending their application to every class of case where one party has sought to gain an unconscientious advantage. I fail to see how in face of these decisions it can be maintained that the Court has no power to apply those equitable principles in the present case and grant equitable relief against the unconscientious advantage of certain circumstances taken by the purchaser.

For the reasons given I am of opinion that there was evidence before the trial Judge which, if believed by him, entitled him to set aside the contract of sale in this case either on the ground that the patient when entering into it was not of sound memory and discretion within the meaning of Article 361 of the Mejellé and that her contract was, therefore, not valid, or on the ground that being

satisfied on the evidence that there had been fraud in the sense of unconscientious dealing he had jurisdiction to grant relief by exercise of those equitable powers which have for many years been applied by Judges of the Cyprus Supreme Court in cases of inequitable and unconscionable conduct.

THOMAS, J.: (After considering the evidence the judgment proceeds): Thomas, J.

The hearing terminated on 31st July, 1930, and on 2nd August the learned Judge gave his decision orally and the following note appears on the Record:

"*Judgment for plaintiff with costs to be assessed* (Contract of sale rescinded on payment of £320)." Reasons for the decision were set out in an elaborate judgment many months later. In this second and supplementary judgment the learned Judge, after stating some novel propositions of law without indicating in any way the authority upon which they rest, makes certain findings of fact. He finds that the deceased did not understand what was happening; that she was under the influence of narcotics administered secretly against the doctor's orders by the nurse Flourenzou who was the moving spirit in a conspiracy of fraud to despoil the deceased. He finds that the deceased was not an independent agent, and that she was tricked and defrauded; and finally "that the so-called contract of sale was based on fraud and misrepresentation and was obtained by undue influence, and also at that time when deceased's mind was so deranged by suffering disease and age that she was not in a position to understand the nature and the consequence of her acts." I wish to point out that, although the Judge finds that there was fraud, he has not indicated at all what the fraud was. Similarly in the pleadings there is a vague allegation of fraud without alleging what is the fraud complained of. Fraud must be alleged precisely with particulars, and must be proved in the same way by establishing definite acts of conduct which in law amount to fraud.

(After citing some passages from the evidence the judgment proceeds):

The learned Judge finds that the deceased "was tricked and defrauded": "*the nurse . . . was the moving* spirit." It is only necessary to say that there is nothing in the evidence to justify in any sort of way such sweeping statements. It is a remarkable fact that one of the eye-witnesses who could have given most valuable evidence, viz., Dr. Ieronymides's father, was not called by the plaintiffs. The natural inference to be drawn from plaintiff's failure to call such an important witness is that he could not support the plaintiffs' story that undue influence was used upon the deceased, and that she was mentally

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incapable of transacting business. I have already pointed out that the learned Judge does not reject the evidence of Mr. Braggioti, for he can find no reason to do so, but he merely brushes it aside, in spite of the fact that it clearly shows plaintiffs' allegations of undue influence and deceased's mental incapacity are untrue. I turn now to the evidence of Dr. Ieronymides. Speaking of what took place at the clinic he stated: "Braggioti asked me whether the deceased could sign a document . . . . Thinking that the document was in connection with that gift (*i.e.*, to his cousin Nicolaos) I said, 'Yes, she can'. I refused to give a certificate that she was of sound mind because I did not know what sort of document she had signed." In the doctor's opinion the deceased was in a perfectly fit mental condition to sign a document making a gift of money to his cousin; but, if it was a question of selling her house, then he finds the deceased was practically insane. The Court below found that the doctor did admit he told Braggioti that deceased was in a fit condition when in fact she was not; further that Dr. Ieronymides said in Court: "I told Braggioti a lie to help my cousin." The Judge's comment upon this is as follows: "A most dishonest action on his part and worthy of censure. The doctor, the only person on whose opinion the whole structure is based, told this Court on his oath that the patient was not in a fit condition, her mind and body a wreck from disease and utterly incapable of transacting any sort of business." I may say that Dr. Ieronymides did not use the words going quite as far as the passage cited would indicate. The Judge continues "if we disregard the doctor's statement and evidence the whole structure would fall to the ground, there would be no evidence to show that this suffering and doped old woman after an operation with gaping wounds was fit to dispose of her property." It is rare that a Court is ready to found its judgment upon the evidence of a witness whom it finds "most dishonest" and to whom it refers as "the unscrupulous doctor ready to say anything to benefit his relations," but such is the fact in this case, as the Judge himself expressly states in his judgment. You have therefore the extraordinary position of a witness stamped by the Judge —and with good reason— as "most dishonest" and "unscrupulous" and ready to say anything which is in his interest and yet believed. What are the reasons which forced the Judge to believe the evidence of this doctor (Dr. Ieronymides) whom he finds most dishonest, unscrupulous and ready to say anything, and whose evidence is flatly contradicted by everyone else present at the signing of the document? The Judge gives his precise reasons for believing Dr. Ieronymides: first, in order to save the doctor's professional reputation, because, if he does not believe him, the Judge must come to

the conclusion that Dr. Ieronymides is committing perjury. It is a question whether it is the duty of any Court to try to save the professional reputation of any man whom it finds dishonest, unscrupulous, and ready to give false evidence if it is in his interest. The second reason given by the lower Court for believing this doctor is that without his evidence there is no evidence of the deceased being " tricked and defrauded " and " the whole of the plaintiffs' case would fall to the ground." The two factors which induced the Judge to believe Dr. Ieronymides are totally irrelevant to the question of whether or not a witness is credible—they afford no ground to assist the Court in coming to a decision on this point.

To prove that the deceased was of unsound mind and incapable of managing her own affairs plaintiffs relied upon the evidence of Dr. Ieronymides, and upon the certificate signed by him and two other doctors. Dr. Ieronymides said that deceased's mind had been affected by cancer and was unbalanced and that she was incapable of managing her own affairs. This may have been the doctor's opinion at the trial, but on the day the document was signed he had no such opinion. Having told the Certifying Officer that the deceased was fit to sign he becomes angry when he learns that the document was to effect the sale of deceased's house. He tells those present: " You should have waited for another fortnight. She would have left my clinic then and you could have done all this at Larnaca." He makes no suggestion that the deceased is not mentally sound; on the contrary by indicating that the patient will be quite all right in a fortnight he definitely negatives such a view. Four days later Dr. Ieronymides examined the deceased with Dr. Papa Nicolaou and Dr. Papadopoulos who gave a certificate (Exh. C.Y. 1) that the deceased was " suffering from mental confusion, a disease preventing her from administering her affairs." The examination of the patient was conducted by Dr. Papa Nicolaou, who claims to be a specialist in diseases of the nerves. The procedure he adopted demonstrates that his claim to be an " expert neurologist " is quite an imaginary one. As a result of asking the patient a lot of questions, many of them quite childish, this so-called expert came to the conclusion that " her mind was in a state of utter confusion—just one stage better than utter loss of mind." That is to say he found the deceased was practically insane. Let us see how this insane woman behaved when the document was signed and immediately afterwards. There is the evidence of Mr. Braggioti—no reason has been put forward to show why the evidence of this impartial witness should not be accepted—who says: " From my conversation with her I understood that the patient had all her senses; she was talking distinctly

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and well. She appeared to understand what was going on." Upon the arrival of Mr. Nicolaides the deceased discussed with him the cancelling of the contract she had just signed, gave him as her advocate definite authority to cancel, and signs a telegram and a letter. Mr. Nicolaides says: "She gave me an authority plainly to rescind contract", which shows that Mr. Nicolaides considered that deceased was then of perfectly sound mind, and this must have been Mr. Nicolaides' opinion when the action was begun, because the deceased sued personally, which showed that she was of full legal capacity.

. . . . . .

I will now refer to the evidence of Mr. M. G. Nicolaides who was counsel for plaintiff and one of the most important witnesses. It has been frequently laid down by many decisions that it is highly undesirable that an advocate in a case should be allowed to be sworn and give evidence on oath. There are cases reported where, upon counsel offering himself as a witness, the Court has informed him that "he must choose between the positions of advocate and witness, and must cease to act as counsel if he desired to give evidence." *Davis* v. *Canada Farmers Mutual Insurance Co.* (1). It has been laid down by the High Court in India that: "It is a rule of professional ethics of almost universal application that having taken up the position of an advocate, a counsel should refrain from testifying on a trial which is being conducted by him" (1). The practice of an advocate in a case giving evidence as a witness—a practice common in Cyprus—has been universally condemned by the Courts wherever English procedure is in force, and if an advocate does give evidence in a case in which he appears as advocate, he must retire from the case as advocate and on no account should he be permitted to continue in his capacity as advocate.

(After referring further to the evidence the judgment continues):

Assuming for a moment that the Judge's findings of fact could be supported by the evidence, do those findings entitle the plaintiffs to rescind the contract on the ground that they establish fraud and undue influence? I omit the ground of misrepresentation as there is no evidence of any misrepresentation: further the misrepresentation is not alleged to be fraudulent and in any event it is alleged to have occurred after the signing of the power, and therefore could not have induced the contract. The plaintiffs founded their action entirely upon the Mejellé, mainly upon Article 945. In his final address to the Court counsel for plaintiffs said:

(1) Eng. & Emp. Dig. Vol. 3 at p. 336.

"All the facts prove she was a "*ma'tuh*" who is defined to be a person so deranged in mind that his understanding is small, his speech confused, and his plan of action bad."

It is true counsel referred to English authorities but he did so, as he says, to help the Court in interpreting the Articles of the Mejellé on which he rested his case. It is a remarkable fact that neither the advocates at the hearing, nor the learned trial Judge, nor the advocates on appeal before this Court, made any reference whatever to the one principal Article in the Mejellé that deals with fraud.

The judgment is based upon English law and not upon the Mejellé. Before this Court plaintiffs' counsel rested his case not upon the Mejellé, as counsel did at the trial, but entirely upon equity.

As to plaintiffs' claim to rescind on the ground of undue influence it is only necessary to say that Ottoman law knows nothing of this principle. There is no case in which the Courts in Cyprus have granted relief upon the ground of undue influence, and I therefore do not think it necessary to consider the point further. It is stated in the jugdment that the Courts here have also an inherent jurisdiction "to come to the relief of any person who has been tricked or misled to enter into contracts either by fraud or misrepresentation or mistake or in cases where advantage has been taken of the weakness of the mind or the body of the person concerned." This is a proposition to which I cannot assent, as it is in direct opposition to the law in force in Cyprus. The judgment further states: "It is only the people who are made victims of unlawful acts on the part of others who will be relieved." That is to say, the acts complained of as grounds for setting aside a contract must be acts forbidden by law. Is it then the law of Cyprus that any contract induced by fraud can be set aside? The judgment of the Court below says "yes", on the ground that the Courts in Cyprus have inherent jurisdiction to grant equitable relief to any person who has been induced to enter into a contract by fraud, deceit, mistake, or where advantage has been taken of his mental or bodily weakness. Where a Court derives its jurisdiction and powers from a statutory enactment as the Courts of Cyprus do from the Cyprus Courts of Justice Order in Council, 1927, replacing the original Order of 1882, it is, in my opinion, not competent for the Courts here to claim to exercise inherent jurisdiction in matters not provided for by the local law.

In the case of *R.* v. *Sutton* (1) heard in October last year the applicant, who was undergoing sentence in England, applied to this Court to be released on bail pending his appeal to the Privy Council, alleging that this Court had

(1) Reported *ante* p. 94.

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inherent power of the Court to grant bail, such as is possessed by the Court of King's Bench in England. This Court was of opinion that in a Court whose powers and jurisdiction are created by an enactment there could be no inherent powers as regards such a matter as bail which was dealt with so specifically by the Court's Order in Council. In my view—quite apart from the fact that it is directly opposed to the clear provisions of the Order in Council—it would be a dangerous principle for the Courts in Cyprus to claim inherent powers to provide remedies where none exist under Ottoman law. In so doing the Courts would be legislating which is outside their power. In matters of procedure it is otherwise; the Courts have certain inherent powers which are nowhere laid down in any Order in Council or local enactment.

The Judge in the Court below also relied upon the *dictum* pronounced by this Court in *Sotiri* v. *Sotiri* (1) that "fraud vitiates everything to which it attaches." Counsel for the respondent went much further than this and submitted that by virtue of Article 17 of the Mejellé the Courts here can apply all the principles of equity. Such an argument, in my view, cannot possibly be supported. Article 17 is one of the maxims contained in the Second Preface to the Mejellé, and these maxims are of an essentially different nature from and form no part of the rules of substantive law beginning with Sale in Book I. There are likewise many maxims in English law, but they are in no sense principles of law such as are embodied in common law or Statute law. Maxims may be applied but subject to common law or Statute law. I am unaware of any decision in English law that is based solely upon a legal maxim, and I do not think any such case is to be found throughout the law reports. If the maxims in the Mejellé are principles of law, then the rest of the Mejellé is superfluous as all cases could be decided upon such maxims as require the Courts to remedy cases of hardship. Counsel cited some ten cases in which the Supreme Court has applied equity. They are nearly all cases where an owner has purported to sell land and later brings a suit to recover possession in the ground that, there being no registration, the transfer was invalid. The Courts, in allowing an owner to recover possession of his property, have made it conditional upon his repaying the purchase money, on the ground that it would be inequitable to allow a party to recover his land and at the same time to retain the purchase money paid under an invalid transfer. This is very far from the proposition that the Courts in Cyprus are free to apply equity in all cases where the local law affords no relief. The Courts considered it would cause

(1) 2 C.L.R. at p. 179.

a great hardship to allow the registered owner to recover his land and keep the purchase money: they, therefore, would only order possession, if the money were returned. In *Sava Pascali* v. *Panayi Toghli* (1) it is said: "This Court has however developed an equitable principle which mitigates the rigour of this doctrine." The Court refers to five cases and says: "In all these cases the principle is enunciated *obiter*." The Court does not say that it decides these cases according to equity, but that it decides that a man cannot have his land and at the same time keep the money paid to him for the land, and that such decision is in conformity with equity. These cases do not establish the principle contended for by counsel, viz., that the Court adopts and applies principles of equity, but they show that the Courts will refuse to give to a registered owner his undoubted right of possession and at the same time allow him to retain the money paid to him for his property under an invalid transfer. In exchange for obtaining his right the Court requires him to do what is just.

Counsel also cited *Petrides* v. *Demetriou* (2) where the Court held that, in deciding whether a sum fixed in a contract for its breach was a penalty or liquidated damages, it was free to apply English law. The Court finds that in French law the "penal clause" is conclusive, and that this principle was adopted by Ottoman law and appears in Article 98 of the Appendix to the Commercial Code. "English law", says the judgment, "follows a different principle and in some cases declines to enforce penal clauses on the ground of equity. It is clearly more desirable that, if possible, we should adopt in Cyprus the more elastic principles of the English law on this point, and will then consider whether anything in the previous decisions of the Court presents an obstacle to their application in Cyprus, and if there is no such obstacle, we will apply them to the present case." Finding no decided cases in the way, the Court applied English law in preference to the principle which was part of the Statute Law of Cyprus. With great respect to the learned Judges who sat in the case I consider that this decision to apply English law because it appears to the Court "more desirable," is a violation of the fundamental provision of the Order in Council (Clause 23) which in effect forbids the application of any law except "Ottoman law as modified by Cyprus Statute Law." In applying English law because it seemed preferable to a principle embodied in Ottoman law the Court acted contrary to the ancient and fundamental maxim that it is a judge's duty to expound the law and not to make the law. *Jus dicere et non jus dare.*

(1) 7 C.L.R. 76 at p. 78.
(2) 10 C.L.R. at p. 35.

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With regard to the *dictum* expressed by the Court in *Sotiri* v. *Sotiri* (1) and relied upon by the Court below that "fraud vitiates everything to which it attaches" I would say that, if "fraud" is used with the meaning it has in English law where it applies to an unlimited variety of transactions, it goes too far. The effect of such a *dictum* is to make a very large number of transactions fraudulent which are not regarded as fraudulent by the Ottoman law. If the word "fraud" is replaced by "the specific form of fraud recognized by Ottoman law" the *dictum* is in harmony with the Courts of Justice Order in Council, but in the form stated in the judgment the Court was applying a principle of law which the Order in Council does not permit to be applied, in that it is not "Ottoman law as modified by Cyprus Statute Law," which is the only law that may be applied by the Courts in exercising civil and criminal jurisdiction.

It was argued that the finding of Court below being matters of fact should not be disturbed as there is plenty of evidence on which they could be based. For a great many years this Court in the hearing of appeals has always acted upon the principle that the finding of the trial Judge on question of fact should not be set aside unless it is one, viewing the evidence reasonably, the Court could not have arrived at. This was laid down in *The Metropolitan Railway Co.* v. *Wright* (2) which was no doubt the authority upon which this Court based its opinion in *Michalaki & another* v. *Perdio* (3). It should be noted that in the former case the House of Lords was considering the question of whether or not a new trial should be granted from the verdict of a jury. In the case of *The Gallibanta* (4) Baggallay, J., held that "great weight is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect." This case was followed by the Court of Appeal in the same year in *Bigsby* v. *Dickinson* (5). The question

(1) 2 C.L.R. at p. 170.
(2) 11 App. Cas. at p. 152.
(3) 5 C.L.R. at p. 33.
(4) 1 P.D. 283 (1876) at p. 287.
(5) 4 Ch. D. at p. 24.

was considered later by the Court of Appeal in *Coglan* v. *Cumberland* (1), where the Master of the Rolls held: "The rehearing on appeal of a case tried by a Judge without a jury is not governed by the rules applicable where there has been a trial and verdict by a jury. The Court of Appeal must act on its own considered conclusion on questions of fact as well as law. Even where the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong." In *Montgomerie & Co.* v. *Wallace-James* (2) the Lord Chancellor, Lord Halsbury, laid it down that "where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such tribunal. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence then the original tribunal is in no better position to decide than the Judges of an appellate Court." In the later case of *The Dominion Trust Co.* v. *The New York Life Insurance* (3), the Privy Council held that "in considering the weight to be attached by an appellate Court to a finding of fact, a distinction should be drawn between cases in which the issue depends upon the veracity of the witnesses, and those in which it depends upon the proper inferences to be drawn from truthful evidence. In the latter class of cases the original tribunal is in no better position than the Judges of the appellate Court."

The duty of a Court hearing an appeal from the decision of a Judge without a jury was clearly defined by Sir Nathaniel Lindley, M.R., in *Coglan* v. *Cumberland*, and by Lord Halsbury in *Montgomerie & Co.* v. *Wallace-James*, and is no longer in doubt. "The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference

(1) 1 Ch. 704 (1898).
(2) (1904) A.C. 73.
(3) (1919) A.C. 254.

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from the facts proved or admitted and to decide accordingly." Lord Cave, C., in *Mersey Docks & Harbour Board* v. *Procter* (1).

The judgment of the Court below rests upon the evidence of Dr. Ieronymides; without his evidence, says the Judge, "the whole structure would fall to the ground." He accepts and believes the evidence of Dr. Ieronymides. Since the question is one of credibility, is an appellate Court precluded from differing from the trial Judge's finding? I will cite a passage dealing with this precise point from the decision of the Privy Council in *Khoo Sit Hoh* v. *Lim Thean Tong* (2). "Their Lordships' Board are therefore called upon to express an opinion on the credibility of conflicting witnesses when they have not seen, heard or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts only have his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in dealing between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the finding of a trial Judge based upon verbal testimony." The authorities I have cited establish a very different rule from that one that has always been followed in Cyprus. The principles to be extracted from these cases appear to me to be: (1) an appellate Court treats the findings of a Judge sitting without a jury on questions of fact quite differently from verdict of jury; (2) that, while great weight should be given to a Judge's findings of fact, it is the duty of the appellate Court to weigh conflicting testimony itself, and draw its own conclusions on questions of fact; and (3) that, even when the Judge's findings of fact

(1) (1923) A.C. 253 at p. 257.
(2) (1912) A.C. 323 at p. 325.

depend upon the credibility of witnesses, an appellate Court has power to set such findings aside, but will not usually do so unless the trial Judge has failed to take account of circumstances material to an estimate of the evidence, or where he has believed testimony which is inconsistent with itself or with indisputable fact. In the present case the trial Judge accepted the evidence of the doctors that the deceased was mentally unsound, while the evidence on the record, some of it quite uncontradicted, showed that their evidence was manifestly untrue and worthless. The case entirely turned upon the evidence of Dr. Ieronymides whom the Judge believed because without his evidence the plaintiffs' case fell to the ground and, secondly, to avoid declaring the doctor guilty of perjury and so ruin his professional career, although the Judge holds this witness to be "unscrupulous," "dishonest," and ready to say anything in his own interest. On the question of whether or not a witness is guilty of perjury, the possible injury to his professional career of so finding is wholly irrelevant to the inquiry. The second ground for treating Dr. Ieronymides as a credible witness in reality is the strongest reason to reject the evidence of a man stamped by the trial Court as of disreputable character. The decision is based upon what the Judge considered was stated in evidence, but a close examination of the Record reveals in numerous instances that the witnesses did not state what the judgment says they stated, or anything like it.

The present case in my opinion is definitely within the terms of the last part of the judgment I have just cited. The learned Judge has given credence to testimony inconsistent with indisputable fact for reasons which logically should have led him to the diametrically opposite conclusion.

In my opinion the findings of fact of the Court below are not justified by the evidence, and, if they were justified, such findings do not constitute grounds in Ottoman law for setting aside the contract.

Appellant's case is in effect based on fraud since a claim based upon undue influence is unknown to Ottoman law. Mr. Justice Sertsios has just called to my notice Article 358 of the Mejellé which lays it down in the clearest manner that an action of fraud dies with the person defrauded and does not pass to the heirs. In accordance with this article plaintiffs had no cause of action in fraud, and their action in this respect was misconceived and bound to fail.

For the reasons I have given I am of opinion that this appeal should be allowed, and that the judgment of Fuad, J., set aside, and judgment entered for the appellant with costs both here and below.

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SERTSIOS, J.: (After dealing with the evidence the learned Judge proceeds):

On the 16th October, 1929, the present action was instituted by the deceased personally against the defendant, Mr. Nicolaides himself being also *additionally* described in the writ of summons as a next friend of the deceased as follows:—"Chrystalleni Charalambous Nicolaides personally and by her next friend Michael A. Nicolaides, advocate, of Larnaca."

As to the form of the title of the action, I propose to deal with it later.

Now the plaintiffs asked by their claim for an order of the Court rescinding the contract as having been obtained by fraud, undue influence and false representation, that is, the plaintiff (the deceased) being at the same time mentally incapacitated and not having full consciousness of her acts at the time of the conclusion of the contract. As I will show later the main and principle point upon which the strength of plaintiffs' claim is based is that the deceased was a person of unsound mind, namely, a *ma'tuh*, as submitted by Mr. Nicolaides in his final address to the Court below.

Moreover, in the opinion of the Court below, as appearing in the learned Judge's written judgment, the statement and evidence of Dr. Ieronymides forms the only foundation upon which the case is based, adding that, if such evidence and statement be disregarded, the whole structure of the case would fall to the ground.

Now the only point that the plaintiffs intended to establish by the evidence of this doctor was that the deceased was a person of unsound mind, at the time of the conclusion of the contract, and that therefore the transaction of sale was bad and of no legal validity. That, consequently, proves clearly that plaintiff had no other point to raise *except* that of the mental incapacity of the deceased. Still I will deal with this point as well as with the others mentioned, when the time comes. As the questions raised are principally questions of facts tending, if proved, to establish certain points of law.

On p. 29 of the Record Mr. Nicolaides said the following:— "My aunt was not in a position to give me any explanations; she gave me authority plainly to rescind the contract."

So the deceased, according to Mr. Nicolaides, was in a position to give plainly such an authority. Consequently, she could not have been a person of unsound mind, namely, a *ma'tuh* under Article 945 of the Mejellé, as submitted in the Court below. How could she have given such plain authority in full knowledge of what she was doing, if she were a *ma'tuh*? All her conduct, as described both

by Mr. Nicolaides and Dr. Ieronymides, was one of a rational person, and not that of a person deranged in mind. Needless to say that the evidence of the late Mr. Braggioti and of all the other witnesses for the defence is unanimously contradicting the suggestion made for plaintiffs that the deceased was mentally incapacitated.

The learned Judge in his judgment in the present case stated the following :— " The nurse who no doubt had a great influence over her was the moving spirit, evidently for reward."

Then the learned Judge quite suddenly and disconnectedly with the immediately preceding part of the judgment goes on to say as follows :—" There is evidence of undue influence and the whole case stinks of fraud."

The learned Judge, however, does not say a word as to how he came to the conclusion that there was an undue influence or fraud. The fact that, as the learned Judge says, Flourenzou had a great influence over the deceased, does not show nor does it in any way mean that an *undue influence* had been exercised.

Assuming that the *undue influence* forms a part of the law we apply in this Colony, which, however, is not the case, as I will show later, the learned Judge does not say a word about any facts in evidence which led him to the conclusion that such an undue influence had been exercised.

As regards the question of undue influence, which is purely an equitable doctrine invalidating a contract under the English law, it has never been acted upon by any Court of law in this Colony ever since the British occupation, and this for the soundest of reasons, namely, that the principle of undue influence is not recognized by the Ottoman law which is the only law enforced in the Colony. By Clause 27 of the Cyprus Courts of Justice Order, 1927, it is provided that every Court and Judge exercising civil jurisdiction in any action shall apply Ottoman law. But the learned Judge does not make the slightest reference to such law in this respect. No doubt he, in dealing with the doctrine of undue influence, had in mind the English law, though he does not say so. This, however, is contrary to the provision laid down in Clause 27 of the Order quoted above.

The nearest approach under the Ottoman law to the English doctrine of undue influence is that described as a "Wrongful Compulsion" in Book 9, Chapter 2, of the Mejellé. Now by Article 1006 it is provided that : " When in consequence of compulsion there takes place an exchange of property for property, and a purchase, and a letting, and a conveyance, etc., they are not held good whether the compulsion be *Mulgi* or *Ghayri Mulgi* (Article 949). Definitions of compulsion are to be found in Articles 948 and 949 of the Mejellé. To compel a person in Turkish

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is termed *Ikrah*. In Article 948 it is laid down that the *Ikrah* is without right to compel a person to do a thing without his consent by fear.

The *Ikrah* (compulsion) again under Article 949 of the Mejellé is of two sorts. The first sort is *Ikrahi Mulgi*. It leads to destruction of life, or loss of a limb or one of them. It is the compulsion which is by a hard blow. The second sort is *Ikrahi Ghayri Mulgi*. This sort of compulsion causes only grief and pain. It is a compulsion which is exercised by acts like a blow or imprisonment."

Now as regards the first kind of compulsion, it cannot be of any application to the present case. The second sort of compulsion again, though involving a slight force only, is equally not applicable to the circumstances of the present case, as there is nothing in evidence to show that any grief or pain was caused to the deceased by inflicting any blow on her or by imprisoning her, as defined by the Article 949 referred to above, before she agreed to sell the house to the defendant. That being so, there was no use of compulsion within the meaning of the law against the deceased before concluding the contract of sale, assuming that such legal compulsion under the Ottoman law is the nearest equivalent of the doctrine of undue influence under the English law.

But even under the English law regarding testamentary dispositions, the influence in order to be undue, within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised by coercion. So in directing the jury in *Wingrove* v. *Wingrove* (1) Hannen, P., said: "All men are familiar with the word influence. They speak of one person having 'unbounded influence' over another and they speak of good influences and evil influences. But there may be what is commonly called 'unbounded influence,' or there may be good influence or evil influence and yet such influence may not be undue in the legal sense of the word. There may be the immoral influence of a person of one sex over a person of the other sex, which would result in the person subject to such influence yielding to it in a manner which would be very deplorable as regards the disposition of property; and yet it may be that in neither of those cases is there anything which the law would regard as undue influence. To render influence legally undue there must be *coercion*. A testator or testatrix may have been induced to make a will of which every disinterested person would disapprove and yet that will may be in law a perfectly valid one. To establish undue influence it must be shown that the testator or testatrix has been coerced to do an act which he or she did not desire to do, etc."

(1) 55 L.J. (P.D. & A.) 8; 11 P.D. 82.

In view of all the above from the mere fact that the deceased in the present case was very much attached to Flourenzou it cannot be reasonably inferred that an undue influence was exercised upon the deceased even under the English law.

Article 978 of the Mejellé provides as follows :—"A person whose intellect is deranged—a *ma'tuh* (see Article 945) is considered as a minor approaching puberty, namely, *saghiri mumeyiz*, under Article 943. Now by Article 967 it is provided that the contract entered into by an infant who is near puberty, *i.e.*, *saghiri mumeyiz*, from which contract benefit only results to him, such as the acceptance of a gift or present, is held good, even if there be no leave or permission from his guardian. But a transaction from which only loss results to him, such as giving something to another, even if there be leave and permission from his guardian, is not held good. All the following articles in Chapter I of Book II of the Mejellé state clearly that the leave or permission of a guardian is required before any transaction is entered into by any infant or infant approaching puberty."

Article 974 of the Mejellé enumerates the various classes of persons who can be guardians of such infants. The seventh category for the purposes of this case reads :—"Seventhly, the guardian of a minor is the Judge or the guardian appointed, that is to say, the guardian appointed by the Judge."

Now as I have already explained Article 978 provides that a *ma'tuh* is considered as a minor approaching puberty, namely, a *saghiri mumeyiz* under Article 943. That being so any transaction entered into by any *ma'tuh*, unless benefit only results therefrom to him, bears no validity without the permission of his guardian, as provided by Articles 966, 967, *et seq.* of the Mejellé, concerning minors mad men and idiots.

Mr. Nicolaides strenuously argued in the Court below that deceased Chrystalleni was a *mat'uh*. If so, who was her guardian, if any ? It would appear from the evidence that the deceased Chrystalleni had no direct relations of her own within the meaning of Article 974 of the Mejellé, excepting under class seven of the persons enumerated therein, which distinctly provides that in the absence of any other relations of the preceding categories, the guardian will be the person so appointed by the Judge. Mr. Nicolaides is an advocate, and as such supposed to know the law better than a layman. If he was taking any interest in safeguarding the interests of the deceased, his duty should have been to place everything concerning such interests in safety by setting at least some one appointed as a guardian of the deceased by the Court for the purpose of

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the administration of the estate. Had this been done in due course, if, of course, deceased was of unsound mind, *i.e.*, a *ma'tuh*, as alleged by Mr. Nicolaides, it would have been a common knowledge that deceased was interdicted, and, naturally, no one would have been so foolish as to risk negotiating with her direct, and not through her guardian, in respect of the purchase of the house in question. Assuming the deceased was a *ma'tuh* at the time of the transaction there was nothing to show that defendant knew anything about the mental incapacity of the deceased as she had never been interdicted through the Court. He was but a *bona fide* purchaser for value, and, as such he believed her to be of sound mind. There is nothing in evidence to show that defendant was aware of the deceased's insanity at the time, if any such in fact existed.

In the case of the *Imperial Loan Co.* v. *Stone* (1), Lopes, L.J., said the following :—" Contracts made with a person of unsound mind are not voidable at his option, if the other party to the contract believed him to be of sound mind at the time the contract was made. In order to void a fair contract on the ground of insanity the mental incapacity of the party seeking to void it must be known to the contracting party.

The party pleading insanity must prove both insanity and the other party's knowledge of it, and, unless he proves both, he is not entitled to void the contract."

In the present case, as I have explained, there was nothing to manifest that deceased was of unsound mind, *i.e.*, a *ma'tuh*. Admittedly no guardian of the deceased was appointed by the Court, as required under Article 974 of the Mejellé ; and the Land Registration Office authorities themselves knew nothing about it, as no steps had been taken by the parties concerned to get the deceased properly represented by a guardian, as required by the law. Defendant was, of course, never informed in this respect, nor was he cognizant of any legal impediment, which, if known, would no doubt have deterred him from entering into any agreement direct with the deceased. But how could he have known anything of the kind at the time of the conclusion of the contract, when it was only some few days after the sale that, in order to establish mental disorder of the deceased Mr. Nicolaides caused a medical Board to meet? Does this not show that Mr. Nicolaides himself knew nothing about it, as otherwise, he would not have summoned a medical consultation? But even some time after the consultation, Mr. Nicolaides did not seem to be satisfied that deceased was under mental disability. The Record shows that the patient died on the 11th February, 1930. The action itself was instituted on the 16th October,

(1) (1892) 1 Q.B. at p. 601.

1929, by Mr. Nicolaides as advocate for the deceased, namely, in the lifetime of the deceased.

The title of the action reads :—

" Chrystalleni Char. Nicolaides, personally and by her next friend Mich. Nicolaides, advocate, of Larnaca.

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Miltiades Ch. Mavrovouniotis, of Larnaca.

From the title itself of the action it is manifest that deceased is represented as suing personally, though, being a lunatic, as alleged by plaintiffs, she had no personal existence, excepting as provided by the law, through a guardian, if any, or her next friend under the Rules of Court. A person described in the writ of summons as suing personally, must necessarily be assumed to be in full possession of his mental faculties, as, otherwise, he could not sue in his personal capacity. A person, again, suing in a personal capacity cannot at the same time appear as suing through another person, say through his next friend. That being so the plaintiff's title in the action described as Chrystalleni Char. Nicolaides *personally* and by *her next friend M. Nicolaides* is quite wrong. The plaintiff Chrystalleni therefore having sued in her personal capacity should certainly not be assumed to have been under any personal disability, namely, a person of unsound mind, *i.e.*, a *ma'tuh*, as strenuously argued by Mr. Nicolaides in the Court below.

All the above as it stands goes therefore to show that Mr. Nicolaides' view must have been that deceased was not a *ma'tuh*. Order IX, r. 7, moreover, of the Rules of Court, 1927, reads :— " An action may be instituted in the name and on behalf of any infant, lunatic, or person of unsound mind by any person as his next friend and such person shall be so described in the writ of summons." Under this rule therefore the action should have been instituted by Mr. Nicolaides as next friend of Chrystalleni Nicolaides, an unsound person, and this has not been done.

The learned trial Judge, dealing with the mental condition of the deceased Chrystalleni Nicolaides, states in his judgment that her mind was so deranged by suffering disease and age that she was not in a position to understand the nature and consequences of her acts. But he seems to have entirely ignored in this connection the evidence of the District Medical Officer, Larnaca, Dr. Pietroni, an independent witness, who had medically attended the deceased, both before and after the operation about a fortnight after she returned from Nicosia to Larnaca. This witness on p. 64 of the Record says that he knew the deceased and he had visited her on her return to Larnaca after the operation several times ; that he had a conversation with her after she returned and she had *all her senses* about her.

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He said he did not see any symptoms of narcotics having been applied to her; that he had seen her also before the operation and she was suffering from cancer. He said further that cancer, application of narcotics, operation and temperature could affect her nervous system, but that during all the time the patient *may be capable* of transacting business. On being questioned by the Court the same witness said that the patient was about 65 years old; that she was suffering from cancer in the last stages, but that she was perfectly normal, otherwise, when he saw her. This is what Dr. Pietroni said. But the learned Judge does not make the slightest reference to his evidence and does not say even a word as to whether he believed him or not.

So, according to this evidence it is not a fact that deceased's mind was deranged by suffering disease and that she was not in a position to understand the nature and the consequences of her acts.

Now, with regard to the most important witnesses for the defendant's case, the learned Judge, as I have explained, has quoted certain passages purporting to be their statements in the witness box. But a very careful examination of the file shows that many of the quoted statements, most detrimental to the defendant's case, were never stated in evidence by the witnesses themselves. In this respect the trial Judge has fallen into a serious error in relying upon statements which were never made by the witnesses. I have taken a certain number of instances, dealing with the judgment of the learned Judge, and in case of each of them I find, after very careful consideration of the evidence, that the view of the Court below cannot be supported.

The learned Judge further on p. 8 of the judgment states the following:—"In addition to the provisions of the Mejellé dealing with the contracts of this kind entered by weak-minded persons—fraud vitiates everything to which it attaches," and cites in support of this theory the case of *Sotiri* v. *Sotiri* reported in C.L.R. Vol. 2, p. 179.

Now in this part of his judgment I notice that the learned Judge gives only two reasons for which, in his opinion, the contract should be invalidated, namely, (*a*) that the deceased was not *compos mentis* at the time the contract was entered into, and (*b*) that the deceased had been defrauded.

As to the first reason, he only makes a general reference to the provisions of the Mejellé dealing with contracts entered into by weak-minded persons, but he does not state which of such provisions of the Mejellé would cover the present case. As the learned Judge has put it, the deceased might come within every single provision of the Mejellé dealing with people mentally incapacitated. She would therefore be either a *mejnun*, that is mad,

under Article 944 of the Mejellé, which again is of two kinds, or a *ma'tuh*, namely, a person of unsound mind, as strenuously argued by counsel for plaintiffs in the Court below. The learned Judge does not say a word as to which of the three categories of weak-minded persons did the deceased belong to, nor does he enumerate any facts in evidence upon which he bases his general finding as to the law applicable. After this the learned Judge quotes verbatim from p. 66 of the Digest of Cases a passage from a judgment of this Court in the case of *Sotiri* v. *Sotiri* (1), in support of the contention that fraud would affect the validity of any contract. I have been through the Record very carefully but have been unable to trace any facts which would establish that fraud had been practised on the deceased. There does not seem to be anything that shows that the power of attorney had been procured by some deceit or trick. The learned Judge simply bases his view upon the reported case cited above in which it is stated that fraud must be held to vitiate everything to which it attaches, without stating first what was the evidence of fraud practised on the deceased. Now the appellant's claim that this Court can apply English law as regards fraud is entirely based upon the case of *Sotiri* v. *Sotiri* (1) in which, however, it is not stated what was the law which the learned Judges of this Court had in view in dealing with the principle and effect of fraud at that time. I say so because there is a distinct statutory provision in the Ottoman law which deals with fraud, and it is the only applicable law in this respect under Clause 27 of the Cyprus Courts of Justice Order, 1927, to which statutory provision the attention of this Court does not seem to have been drawn at the time. Chapter VII of title VI of Book I of the Mejellé contains the law in question under the heading: "*Concerning injury and concerning fraud.*" Now, Article 164 of the Mejellé deals with *fraud* which is termed in Turkish *Tagrir*. Article 165 deals with *excessive injury*, *i.e.*, *Ghaben Fahish* in Turkish, which means "to be deceived in respect of goods to the extent of half a tenth, in respect of animals to the extent of one-tenth and in respect of real property to the extent of one-fifth or to any greater amount."

Dealing with a contract of sale, it is to be observed that under Article 165 of the Mejellé, as I shall explain below, there may be in such a contract an "excessive injury" without fraud, and in such a case the person who has sustained the injury cannot avoid the contract. When, on the other hand, one of the parties to a sale has defrauded the other, and it has been ascertained that there has been *excessive injury* (*ghaben fahish*) under Article 165, the person who has been deceived can annul the sale.

(1) 2 C.L.R. 179.

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All the above observations are to be found in Articles 356 and 357 of the Mejellé respectively.

The learned editor of the *Othomanikoi Kodikes* Nicolaides, commenting upon Article 357 of the Mejellé gives the following example in note (1), *e.g.*: "If the seller of a thing sells it to the purchaser telling him that it is worth 1,000 piastres, and that in fact some third person had offered him this price, and the vendee, believing in his words, buys it from him, but he subsequently discovers that the thing sold was not of the value assured by the seller, and that the third person mentioned by the seller had never offered him the sale price of 1,000 piastres, he is entitled to annul the sale by returning the thing sold. In the same way the seller is entitled to act, if in the same manner he was deceived by the purchaser. But it should be noted that the excessive injury sustaind by either party respectively must be to the extent fixed by Article 165 of the Mejellé."

Ali Hydar in Vol. I, p. 590, commenting upon the same Article 357 of the Mejellé, gives a still much better illustration as follows:—" . . . excessive injury (perhaps better 'overcharge') is the injury explained under Article 165 of the Mejellé. Therefore, if a man sells to another his house valued at 2,000 piastres, for 2,300 piastres, alleging that it is valued at 2,300 piastres, that other man is not entitled to cancel the sale on the ground of fraud (*taghrir*). Because it is true that he has in fact been defrauded, but there can be no option of fraud and excessive injury, inasmuch as the amount of excessive injury in respect of real property is one-fifth ($\frac{1}{5}$), and the amount of money to the extent of which that person was cheated is 300 piastres, namely, less than the one-fifth of the 2,000 piastres. Fraud alone (*i.e.*, without excessive injury) cannot be a ground or reason for rescinding a contract."

With regard now to the transaction in this case, it is quite clear from the evidence that deceased offered to sell the house for £500, but eventually she sold it to the defendant for £430. Assuming now that deceased was defrauded, though no fraud has been proved as I have already explained, and assuming, further, that the real value of the house was £500—though it was not, as it required repairs—it is quite clear that the amount of money to the extent of which the deceased was cheated would be the difference between the two figures, *i.e.*, £500 and £430—namely £70—which is less than the one-fifth ($\frac{1}{5}$) of £500 being the original amount the deceased claimed for the house. Therefore, no excessive damage or injury (*ghaben fahish*) under Article 165 having been sustained by the deceased, she would not be entitled to opt and claim rescission of the sale, even if fraud (*tagrir*) had been established in the case.

The above is the only deceit or fraud which the Mejellé takes cognizance of, and by such law alone we ought to be guided in deciding on this point. That being so, I proceed to consider and explain the provision laid down in the immediately following Article 358 which reads: "On the death of any party who sustained excessive injury by fraud, the right of action for fraud does not pass to his heir."

The learned Judge made no reference to this fundamental provision of the law, which declares that the right of action for fraud or deceit dies with the person deceived, and does not pass to his heirs, and this is in conformity with the ancient legal maxim: *Actio personalis moritur cum persona.*

Had counsel for plaintiff been aware of this provision of the Civil Law, it is difficult to believe that he would have continued this action for a right that had ceased to exist upon the plaintiff's death.

In the last paragraph of his judgment the learned Judge ordered the cancellation of the contract of sale, and the registration of the house in the name of the heirs of the deceased upon the return of the purchase money to the defendant less the sum of £60 which the trial Judge found represented money paid to two persons, Nicola and Flourenzou for the part they played in the fraud, and that in such circumstances the amount of £60 should not be paid back to the defendant, preventing him thus to derive any benefit from his unlawful act, namely, fraud.

Dealing now with the reason for which the learned Judge thought the defendant should be deprived of the restitution of the £60 to him, I notice that the learned Judge thought that this sum of money paid to Nicola and Flourenzou formed part of a design to take the house by fraud and undue influence, for which the defendant should be punished by not getting back this money. But in deciding so the learned Judge has punished the defendant alone, while the other two persons, namely, Flourenzou and Nicola, who are stated to have deliberately assisted the defendant in this unlawful design, were remunerated, being thus allowed to derive a benefit from an alleged unlawful transaction. But if this transaction was illegal, all the acts done thereunder were equally illegal and of no validity. Surely you cannot punish one party to an illegal transaction by remunerating the other. The learned Judge does not give any authority upon which he based his decision in this regard. But there is a distinct provision in the Ottoman law to the contrary, to which apparently the attention of the Court below was not drawn. Under Article 957 of the Mejellé, infants, mad men and people of unsound mind (*i.e.*, *ma'tuh*) are *ipso jure* prohibited from dealing with their property.

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Now the effect of the restraint on persons above mentioned is given in Article 960 of the Mejellé which reads :— " Contracts such as the contract of sale, and others which are agreed upon by the persons under an interdiction referred to in the above mentioned articles (Article 957 being naturally included), have no validity. Nevertheless they are liable to make compensation at once for any damage or loss occasioned from their acts. For example, " when an infant has destroyed some one's property, although the infant is not capable of transacting business he is liable to make compensation."

Now what applies to an infant would equally apply to a mad man or a person of unsound mind, namely, a *ma'tuh.*

Assuming therefore that the deceased in this case was a *ma'tuh* as alleged by the plaintiffs, she would still be responsible to make compensation, though, if such, she was not capable of transacting business. The deceased in this case got the purchase money and at once she disposed of some of it to the extent of £60 by making gifts to some two persons, namely, to Nicola and Flourenzou. The contract of sale, if she really was a *ma'tuh*, would *ipso jure* become invalidated, but under the law she would still be responsible to make compensation for the loss occasioned from her own act of disposing of the money mentioned in making the gifts in question. This is the law which has been entirely ignored.

Assuming even that the equitable principles of the English Law can apply, the law, as laid down in the articles mentioned, should not have been ignored, upon the well-known principle of the English Law : " Equity always follows the Law."

I have had, however, the advantage of reading the part of the judgment of my learned brother Mr. Justice Thomas dealing with the question of the applicability of the equitable principles under the English Law in our Courts. He has dealt with this subject exhaustively and I entirely agree with his views that those principles are not applicable in this Colony, unless the Courts are prepared to legislate and not to administer the existing laws in the Island.

This appeal raises difficult questions of law and fact— the more so in the latter case when it becomes the duty of this Court to interfere with the finding of the Court below on the facts.

In the case *Markoulli* v. *Rossos* (1) the Court decided as follows :— " The Supreme Court on appeal will not interfere with a finding of fact of the District Court based upon the oral evidence of witnesses heard by the District Court, unless very strong ground is adduced to show that the *verdict* is against the weight of evidence. In cases of this

(1) 5 C.L.R. at pp. 33-34.

description when the question is purely one of fact it has been the practice of the Appeal Courts of the United Kingdom, not to interfere with the verdict of the Court which tried the case, unless some very strong ground is adduced to show that the *verdict* is against the weight of evidence."

What I have got to notice with the above judgment of this Court is that they describe the judgment of the District Court as a *verdict* and therefore they apply the practice followed by the Appeal Courts in England of not interfering with the *verdict* of the Court which tried the case.

By the English law, however, the *verdict* is a *verdict* of 12 men. It is but the abreviation of the Latin word *veredictum*. "*Veredictum est quasi dictum veritatis*, as *judicium est quasi juris dictum. Et, sicut ad questionem juris non respondent juratores sed judices, sic ad questionem facti non respondent judices sed juratores.*" For jurors are to try the fact and the Judge ought to judge according to the law that rises upon the fact, for *ex facto jus oritur* (Co. Litt. 226, a, b). Consequently, in the judgment of this Court quoted above the Supreme Court treated the judgment of the District Court as a *verdict* as if the case had been tried and decided by a jury, though the jury system has never been in use in Cyprus ever since the British occupation. As a matter of fact, such has always been the practice of this Court, namely, it kept to the practice followed by the Courts in England in dealing with appeals from a verdict, that is to say, from a decision in a case tried by a jury. On consideration, however, I have found that this view of the law cannot be supported any longer. For the reasons I have stated, a finding of a Judge or a number of Judges, not exceeding 3 in a District Court, cannot be termed a *verdict*. Consequently, the practice followed here before of treating the finding of such Court as a *verdict* should no longer be followed in my view. Indeed in the case *McArthur* v. *Dominion Cartridge Co.* (1) it was decided that when an appeal is brought from a finding of a jury on a question of fact, it is not the province of the Court of Appeal to retry the question. The verdict must stand if it is one which the jury as reasonable men, having regard to the evidence before them, might have found, even though a different result would have been more satisfactory in the opinion of the Judge who tried the case in the Court of Appeal. But in the case of *Coghlan* v. *Cumberland* (2) it was decided that "when a case has been tried by a Judge alone, without a jury the appeal to the Court of Appeal is not governed by the Rules applicable to applications for new trials after a trial and verdict by a jury, but amounts to a rehearing of

(1) (1905) A.C. 72.
(2) (1898) 1 Ch. 704.

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the case; and although the appeal turns on a question of fact, the Court of Appeal reconsiders the materials before the Judge, with such other materials as it may have decided to admit, and then makes up its own mind on the merits, not disregarding the judgment appealed from, but carefully weighing and considering it, and *not shrinking* from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong." In the case of *Bigsby* v. *Dickinson* (1) James, L.J., in giving his judgment said *inter alia* the following, referring to the subject I am dealing with now: "We were very much pressed not to disturb the finding of the Vice-Chancellor on a matter of conflicting evidence. With the respect to the great weight that is due to the decision of a Judge of first instance, whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are material elements in the consideration of the truthfulness of their statements, I repeat, and adhere to, what we said in the case of the *Glanibanta*. Of course, if we are to accept as final the decision of the Court of first instance in every case where there is a conflict of evidence our labours would be very much lightened. But then, that would be in truth to do away with the right of appeal, etc.".

In the case of the *Glanibanta* (2) referred to by Lord Justice James in the judgment quoted above, the Court of Appeal stated the following in this connection: "Now we feel as strongly, as did the Lords of the Privy Council in the cases just referred to, the great weight that is due to the decision of a Judge of the first instance whenever in a conflict of testimony the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."

Applying this to the present case, I find that, apart from the question of the credibility of the witnesses, the inferences drawn by the learned Judge are inconsistent with, and contrary to, the facts deposed to and appearing on the Record as I have already explained at some length. But, further than that, the reasons given by the learned Judge

(1) (1877) 4 Ch. D. 24 (C.A.).
(2) (1876) 1 P.D. 287 (C.A.).

for having acted upon the sole evidence of Dr. Ieronymides are: (1) because, if he disbelieved his evidence in Court, he ought to come to the conclusion that he was committing perjury and making statements which might ruin his professional career; (2) because, if he disregarded and disbelieved his evidence the whole structure would fall to the ground; (3) because, but for the doctor's evidence there *would be no evidence at all* to show that the suffering woman, etc., was not in a fit condition to transact business and to dispose of her property. All these reasons, however, given by the learned Judge in his judgment, obviously have not any bearing whatever on the question of credibility of this witness. Consequently, even in this respect the learned Judge's decision is not sustainable. His judgment is wrong as being not only against the weight of evidence, but, much more than that, inconsistent with, and often contrary to, the evidence itself.

In the circumstances, with all respect to the learned Judge of first instance, and although I attach much importance to the dissenting view of the learned Chief Justice, I think I am bound to state and abide by the opinion I have formed and the conclusion I have come to after a most prolonged and searching examination into the whole case, both on the issues of fact, and the various questions of law, which is that this appeal ought to be allowed with costs both in this Court and in the Court below.

Appeal allowed.