[SMITH, C.J. AND MIDDLETON, J.]

P. PAGES, AS LIQUIDATEUR JUDICIAIRE OF THE ESTATE OF CHARLES JACQUES TARDIEU, DECEASED, *Plaintiff*,

v.

EFDOKIA CHAKALLI AND OTHERS, *Defendants.*

Nov. 16

PRINCIPAL AND AGENT—JOINT OWNERS—WHEN ONE JOINT OWNER BOUND BY ACT OF ANOTHER—AGENT'S LIABILITY TO PROVE ACCOUNTS RENDERED—ACCOUNT STATED—SILENCE—CONDUCT—ACQUIESCENCE—MEJELLE, ARTICLE 67—APPENDIX TO THE OTTOMAN COMMERCIAL CODE, ARTICLE 99.

C., G. and P. were the joint owners of certain cargoes of barley and carouba shipped to T. for sale on commission, and before the cargoes were sold and accounts presented by T., C. died. After C.'s death his personal representatives entered into an agreement with S., as agent of T., for the settlement of these and other accounts between C. and T., by which it was arranged, amongst other things that C.'s interest in the three cargoes should be provisionally estimated at a certain sum specified in the contract, but if on the completion of the sales and the rendering of accounts by T. it was found that the sum due to C. was more than the provisional amount agreed on, the difference should be credited to C.'s heirs, but if less, then that the difference should be debited to them. The accounts were rendered to C.'s representatives in August, 1895, and payments on account of what was due by C. to T. were made on March 1st and October 31st, 1895. C.'s representatives made no objection to the accounts on the occasion of the second payment on account, but asked for further time to pay the balance and for a further discount. On the 10th December certain unspecified objections were made to the accounts. Upon an action by the liquidateur judiciaire of T.'s estate to recover the balance due to T. as shewn by the accounts;

HELD (*affirming the decision of the District Court*): *that under the circumstances the personal representatives of C. must be taken by their conduct and silence for so long a period to have admitted and acquiesced in the correctness of the accounts, and could not now, therefore, call upon the representatives of T. to prove the accuracy of them.*

APPEAL from the District Court of Larnaca.

Pascal Constantinides (with him *G. Chakalli*), for the Appellants.

Artemis for the Respondents.

The facts and arguments sufficiently appear from the judgment.

Judgment: The Plaintiff in this action is the *liquidateur judiciaire* of C. de J. Tardieu, of Marseilles, and he sues the Defendants to recover the sum of 22,557 fr. 95 c., alleged to be due on an agreement entered into by them with the agent of Mr. Tardieu at Larnaca, on the 26th February, 1895,

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By that agreement the Defendants bound themselves to pay to Tardieu the balance of three accounts, which are described as "closed" on the 1st October, 1894, the 1st July, 1894, and the 1st October, 1894, respectively, amounting together to the sum of 105,865·95 fr.

It appears, however, that from this amount would have to be deducted the value of Chakalli's share in three cargoes of barley and caroubs, which were consigned to Tardieu for sale, and which partly remained unsold, or, having been sold, had not been accounted for at this time, and the agreement goes on to state that, for the purposes of arriving at the balance due, the share of Mr. A. Chakalli, who died in August, 1894, in these three cargoes of barley and caroubs, is taken to be 26,900 fr., and, should this share be ultimately found to be greater than the estimate, Tardieu is to pay the excess to the estate of Mr. A. Chakalli; and, on the other hand, if the share ultimately turn out to be less than the estimate, then the estate of A. Chakalli will pay the difference to Tardieu.

Two of the cargoes referred to are described as already sold, but of the sale of which no account has been furnished by Tardieu, and the other is described as unsold.

On the net balance payable by the estate of A. Chakalli, Tardieu agreed to allow a discount at the rate of 20% per annum: and the sum remaining due, after deduction of this discount, was agreed to be paid by the Defendants on the 1st March and the 1st October, 1895. The first payment was to be in cash, and the second was to be effected by a bond signed by the Defendants and guaranteed by J. Papadopoulo. Nothing is said in the agreement specifically as to when this bond is to be given, but having regard to the wording of the last clause in the agreement, and to the fact that if it were intended that the bond should be given on the 1st October, no period is fixed as to the time when it is to be payable, it appears to us that it was the intention of the parties, that the bond should be given at once, and be payable on the 1st October, 1895.

The last clause of the agreement says that, if the Defendants are unable to pay the last instalment up to £300, they shall be granted a further delay of three months for the payment of this sum (*i.e.* £300); and the payment of this is to be secured by a new bond signed by them and guaranteed by Papadopoulo.

The meaning of this we understand to be that, if the Defendants paid so much of the last instalment as reduced the debt to £300, they would then be granted three months within which to pay this sum, the

payment of which should be secured by a bond for this amount signed by the Defendants and guaranteed by Papadopoulo.

It, therefore, appears to us that the intention of the parties was, that of the debt the half should be paid on March 1st and the other half on the 1st October, the parties agreeing to secure the payment of the latter by a bond falling due on October 1st. There is no evidence before us as to whether such a bond was given: and neither Tardieu's agent, Stini Christofides, nor any of the three Defendants have been called as witnesses: but it appears to us improbable that the bond was given, or an action would have been brought upon it: a claim being also added under the agreement to recover the amount due from the Defendants by reason of the produce of the sale of the cargoes not having reached the estimated amount of 26,900 fr.

This construction, placed by us on the wording of the agreement, would appear to be that placed upon it by the Defendants themselves: as in October, 1895, they paid a sum on account in cash, no mention being made of their liability then to give a bond.

This construction, too, appears more consistent with the wording of Clause 9 (1) of the agreement, by which when the final balance of account, after the sale of the three cargoes, came to be finally settled, each party agreed to pay to the other the difference between the realized and estimated value, according as such estimated value was exceeded, or was not reached.

It appears then, that from the 105,865·95 fr. admitted to be due from the defendants to Tardieu, was to be deducted the sum of 26,900 fr., leaving a balance in favour of Tardieu of 78,965 fr. and deducting from this sum discount at the rate of 20% the sum of 63,172 fr. appeared to be admittedly due by the Defendants to Tardieu on 26th February, 1895.

The actual amount remaining due was to be regulated after the accounts of the three cargoes had been received.

The half of the sum of 63,172 fr., viz.: 31,586 fr. was paid in accordance with the contract on the 1st March, 1895.

The three cargoes, the accounts of which had not been received at the date of the agreement, were cargoes, in two of which A. Chakalli was jointly interested with N. Georgiades, and in the third of which A. Chakalli, N. Georgiades and J. Pierides were jointly interested.

It appears from the correspondence of Tardieu with Georgiades that these cargoes were consigned to Tardieu, as agent, for their sale on commission; and it further appears that Georgiades was the person who

was directly dealing with Tardieu, though the latter was aware of the interest of A. Chakalli and Pierides.

There is no evidence of any direct communication with regard to these cargoes between Tardieu and A. Chakalli: and the inference that must be drawn is, that Georgiades was the agent of Chakalli, as regards all dealings with these cargoes.

It appears that the accounts of the sales of the three cargoes was sent to Georgiades, or to the Syndics of his bankruptcy, as he had then become a bankrupt, in July, 1895. Copies were served on the Defendants, and, though there was no evidence before the District Court as to when they received them, it was admitted before us by their Counsel that they received them in August, 1895.

It appeared from these accounts that A. Chakalli's share in the proceeds of the three cargoes amounted only to 21,367 fr., instead of 26,900 fr. as estimated, and thus the amount to be paid on the 1st October, 1895, according to the contract, would be arrived at as follows:

Admitted debt	fr.	105,865
Deduct value cargoes		21,367
Balance ...	fr.	84,498
Deduct 20%		16,899
Balance due ...	fr.	67,599
Less sum paid 31st March, 1895		31,586
Balance ...	fr.	36,013

The balance payable under the agreement, would, therefore, appear to be 36,013 fr.

Nothing was paid on October 1st, but on October 31st a sum of 13,895 fr. was paid, which leaves a balance due to the Plaintiff of 22,118 fr. According to the evidence of Mr. N. Vitalis, who was the agent of the *liquidateur judiciaire* of Mr. Tardieu, who had at this time become a bankrupt, when this payment of 13,895 fr. was made, the defendants asked for a further delay for the payment of the balance and for a further discount, and these requests were refused.

No objection was made to the accounts at this time, and it was not, so far as appears from the evidence, until December, 1895, that any formal objection was taken to the accounts; and, even then, no precise objection was formulated.

It would appear from a letter of Mr. N. Vitalis to Mr. G. Chakalli, who possibly may have been acting on behalf of Efdokia Chakalli,

though there is no evidence of the fact, that some question as to the correctness of the accounts, so far as regards the amount charged as expenses of the sales, had arisen in the early part of November, 1895; but it does not appear that any formal objection was then made.

On the 10th December, a letter was sent to Mr. Vitalis signed by the Defendant Petrakides, and Mr. G. Chakalli on behalf of the Defendant Efdokia, in which it is stated that they have many objections to the accounts, and on the 11th December, Mr. Vitalis offered to refer any objections the Defendants had to the accounts of the sales of these cargoes to the *liquidateur judiciaire*, if the Defendants would submit them in writing. This very reasonable offer was not accepted and this action was subsequently brought. The District Court, after hearing the evidence adduced, gave judgment for the Plaintiff for 22,117 fr. with interest at 6 per cent. from the 1st October, 1895 to final payment. The judgment proceeds on the ground that the Defendants by not objecting to them in reasonable time must be taken to have acquiesced in the correctness of the accounts furnished.

The Defendants appealed, and it is contended for them that they have the right to call upon the Plaintiff to prove the amount received on the sale of these cargoes, and the amount actually expended. They further contend that knowledge or acquiescence of Mr. Georgiades, with regard to these cargoes, are not binding upon them, and that this would, at all events, be the case after the death of A. Chakalli, in August, 1891.

No suggestion of fraud is made, nor are any errors in the accounts pointed out, but the Defendants' position is simply that they, as principals, have the right to call upon their agent to furnish them with proof of the amounts received by him on the sale of these cargoes, and that the sums stated by him to have been incurred, as expenses were, in fact, incurred and paid.

It is clear that in these three transactions, A. Chakalli and N. Georgiades were jointly interested, and we think it is a fair inference from the correspondence of Tardieu, put in evidence, the originals of which we have procured from Larnaka, that it was left to N. Georgiades to manage all matters connected with these cargoes: and with regard to any specific matter brought to Georgiades' knowledge in Chakalli's lifetime and acquiesced in by Georgiades, we must hold that his acquiescence would bind A. Chakalli, his partner, in the transaction. With regard to one transaction complained of, that is to say, the settlement of the claim against the Insurance Company in the matter of the cargo of the Sophia Principessa effected by Tardieu's agents, Messrs. Allatini Brothers, this is certainly the case. The whole details

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of the matter were given to Georgiades by Tardieu in the letters written in the months of February and March, 1894, and there can be no question that the settlement now objected to was acquiesced in by Georgiades; at all events there is no evidence that he ever dissented from it.

With regard to the proof of Tardieu's accounts, we agree with the proposition that the principal has the right to call upon his agent to furnish him with evidence of his receipts and expenses; and it is certainly the case that there is no evidence before the Court of the correctness of the accounts which have been furnished by Tardieu to the Defendants. The Plaintiff sought to put in evidence affidavits procured in England and Marseilles verifying the correctness of the accounts as regards the amounts received for the cargoes and the sums expended: but the Defendants successfully objected to the affidavits as no leave of the Court for the taking of such evidence on affidavit had been obtained. Unless the District Court was justified in holding that the Defendants had acquiesced in the correctness of these accounts and that it was not open to them now to dispute them, it would be necessary for us to call upon the Plaintiff to furnish us now with evidence of the correctness of the three accounts in question. We have given the matter our careful consideration, and we have arrived at the conclusion that the District Court was justified under the circumstances in holding that the Defendants by their silence and by their conduct acknowledged the correctness of the accounts connected with the sales of these cargoes.

There is nothing specific in the Law concerning acknowledgments by silence, beyond the general principle laid down in Article 67 of the Mejellé, that silence when a person ought to speak is regarded as an admission. The circumstances in which a person ought to speak, and in which if he does not, an admission on his part is to be inferred, are apparently left to the Courts to determine. In the case before us, Tardieu had had in his hands for a very considerable period for sale, goods, in which A. Chakalli was jointly interested with others: the accounts of the sales of these goods are furnished to the Defendants sometime in the month of August, 1895, and are retained in their hands without any objection whatever for, certainly, two months; on the 31st October, 1895, a payment on account of the sum admitted to be due by the Defendants to Tardieu is made without, according to the evidence of Mr. Vitalis, any single objection to the accounts being made. The Defendants were, of course, aware that, under the terms of their agreement, they had to pay to the Plaintiff, or his agent, on the 1st October, 1895, the sum of 31,586 fr. and they must further have been aware when they received the three accounts in August, that they

would have to pay considerably more than this, inasmuch as the share of A. Chakalli in the three cargoes, which had been estimated in the agreement at 26,900 fr., turned out to be only 21,367 fr.; knowing all this, on 31st October the Defendants make no objection to the accounts, but make a payment of 13,895 fr. on account, and ask for time to pay the balance, and also ask for a further discount. It is not until 10th December that the agent of the Plaintiff was informed by letter signed by the Defendant Petrakides, and Mr. George Chakalli on behalf of Efdokia Chakalli, that they had many objections to make to the accounts of the three cargoes, but without specifying what the objections were, or even the nature of them. To this, the Plaintiff's agent replied on the following day offering to transmit the objections to the *liquidateur judiciaire*, if the Defendants would formulate them. This apparently was never done, and there the matter rested until the present action was brought.

Having regard to all the circumstances, it appears to us that this is a case in which the Defendants may, fairly, by their silence and conduct, be taken to have admitted the correctness of the accounts, and that the District Court was justified in so finding.

It is not easy on a perusal of the notes of proceedings to say what objections the Defendants wished to raise to the accounts.

At the settlement of the issue before the Judge, they specifically mentioned the settlement of the claim with the Insurance Company, as to which, as we have said, we think they are concluded, by the fact that all details of the settlement were communicated to Mr. Georgiades in the lifetime of A. Chakalli, and it may be inferred that they objected to the large amount of the expenses.

The expenses, no doubt, were heavy, but this could hardly fail to be so when the length of time during which this produce remained unsold is considered. In some cases, owing to the great fall in the value of cereals and caroubs, the cargoes or large portions of them remained in store for two years or upwards, and it is easy to understand how the charges for warehousing, etc., would mount up.

With regard to the clause in the contract which reserved a right to the Defendants to deduct from the last payment to be made under the agreement the amount of any error they discovered in the accounts between Tardieu and Chakalli, it appears to us that this most probably refers to the accounts mentioned in the first clause of the agreement as closed. The five months within such mistake is to be pointed out is under the agreement specifically declared to be from " to-day," that is from the date of the agreement, the 26th February, 1895. At this

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date the cargo of caroubs shipped by the Papa Micheli, and warehoused at Cette, in September, 1893, remained still unsold, and might, so far as appeared, so remain for an indefinite space of time; and we think the clause giving the Defendants the right to point out mistakes in the accounts between Tardieu and A. Chakalli within five months of the 26th February, 1895, cannot have been intended to embrace the account of this cargo.

It was equally uncertain when the accounts of the sales of the other two cargoes would be furnished; and, as a matter of fact, they were not received by the Defendants until after the expiration of the five months, and for these reasons we think the agreement was intended to confer on the Defendants a right to point out errors in the accounts which are described as closed.

With regard to the question of interest, we are unaware on what ground the District Court has awarded the Plaintiff interest at the rate of 6% from the 1st October, 1895, until final payment. The agreement, on which the action is brought, is silent as to the payment of interest in case default is made in payment of either instalment agreed to be paid on the 1st March and on the 1st October, respectively; and the agreement containing no stipulation for the payment of interest we do not see on what ground the Plaintiff can claim it. He could, had he chosen, have annulled the agreement and sued for the balance due by the estate of Chakalli to Tardieu without deducting the 20% discount agreed to be given; but in the absence of any specific agreement as to interest, we do not see how the Plaintiff is entitled to charge interest on the amount due on October 1st.

Under the last clause of the agreement, if the Defendants were unable to pay the last instalment, but reduced the amount due from them to £300, a bond for this sum with interest was to be given, but the rate of interest is not specified, and we do not feel ourselves at liberty to deduce from this clause an agreement to pay interest in case the debt were not reduced to £300.

We think, however, that the Plaintiff is entitled to interest at the legal rate of 9 per cent. from the date of the institution of the action under Article 99 of the Appendix to the Ottoman Commercial Code.

The only remaining question is as to the liability of the guarantor J. Papadopoulo. It is contended on his behalf that the agreement states that, if the Defendants do not fulfil the obligations undertaken by them, the agreement is declared to be void, and Mr. Tardieu resumes his original position, that is to say, may demand from the Defendants the sum of 105,865 fr. less the amount to be deducted as A. Chakalli's share of the proceeds of the three cargoes, but without any allowance of

20% as discount. The argument on behalf of Mr. Papadopoulo is that the agreement was void when the Defendants made default in paying what was due from them on the 1st October, and the fact that they have both chosen to act as though the agreement is still in force cannot affect him.

The liability of the guarantor is created by the words written at the end of the agreement and signed by him as follows: " I guarantee the execution of the present agreement until its fulfilment."

We have no doubt that the meaning of the clause in the agreement is not that the agreement itself became absolutely null if the Defendants made default, but that it may be declared so if they did. The agreement is silent as to the party by whom it is to be declared void, but the Defendants were not in the least likely to do so, because they would lose the benefit of the very liberal discount of 20% agreed to be given them. Practically, it seems to us to be intended as an option given to Tardieu, either to proceed under the agreement or to demand from the estate of A. Chakalli the full sum due without any deduction for discount. If he elected to pursue the latter course he would, of course, lose any benefit he might obtain by the guarantee of Mr. Papadopoulo.

It appears to us that Mr. Papadopoulo guaranteed the execution of the agreement generally. He guaranteed, according to our construction of it, the payment of one-half the debt on the 1st March and the 1st October, respectively, and he guaranteed that the payment of the latter should be secured by a bond signed by the other two Defendants and himself. He further guaranteed by Clause 9 the payment by the one party to the other of the differences that might arise through the realized value of the three cargoes not amounting to or exceeding the estimated value. The fact that no bond was given securing the payment of the last instalment of the admitted debt does not appear to us to affect Mr. Papadopoulo's position as guarantor of the payment to be made on October 1st, or of the payment of the differences above mentioned, which is the only matter in dispute in this action.

Under these circumstances we must hold that Mr. Papadopoulo is liable under his guarantee.

The judgment of the District Court will, therefore, be varied by omitting the direction to pay interest on the sum of 22,117 fr. at the rate of 6% per annum, and by directing that, instead thereof the Defendants pay interest on the said sum at the rate of 9% per annum from the date of the institution of the action, the 26th February, 1896.

The Appellants having practically failed in the appeal must pay the Respondent's costs of appeal.

Judgment varied.