1979 April 12

[TRIANTAFYLLIDES, P., STAVRINIDES, HADJIANASTASSIOU, JJ.]

NATIONAL BANK OF GREECE,
Appellants-Defendants,

v.

KYRIACOS K. MASONOU,
Respondent-Plaintiff.

(*Civil Appeal No.* 5672).

Banking—Banker and customer—Fixed deposit account—Money repayable only on production of receipt or deposit book—Both parties losing their documents—Court, in the exercise of its equitable jurisdiction, would not allow absence of the document to stand in the way of depositor reclaiming his money—Claim resolved in the same way as any other type of civil action—It is for plaintiff to prove his claim on a balance of probabilities.

Civil Procedure—Pleadings—Particulars—Claim against bank under "Γραμμάτια" (*"bonds"*)*—Whilst evidence adduced was in respect of receipts of deposits of money—Particulars clarifying nature of claim, given to bank—Particulars intended to put opposite party on his guard and prevent his being taken by surprise at the trial—Amendment of statement of claim not necessary.*

Equity—Principles of equity—Banker and customer—Fixed deposit account—Re-payable on production of receipt—Both parties losing their documents—Depositor allowed to re-claim his money in exercise of Court's equitable jurisdiction—Article 28 *of the Constitution not contravened—Maxim "equality is equity" not applicable.*

Decided cases—Obiter dicta—Whether Court can refer to obiter dicta of English decisions.

Words and Phrases—"Γραμμάτια" (*"bonds"*).

The respondent-plaintiff sued the appellant bank claiming a

sum exceeding £4,000 under two "γραμμάτια" (bonds), or alternatively, the balance due under an account. The appellants sought further and better particulars of the nature of the claim envisaged by the two "γραμμάτια" (bonds) and counsel for the respondent in reply stated that by such description it was meant to refer to those documents ordinarily issued by the bank evidencing a deposit of money with the bank, repayable after the lapse of thirteen months and with a higher interest payable than the other deposits of less duration.

In support of the claim there was evidence from the respondent who stated that he was residing at Pighi village and in January, 1974 he went to the Famagusta Branch of the appellant bank together with a colleague of his and lodged the sum of £2,500 and was given a receipt therefor; that this document was payable on February 19, 1975 and the interest stipulated was 7 3/4%; that one and a half months after the first visit he went alone to the Bank and lodged the amount of £2,300 and was given another receipt; that when the Turkish invasion of Cyprus took place he was forced to leave his village (Pighi) in a hurry and left behind the said receipts at his home; and that as his village was still under occupation there was no way for the plaintiff to collect the receipts in question. The evidence of the respondent with regard to the first visit was corroborated by his colleague.

When the respondent asked for the money due to him the appellants refused payment because their books were left at Famagusta, which was still under Turkish occupation, and in the absence of such books it was very difficult to verify the claims of the depositors. Subsequently, however, they paid to him the amount of £1000 upon his executing an indemnity bond.

The trial Court rejected the submission of Counsel for the appellant that a claim for the recovery of money due by a bank to a customer by virtue of a deposit receipt required corroboration and held that "the claim must be resolved in the same way that any other type of civil action must be decided, that is it is for the plaintiff to prove his claim on a balance of probabilities"; and having accepted the evidence of the respondent and his witnesses gave judgment for the respondent as per his claim.

Upon appeal counsel for the appellant bank contended:

(a) That the trial Court misdirected itself as to the weight

and effect of the evidence adduced and drew unwarranted conclusions in that the claim of the respondent was based on "γραμμάτια" (bonds) whilst the evidence adduced was in respect of receipts of deposits of money repayable after a lapse of a specified time, and the further and better particulars given by the respondent could not be deemed to be an amendment of the statement of claim which could only be amended by an order of the Court.

(b) That the trial Court wrongly found that the receipt evidencing the deposit of money was lost because it believed the uncorroborated evidence of the respondent which is inconsistent with itself and/or with the pleadings which were not amended and because it failed to consider and appreciate the case of *Atkinson* v. *Bradford Third Equitable Benefit Building Society* [1890] 59 L.J. Q.B. 360.

(c) That the trial Court misdirected itself as to the law applicable in this case because (a) in the exercise of its equitable jurisdiction it relied on obiter dicta of English decisions and/or secondary authorities which can be distinguished, and which are contrary to the principles of equity, viz. that equity follows the law, and that where there is equal equity the law shall prevail and (b) that the dicta of Lord Denning in *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Ltd.* [1973] 1 All E.R. 193 were read out of context in a case which was irrelevant to the issue before the Court.

(d) That the principles of equity should not have been invoked because (a) this would put the appellants at a disadvantage and it would defeat another principle of equity designed to ensure equality of treatment between the parties (b) it would lead to inequality in breach of the principle of equality enshrined in Article 28 of the Constitution and of the maxim of equity "equality is equity".

Held, (1) that in its ordinary use the word "γραμμάτιον" (bond) connotes a document acknowledging a debt coupled with an obligation to repay it; that from the further and better particulars

given to counsel for the appellants, it was clarified that the documents to which he referred were those ordinarily issued by the bank evidencing a deposit of money with the bank repayable after the lapse of time; that though the statement of claim has not been amended no such amendment was needed; that the particulars given by counsel for the respondent were intended—and the trial Court rightly found so—to put the opposite party on his guard and prevent his being taken by surprise at the trial of the action; that, therefore, the trial Court has not misdirected itself; and that, accordingly, contention (a) must fail.

(2) That it was not denied that the respondent has given notice to the appellant bank of withdrawal of his money; that though it was true that there was a stipulation in the terms of the contract that the receipt was not negotiable and that in the case of withdrawal of the money it was imperative to produce the receipt, it was equally true that the Bank has paid the respondent the sum of £1000 without the production of the receipt; that in the *Atkinson* case (*supra*) notice of withdrawal was a condition precedent to the accruing of any cause of action; that in the present case the trial Court was aware that even if the return of the deposit book was a condition precedent the *Atkinson* case is distinguishable once the Court had in mind that the documents were lost; that, therefore, the trial Court has not failed to consider and appreciate the *Atkinson* case; and that, accordingly, contention (b) must fail.

(3) That the existence of equitable jurisdiction to grant relief for the loss of documents has been accepted and in case of the loss of the book the Court would exercise its equitable jurisdiction and not allow the absence of the receipt to stand in the way of the depositor re-claiming his money, nor would the Court require the depositor to give an indemnity, the deposit book or receipt not being a negotiable instrument (see 2 Halsbury's Laws of England, 3rd edn. 174 para. 327); that equity stepped in to fill the gap and closed the door to a party's unjustified insistence on his contractual rights in circumstances which would lead to manifest injustice; that, further, equity intervened to stop the abuse of a legal right in an effort to moderate the rigour of the contract law, thereby ensuring that justice is done in accordance with the substantive rights of the parties (see in *re Dillon* [1890] 44 Ch. D. 80); that though the said dicta in the

Gillespie case (*supra*) were obiter and were not related at all to the present case the importance of such observations cannot be undermined; that the trial Court quite rightly made a brief reference to the *Gillespie* case in order to show what is the trend today in England in order to do justice; and that, accordingly, contention (c) must be dismissed.

(4) That the jurisdiction to grant relief for the loss of documents is not limited to any particular class of documents; that this is not a case in which Article 28 of the Constitution can be invoked or that there was a discrimination in this case of the respondent proceeding to Court to put his claim in the hands of justice; that the mere fact that both the bank and the respondent had lost their books shows that it was necessary to proceed to the Court and that there was no discrimination of any kind and this is a case in which equity should intervene to do justice to both parties; that the maxim "equality is equity" does not apply to the facts of the present case because the substratum of this rule is that a Court may intervene and authorise equal division of property among claimants to it in the absence of sufficient reasons or basis for its division among interested parties in any other way (see Snell's Principles of Equity, 27th ed. p. 36); and that, accordingly, contention (d) must, also, fail.

(5) That the bank was in the same position as the respondent and that was the reason why equity stepped in, in order to do justice; that both parties have lost their documents and therefore the Court rightly heard evidence on the issues before it; that there was sufficient evidence before the trial Court and having gone through such evidence, the claim was resolved in the same way that any other type of civil action ought to be decided, that is, it is for the plaintiff to prove his claim on a balance of probabilities; and that, accordingly, the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Pinson v. *Lloyds and Nat. Prov. Foreign Bank* [1941] 2 All E.R. 636 at p. 638;

Atkinson v. *Bradford Third Equitable Benefit Building Society* [1890] 59 L.J.Q.B. 360 at pp. 362, 363;

Gillespie Bros. & Co. Ltd. v. *Roy Bowles Transport Ltd.* [1973] 1 All E.R. 193;

Bagley v. *Winsone* [1952] 1 All E.R. 637;

In re Dillon [1890] 44 Ch. D. 76 at pp. 80–81;

Levison v. *Patent Steam Carpet Cleaning* [1977] 3 All E.R. 498.

Appeal.

Appeal by defendants against the judgment of the District Court of Famagusta (Pikis, P.D.C. and Artemis, D.J.) dated the 5th February, 1977 (Action No. 4/76) whereby they were adjudged to pay to the plaintiff the sum of £3,800.—due to him under two bonds ("grammatia").

P. Cacoyiannis, for the appellants.

A. Poetis, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Hadjianastassiou, J.

HADJIANASTASSIOU J.: This is an appeal by the defendants, the National Bank of Greece, from the judgment of the Full District Court of Larnaca, dated February 5, 1977, allowing the claim of the plaintiff Kyriacos K. Masonou against the defendants, in an action for the recovery of a sum of money under two "grammatia", or alternatively, the balance due under an account.

The plaintiff brought an action against the defendants claiming in the statement of claim a sum exceeding £4,000 and interest. On the contrary, the defendants, in the statement of defence repudiated the claim of the plaintiff and made it clear that they were not prepared to accept this claim. When the pleadings were closed, counsel appearing for the defendants addressed a letter dated October 5, 1976, seeking further and better particulars of the nature of the claim envisaged by the two "grammatia".

On November 3, 1976, counsel for the plaintiff in reply, clarified to counsel that by that description in the statement of claim, it was meant to refer to those documents ordinarily issued by the bank evidencing a deposit of money with the bank in question repayable after the lapse of 13 months and with a higher interest payable than the other deposits of less duration.

In the course of the trial, it was made quite clear that docu-

ments described as "grammatia" were the usual deposit receipts, ordinarily issued by the bank to depositors of money evidencing the indebtedness of the bank and stipulating the time of repayment of the loan, which as we said earlier, was after the lapse of 13 months.

On December 6, 1976, the plaintiff told the Court that he was residing at Pighi village and in January, 1974, he went to the National Bank of Greece in Famagusta together with his colleague, Sotiris Costi, and lodged the sum of £2,500. He was given a receipt upon lodging that amount. This document was payable on February 19, 1975, and the interest stipulated was 7 3/4%. One and a half months after his first visit he went alone to the bank and lodged with the same bank the amount of £2,300; and the bank gave him another receipt.

The plaintiff, unfortunately, was forced to leave his village in a hurry, when the Turkish invasion of Cyprus took place, leaving behind the said receipts at his home. As the village of Pighi is still under occupation, there was no way for the plaintiff to collect the receipts in question. The plaintiff had neither a copy nor a photostat copy of this receipt. When he was invited by his counsel to give details of the contents of the receipt, counsel appearing for the defendants objected firstly because there was not an allegation in the pleadings that the receipt or lodgement of money was lost; and secondly that the action ought to be brought on a lost document. In spite of the fact that in the particulars of the statement of claim reference was made to the fact that the two "grammatia" in question were left at Pighi village, counsel further argued that once the documents were still in existence there, as alleged by the plaintiff, and once no loss or destruction was proven, the plaintiff was estopped to give oral evidence as to the contents of those because the plaintiff cannot bring his case within the meaning of the word "lost".

In the light of the evidence that the receipt evidencing the indebtedness of the defendants to the plaintiff could not be traced or found for the reasons stated earlier, the trial Court in a short ruling—having taken judicial notice of the tragic events of 1974—overruled the objection and allowed the plaintiff to give oral evidence as to the contents of the document having been considered for all practical purposes by the Court as lost; and because its production was considered utterly impossible,

once the area was inaccessible due to the Turkish occupation; and that it was made clear in the statement of claim that the documents were beyond the reach of the plaintiff.

The plaintiff facing apparently financial difficulties visited the bank on two or three occasions to ask for the money due to him, but the bank refused payment. Subsequently, the defendants paid to him the amount of £1,000 only in February, 1975. He repeatedly demanded payment of the balance, but the bank kept refusing; he brought the present action in order to claim the recovery of the balance.

Because the plaintiff was challenged in cross-examination as to whether he had actually the means enabling him to lodge those amounts in the bank, counsel called the Mukhtar of Pighi village, Pantelis Avgousti, who told the Court that he was the secretary of the Co-operative Society. He knew the plaintiff, and on January 14, 1974, the plaintiff withdrew from the Co-operative Society the amount of £1,090 having lodged with the said Society, one and a half years earlier, the sum of £1,000.

There was further supporting evidence by the person who had accompanied the plaintiff on his first visit to the Bank, Sotiris Costi, who said clearly that on the 18th or 19th January, 1974, he accompanied the plaintiff to the bank in question and helped him count the money at the bank. He added that he was not counting himself, but he was giving the money to the plaintiff who was counting it after he had agreed about the interest. After they counted the money, they gave him a document.

Mr. Kyprianou who was, before the Turkish invasion, serving as assistant branch manager at Famagusta said that the employees of that branch of the defendants left in a hurry without taking with them the books of the bank, a fact that has created many difficulties for the subsequent transactions of the banking business of the defendants. Furthermore the defendants had no alternative source of information as to the state of the accounts of the many customers of the Famagusta branch of the defendants. This statement has not been challenged; Mr. Kyprianou further explained that in the absence of their books it was very difficult to verify the claims of depositors and because of the large number of customers it was difficult for the employees of the bank to remember with accuracy who was and who was

not a customer. Furthermore, Mr. Kyprianou was unable to confirm or deny whether the plaintiff was a depositor of the bank. He did, however, state in cross-examination that it was their practice after their displacement from Famagusta to inquire into the claims of persons claiming to be depositors of the bank before allowing payment of any sum of money due to them.

It appears further that Mr. Kyprianou or indeed the bank must have scrutinised the plaintiff's claim whether he was a depositor before they paid to the plaintiff the amount of £1,000. As to the practice of the bank Mr. Kyprianou said that on accepting a fixed term deposit the bank invariably issued a receipt in triplicate furnishing the depositor with the first copy of the receipt. The receipts were identical in form and terms to a receipt produced before the Court *exhibit* 2, but the plaintiff was unable to state with certainty whether the receipts issued to him were identical to *exhibit* 2. He agreed, however, that the documents issued to him were broadly speaking similar to *exhibit* 2 except perhaps the colour. The trial Court has accepted that the bank on accepting a deposit was invariably furnishing the depositors with a receipt identical with *exhibit* 2 filled in with the particulars of the depositor and the money lodged with the bank.

The trial Court having also dealt with the submission of counsel that the claim of the plaintiff should not be accepted—and a similar stand was taken before the Appeal Court—unless supported by strict corroboration, said that:- None of the authorities quoted by learned counsel nor anything that is said in Phipson on Evidence support the view that the claim for the recovery of money due by a bank to a customer by virtue of a deposit receipt or otherwise must be corroborated before sustained. The claim must be resolved in the same way that any other type of civil action must be decided, that is, it is for the plaintiff to prove his claim on a balance of probabilities.

Then the trial Court having dealt with the credibility of the witnesses made this statement:-

> " The plaintiff and his witnesses impressed us extremely well and we accept them as witnesses of truth. The testimony of Sotiris Costi supports in a very direct way the contention of the plaintiff that on 19th January, 1974, he deposited a sum of money with the defendants. As already

indicated the testimony of Mr. Kyprianou does lend further support to the allegation of the plaintiff that he is a depositor of the bank. We find as a fact that the plaintiff on 19th January, 1974, deposited with the defendants £2,500 payable after the expiration of 13 months; the deposit carried interest at the rate of 7 3/4% per annum. One and a half months later he deposited a further sum with the defendants upon similar terms and conditions, this time the amount being £2,300. On both instances the plaintiff was issued with a receipt in the terms of *exhibit* 2. An amount of £1,000 has been refunded in accordance with the provisions of *exhibit* 1".

Finally the Court concluded as follows:-

"The plaintiff has established a right to the recovery of the money and having in mind the nature of the documents lost the defendants are not at risk of paying the same amount of money over twice which is the purpose of an indemnity, for lost negotiable instruments. In the result, judgment is given for the plaintiff as per claim."

On appeal the first complaint of counsel was: (a) that the Court misdirected itself as to the weight and effect of the evidence adduced and drew unwarranted conclusions in that the claim of the plaintiff was based on "grammatia" whilst the evidence adduced was in respect of receipts of deposits of money repayable after a lapse of a specified time, and the further and better particulars given by the plaintiff could not be deemed to be an amendment of the statement of claim which could only be amended by an order of the Court.

The trial Court, which as we have said earlier, dealt with the same argument, raised on appeal said on this point:-

"The word grammation is not exclusively synonymous with the documents known as bonds under English law... In its ordinary use the word "grammation" connotes a document acknowledging a debt coupled with an obligation to repay it... In our judgment the word grammation is apt to cover plaintiff's claim as it was developed before us in the course of the trial and the submission made on behalf of the defendants to the contrary is dismissed."

Having considered the argument of counsel we find ourselves unable to agree with counsel for the appellants that the trial Court misdirected itself and we endorse the statement above viz., that in its ordinary use the word "grammation" connotes a document acknowledging a debt coupled with an obligation to repay it.

Furthermore, it was equally clear that from the further and better particulars given to counsel for the appellants, it was clarified that the documents to which he referred were those ordinarily issued by the bank evidencing a deposit of money with the bank repayable after the lapse of time. It is true, of course, that the statement of claim has not been amended, but with respect, no such amendment was needed in our view.

In *Pinson* v. *Lloyds and Nat. Prov. Foreign Bank*, [1941] 2 All E.R. 636—relied upon by counsel—Scott, L.J. dealing with the question of pleadings had this to say at p. 638:-

> "It is a well-recognised canon of pleading that the defendant need not, and, indeed, ought not to plead to 'particulars', whether contained in, or delivered with, the statement of claim. The reason for that canon is plain. All the material facts constituting the cause of action ought already to have been plainly stated in the pleading itself, as required by R.S.C., Ord. 19, r. 4, the plainest and most fundamental of all the rules of pleading. The proper function of 'particulars' is not to state the material facts omitted from the statement of claim, in order, by filling the gaps, to make good an inherently bad pleading, however common that pernicious practice may have become. On this topic I made some observations in *Bruce* v. *Odhams Press, Ltd.* (1), at pp. 712, 713 ([1936] 1 All E.R., at p. 294), and will not repeat them beyond saying that I still hold the opinion that it is not the function of particulars to take the place of necessary averments in the pleading. Their function is to put the opposite party on his guard and prevent his being taken by surprise at the trial of an action, the 'material facts' of which should have been already averred. Nor have mere statements of evidence, as such, a place in particulars, any more than in the pleading, although the dividing line between statements which contain sufficient indication to prepare the opponent's mind for what he will have to meet

at the trial and mere statements of evidence is sometimes hard to draw, and should not invite meticulous criticism. The essential rules of modern pleading embody a common-sense view of litigation, and, if complied with substantially and in accordance with their real intention, are well-calculated to keep down the cost of litigation."

Turning now to the present case, and with these consideration in mind, the particulars given by counsel for the respondent-plaintiff were intended—and the trial Court rightly found so—to put the opposite party on his guard and prevent him being taken by surprise at the trial of the action. We think, therefore, that the argument put forward by counsel is not a convincing one and we would dismiss it.

Counsel further argued that the trial Court wrongly found that the receipt evidencing the deposit of money was lost because it believed the uncorroborated evidence of the plaintiff which is inconsistent with itself and/or with the pleadings which were not amended; and that it failed to consider and appreciate the case of *Atkinson* v. *Bradford Third Equitable Benefit Building Society*, [1890] 59 L. J. Q. B. 360.

The trial Court, having dealt also with the same argument expounded before us, viz., that the claim of the plaintiff should not be accepted unless supported by corroboration, and in fact strong corroboration, said:-

"None of these authorities nor anything that is said in Phipson supports the view that a claim for the recovery of money due by a bank to a customer by virtue of a deposit receipt or otherwise must be corroborated before sustained. The claim must be resolved in the same way that any other type of civil action must be decided, that is it is for the plaintiff to prove his claim on a balance of probabilities. Within this ambit the onus of proof, as it has been repeatedly stressed, varies in direct proportion to the gravity of the allegation made and considering the nature of the claim of the plaintiffs and the position in which the defendants found themselves in the absence of their books a claim of this nature must be scrutinized in the most careful manner."

In *Atkinson* (*supra*) at p. 360 it was held that the stipulations

as to giving notice of withdrawal, the production of the pass-book, and the like, were conditions precedent to any liability on the part of the society to repay the loan, and that as some of them had not been fulfilled in the lifetime of A., no cause of action had accrued to him before his death, and that the Statute of Limitations did not begin to run against his administrator until letters of administration had been taken out. It was held also, per Lindley, L.J., that even if the conditions which had not been fulfilled were not conditions precedent, yet where a creditor dies intestate on the day on which a debt becomes payable to him, and there is no evidence to shew whether he died before or after the time when the debt became payable, the Statute of Limitations does not begin to run against the administrator until letters of administration have been taken out.

Lord Esher, M.R., in dismissing the appeal said at pp. 362, 363:-

"It seems to me that this case depends upon the contract between the deceased man and the defendant society which was made at the moment when he deposited his money with the society. When money is deposited by a person with this society by way of loan, the society gives the depositor a loan passbook and also a copy of the rules. The amount so lent is entered in the passbook, which contains certain terms in writing. It seems to me, therefore, that the pass-book contains the terms of the contract in writing, and is given to the depositor as containing the terms on which he is lending his money to the society. The terms of the contract are therefore agreed upon between the parties. The terms with regard to repayment are, that sums over 20 l. are payable back to the depositor under certain circumstances. There is no liability on the part of the society to repay the deposit, and no cause of action accrues against the society until the circumstances have arisen. What are those circumstances? In the first place, there is a stipulation requiring notice of withdrawal to be given according to terms stated when the notice is given. That notice, therefore, is a condition precedent to the accruing of any cause of action. Then there is a stipulation that no money will be paid out except on the production of the investor's book, and he must either attend personally or send a written authority. That is the contract between the parties, and

there is no liability imposed on the society to repay the deposit until those conditions which, in my opinion, are conditions precedent have been fulfilled. In this case they were not fulfilled in the lifetime of Thomas Atkinson, and therefore no cause of action accrued against the society during his lifetime. It has been said that the administrator, the present plaintiff, has not produced the pass-book, and that one of the conditions, therefore, has not been fulfilled. There is, however, no stipulation that the book is to be produced by him—only that the book is to be produced; and as the defendants have got the book, and had it when this action was brought, that condition precedent, so far as the plaintiff is concerned, has been fulfilled; but as regards the deceased man it was not fulfilled, and therefore no cause of action accrued to him during his lifetime which he could have maintained. The Statute of Limitations did not begin to run as against the administrator until letters of administration had been taken out, and therefore no cause of action accrued to the administrator until that time. That is sufficient to decide the case."

In the present case, there was a finding of fact that the respondent deposited with the appellant the sums of £2,500.— and £2.300.— In both instances, the respondent was issued with a receipt in the terms of *exhibit* 2. Furthermore, the amount of £1,000.—was paid by the appellants to the respondent, and the latter executed what has been referred to as an indemnity bond in the terms of *exhibit* 1. This document contains also a declaration by the respondent to the effect that the bank was indebted to him for an amount of £4,800.—coupled with an affirmation that he did not assign his rights in that document.

That the respondent has given notice to the bank of withdrawal of his money was not denied. It is true, of course, that there was a stipulation in the terms of the contract that the receipt was not negotiable and that in the case of withdrawal of the money it was imperative to produce the receipt, but it is equally true that the bank without the production of the receipt has paid the respondent the sum of £1,000.—and with this in mind we do not see in what way the trial Court has failed to consider and appreciate the Atkinson case. In that case, notice of withdrawal was a condition precedent to the accruing of any cause of action. In the present case the trial Court was aware that even if the return of the deposit book was a condition

precedent, that case is distinguishable once the Court had in mind that the documents were lost.

With that in mind, the trial Court exercised its equitable jurisdiction and has not allowed the absence of the receipts to stand in the way of the depositor claiming his money. We fail to see the Court misinterpreting the substance of that case, as we think that it has followed the proper procedure. We would, therefore, dismiss this argument also.

Counsel, in a full and strong argument, further contended that the trial Court misdirected itself as to the law applicable in this case (a) because in the exercise of its equitable jurisdiction it relied on obiter dicta of English decisions and/or secondary authorities which can be distinguished, and which are contrary to the principles of equity, viz., that equity follows the law, and that where there is equal equity, the law shall prevail; and (b) that the dicta of Lord Denning in *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Ltd.*, [1973] 1 All E.R. 193 were read out of context in a case which was irrelevant to the issue before the Court.

We think, in order to follow this argument, it is necessary to state that the trial Court made it clear that the conditions at the back of *exhibit* 2, stipulate, *inter alia,* for the production of the receipt as an essential condition "aparetitos" for the payment of the debt. It is equally useful to state that Mr. Kyprianou stated to the trial Court the practice followed at Famagusta where the loss of a document was reported. The procedure followed, provided the bank was satisfied that it was a genuine case involving the loss of the relevant document, entitled the issue of a new receipt. With that in mind, the question which the Court posed was whether the bank was liable to refund money to a depositor in the absence of the production of the deposit receipt.

It was the case for the defendants all along before the trial Court, that the claim of the plaintiff should be dismissed despite any finding of the Court, accepting the details of the claim of the plaintiff, in the absence of the production of the receipts evidencing the debt. (See *Bagley* v. *Winsone*, [1952] 1 All E.R. 637, an authority for the proposition that where by virtue of the contractual stipulation the production of a receipt is made a condition precedent to the repayment of a deposit, the banker is entitled to withhold payment pending such production). (See also Paget's Law on Banking 7th Edition at p. 143).

Counsel for the plaintiff did not dispute the principle quoted, but went on to argue that the Court had equitable jurisdiction to grant relief for lost documents, and thereby relieving a party from the consequences attendant on the loss of a document where its production was a condition precedent to payment.

The existence of equitable jurisdiction to grant relief for the loss of documents has been accepted, and in case of the loss of the book, the Court would exercise its equitable jurisdiction and not allow the absence of the receipt to stand in the way of the depositor re-claiming his money. Nor would the Court require the depositor to give an indemnity, the deposit book or receipt not being a negotiable instrument. (See 2 Halsbury's Laws of England, 3rd edn. 147 para. 327). In support of this proposition, Cotton, L.J., in *Re Dillon*, [1890] 44 Ch. D. 76, had this to say at pp. 80-81:-

> "It was urged that her evidence was not corroborated, and that the Court will not establish a claim against the estate of a deceased person on the evidence of the claimant alone unless it is corroborated. I do not think that this proposition is now law. Where a claimant's case depends entirely on his own evidence the Judge ought to sift that evidence very carefully; but if the claimant gives evidence which is not shewn to be inaccurate in any material point, and which satisfies the Judge of its truthfulness, he ought, I think, to act upon it though it be not corroborated. In the present case, moreover, I think that there are circumstances which tend to corroborate Miss Duffin's evidence.....If the document was lost they would require some explanation why it was not forthcoming before they paid the money; but I do not think that they could refuse to pay. I cannot think that the requiring this cheque to be signed puts the account on any footing different from that of an ordinary deposit account, so as to prevent the fund from being given away as a donatio mortis causa."

In the same case, Lindley, L.J., speaking about the requirement of giving an indemnity, said at p. 83:-

> "Even if the deposit receipt had combined with it a form of cheque, and this was filled up and signed by the depositor before the loss, it is apprehended that, as the banker could not be sued on the cheque, he would not be entitled to an indemnity."

It is evident that equity stepped in to fill the gap and closed the door to a party's unjustified insistence on his contractual rights in circumstances which would lead to manifest injustice. This equitable principle, as we said earlier, has been repeated in re *Dillon* (*supra*), and it is quite apparent that equity intervened to stop the abuse of a legal right in an effort to moderate the rigour of the contract law, thereby ensuring that justice is done in accordance with the substantive rights of the parties. (See also 14 Halsbury's Laws of England, 3rd edn., 464–465, and particularly paragraph 881 and under Q at p. 465).

In a recent case, *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Ltd. and Another*, [1973] 1 All E.R. 193, observations were made by Lord Denning, showing the modern trend of judicial authority to unfetter the hands of the Court to whatever extent this is necessary to do justice in each case. Lord Denning, M.R. said at p. 200:–

> "The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the Courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago, '... there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused': see *John Lee & Son (Grantham) Ltd.* v. *Railway Executive* [1949] 2 All E.R. at 584). It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so."

In *Levison* v. *Patent Steam Carpet Cleaning* [1977] 3 All E.R. 498, the dictum of Lord Denning at p. 200 applied.

We are aware, of course, of the criticism made by learned Counsel for the appellants, that the statements made were obiter dicta and were not related at all to the present case, and we agree, but with respect, one cannot undermine the importance of such observations. The trial Court, in our view, quite rightly made a brief reference to the *Gillespie* case, in order to show what is the trend today in England in order to do justice.

Equity steps in when justice is required. Counsel further argued that in the present case the bank was in the same position as the plaintiff.

We agree that the bank is in the same position as the respondent and that is the reason why equity steps in, in order to do justice. Both parties have lost their documents—once they were left behind at Famagusta and Pighi—and the Court rightly heard evidence on the issues before it. In our view, there was sufficient evidence before the Court, and having gone through such evidence, the claim was resolved in the same way that any other type of civil action ought to be decided, that is, it is for the plaintiff to prove his claim on a balance of probabilities.

Counsel further argued that the principles of equity should not have been invoked having regard to the facts of the present case, inasmuch as it would put the appellants at a disadvantage, and it would defeat another principle of equity designed to ensure equality of treatment between the parties.

Having considered this contention also, in spite of the commendable efforts of counsel, we do not share his views, because the jurisdiction to grant relief for the loss of documents is not limited to any particular class of documents. But, counsel went even further and argued that the application of the principle of equity would lead to inequality in breach of the principle of equality enshrined in Article 28 of the Constitution; and of the maxim of equity "equality is equity". In fact, counsel has invited the Court not to intervene, because there are, in the present case, conflicting equities in the sense of the two parties being likewise afflicted by the same calamity from which relief is sought.

With the greatest respect to the argument of counsel, this is not a case in which Article 28 can be invoked or that indeed there was a discrimination in this case of the respondent proceeding to Court to put his claim in the hands of justice. The mere fact that both the bank and the respondent had lost their books, shows in our view that it was necessary to proceed to the Court and that there was no discrimination of any kind, and this is a case in which equity should intervene to do justice to both parties.

As to the maxim of equity, "equality is equity" we think with respect, once again, that this principle does not apply to the facts of the present case, and as it appears from Snell's, Principles of Equity, 27th edn. p. 36, the substratum of this rule is that a Court

may intervene and authorise equal division of property, among claimants to it in the absence of sufficient reasons or basis for its division among interested parties in any other way. We think, therefore, that this maxim cannot be invoked either, having regard to the particular facts of this case.

For all the reasons we have given in this judgment, we would affirm the judgment of the Court and dismiss the appeal, once the respondent has established a right of the recovery of the money. But in the circumstances, there shall be no order as to costs.

Appeal dismissed. No order as to costs.