C.A. 118/51

NEW ZEALAND INSURANCE CO. LTD. AND ANOTHER

v.

IZHAK YOUVAL (SALZMAN)

In the Supreme Court sitting as a Court of Civil Appeal.
[June 4, 1953]
Before: Silberg J., Assaf J., and Landau J.

Conflict of Laws - Palestine Order in Council, 1922, *Article 46 - English law to be applied - English law, when applied as foreign law and not by virtue of Article 46, to be proved by experts - Principle of identity of laws - Contract of marine insurance - Ottoman Maritime Code,* 1863, s. 193.

The plaintiff, a Haifa merchant, insured with the defendant, a company having its head office apparently in New Zealand and a branch in London, a consignment of 100 watches despatched to him from Paris. The policy, made in Haifa and mentioning the London branch, was in English and contained a "lost-or-not-lost" clause. In fact the watches had been sent from Paris twenty days before the issue of the policy, but this fact was not disclosed to the underwriters. The consignment was stolen while in transit in France, and only seven watches were recovered. It was impossible to determine whether the theft had been committed before or after the date of the policy. The District Court gave judgment against the defendants for the value of 93 watches, holding that the information relating to the prior despatch of the watches had not been withheld by fraud on the plaintiff's part, and that there was no duty on him to volunteer it.

Held, allowing an appeal and remitting the case to the District Court for further consideration:

1. The question what was the law applicable to the contract, being one of conflict of laws to which no local law extended or applied, must be determined in accordance with the English common law by virtue of Article 46 of the Palestine Order in Council, 1922.[1)]

2. *Quaere*, whether the English law rule is that in the absence of an agreement to the contrary a contract of marine insurance is governed by the law of the place where the underwriter carries on his business.

Spurrier v. G.F. La Cloche 1902 A.C. 446 and
Greer v. Poole (1879) 5 Q.B.D. 272 considered.

3. There was no evidence before the court to prove either what was the country in which the underwriter carried on business or, assuming it to be England, what the provisions of the English law were. As distinct from a case in which English common law is applicable under Article 46, it is necessary to prove such law by expert evidence when it is to be applied as a foreign law.

4. In the absence of evidence, it must be presumed that the law of the defendant's place of business is identical with the local law.

5. A question of marine insurance is comprehensively answered by the Ottoman Maritime Code, 1863, and there is no occasion to turn to English law under Article 46. On the contrary, the Code must be interpreted in the light of the French law from which it was derived.

6. By Article 193 of the Ottoman Mercantile Code [1)] a contract of insurance will be cancelled in the event of the non-disclosure of a fact which, had it been known to him, would have prevented any ordinary, reasonable underwriter from consenting to the conditions included in the policy.

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1) Palestine Order in Council, 1922, Article 46:

Law to be applied

The jurisdiction of the Civil Courts shall be exercised in: conformity with the Ottoman Law in force in Palestine on 1st November, 1914, and such later Ottoman laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.
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Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's (the State of Israel's) jurisdiction permit and subject to such qualification as local circumstances render necessary

Accordingly:

(a) The question does not depend upon whether the assured knew or did not know of the loss of the watches, or whether he acted fraudulently or not.

(b) The "lost-or-not-lost" clause proved that the mere fact that the watches had already been despatched at the date of policy could not have affected the underwriters' estimate of the risk insured.

(c) The question whether the non-disclosure of the fact that the watches were already in transit for twenty days at the time when the insurance was applied for affected the validity of the contract depended upon whether that period was so long in reference to the circumstances that an ordinary, reasonable underwriter would regard it as increasing the risk he had underwritten. That question should be answered by the District Court.

Case remitted accordingly.

Palestine cases referred to :

(1) *C.A.* 123/41 - *Gustav Weil v. Barclays Bank (D.C. & O.), Haifa Branch;* (1941) 2 *S.C.J.* 354.

(2) *C.A.* 259/41 - *Leopold Baef v. The Palestine Building Syndicate, Ltd.;* (1942) 1 *S.C.J.* 82.

(3) *C.A.* 73/43 - *L. v. L*; (1943) 1 *A.L.C.* 245.

Israel cases referred to:

(4) *C.A.* 37/48 - *Bank Hapoalim Ltd. v. Ya'acov Kravtsov;* (1948/9) 1 *P.* 44.

(5) *C.A.* 130/50 - *Amal Ltd.* v. *Yehoshua Shindler;* (1952) 6 *P.D.* 710.

(6) *C.A.* 37/49 - *Gila Cohen Rapoport v. Sara Paldwrowski;* (1950) 4 *P.D. 645.*

(7) *C.A.* 51/49 - *Yosef Yazdi and Others v. Rivka Yazdi;* (1950) 4 *P.D. 762.*

(8) *C.A.* 167/47 - *Binyamin Minkowitz v Zalnan Fishtsner & Others;* (1948/49) 1 P. 49.

(9) *C.A.* 65/49 - *Moshe Freisler v Fritz Weiss;* (1951) 5 *P.D.* 878.

English cases referred to :

(10) *Spurrier and Another v. G.F. La Cloche;* (1902) *A.C. 446.*

(11) *Greer v. Poole and Others;* (1880) 5 *Q.B.D. 272.*

1) For the text of Article 193 see p. 346 infra.

Solomon for the appellant.
Meridor for the respondent.

SILBERG J. This appeal concerns marine insurance and the question that has been raised before us is :what is the position in law of an assured who keeps silent and does not disclose to the insurance company that the goods have already been sent from the place of despatch, that they have been lost en route, and that it is not known whether such loss occurred before the contract was made or thereafter. The difficulties of this case are increased by the fact that the policy contained the well known "lost-or-not-lost" clause and that it did not restrict the insurance to future risks only.

2. The material facts are set out below, and particular importance must be attached to the relevant dates :

(a) In 1947 the plaintiff Mr. Izhak Youval (Salzman), began business as an importer of watches. His method of operation was to send gold ingots to Prance for the purpose of being worked and mounted, and filled by the Lanco Company into watches which be later re-imported into Palestine as finished goods. One of these orders was carried out in the middle of March, 1947. It concerned some 250-300 watches which were to be sent from France to Haifa in small batches. At the same time the plaintiff informed the Lanco Company that he had opened a bankers' credit in its favour in connection with this order. Several months passed and after a great deal of correspondence the company at last telegraphed to the plaintiff on June 20, 1947, that it was about to send him 100 watches and requested him to have them insured. And indeed after seven days - that is on June 27th, 1947 - the watches were despatched from a Post Office in Paris. The company then wrote to the plaintiff

to that effect in a letter which had left Paris on July 5th and which reached the plaintiff between the 10th and 12th but not later than the 15th of the same month. On receipt of the letter the plaintiff transferred by telegram to the Lanco Company the cost-price of the watches in accordance with the bill which was attached to the letter. On the 16th of July, Mr. Israel Salzman - the son of the plaintiff and the manager of his business - went to the office of Hamisrad Hameouhad Leahrayout Ltd., the agents of the appellant, the New Zealand Insurance Co. Ltd. There he spoke to Mr. Frankel, the clerk in charge and requested him to insure 100 gold watches against loss and damage for up to 800 Palestine Pounds from the Post Office in Paris to Rehov Herzl, Haifa. Frankel agreed, Salzman paid the premium and the next day, that is on July 17, 1947, an insurance policy on behalf of the New Zealand Insurance Company was issued as requested and delivered to the plaintiff. At the time when Salzman requested the insurance to be effected he did not inform Frankel that the watches had already been sent from Paris; on the other hand he was not asked by Frankel whether the watches had already been sent or not. I shall deal with this point further in the course of this judgment.

(b) Several months passed but the goods failed to reach their destination. The plaintiff inquired as to the meaning of this. The company tried to put him at his ease and investigations were made in France until finally - in February 1948 - it appeared that the watches had been stolen on the way and had disappeared, and that only seven of them had been recovered in Marseilles. From a letter which the plaintiff received towards the end of 1949 from the French Railways we learn that the person who stole the watches was found and arrested on or about July 26, 1947 but - as the Company adds regretfully - "the thief did not indicate the exact date on which the theft was committed."

(c) The plaintiff applied to the agents of the Insurance Company and asked to be indemnified in respect of the damage (which according to the policy was payable in Haifa). The agents refused, their only ground being :

> "There is no evidence that the goods which were insured were still in existence when you requested the insurance to be made. It is obvious that a contract of insurance can be made only in respect of existing goods and not on goods that are non-existent. Consequently we have to reject the claim."

Because of this refusal the plaintiff lodged a claim before the District Court, Haifa, against the New Zealand Insurance Co. Ltd. and (alternatively) against the Hamisrad Hameouhad Leahrayout Ltd., and asked for judgment against them in respect of the damage in the sum of L.P. 8.- for each of the 93 watches that had been stolen and not recovered or the sum of L.P. 744.-in all, together with interest and costs. In paragraph 5 of the statement of claim the plaintiff writes :

> "5. The loss of the said 93 watches took place subsequent to July 17, 1947. Alternatively, the plaintiff claims that even if it should appear that the said watches were lost between June 27, 1947, and July 17, 1947, the first defendant is liable for the damage."

The defendants' main defence, as set out in paragraphs 5 and 6 of their statement of defence, was as follows:-

> "5. The date of validity of the said policy was from July 17, 1947, in respect of the said goods provided that the said goods were at that time in transit through the post from France to 44, Rehov Herzl, Haifa.
> 6. According to the plaintiff, the goods were sent by post from France on June 27, 1947. The defendant was not liable for any loss to the goods during the period between June 27, 1947 and July 17, 1947. lf the goods were lost then their loss took place before the date of the policy and no

liability lay on the defendant in respect of goods that were not in transit in the post before the policy came into force."

In addition to the above, the defendants added a vague and laconic plea in their statement of defence. Paragraph 7 reads as follows:

"7. The insurance policy does not cover the case in question."

No explanation was given as to why or wherefore. To the simple reader this sentence is nothing but a mere abstract and a more concentrated resume of the pleadings set out in paragraphs 5 and 6 of the statement of defence which I have set out.

(d) From the letter of Hamisrad Hameouhad Leahrayout Ltd. rejecting the claim and from the statement of defence of the defendants, it is clear that, at the begining, the dispute centred on one small point. It was confined to the question whether the insurance company was or was not liable for loss which had taken place before the insurance policy was issued. But during the trial in the District Court and as a result of the evidence produced by each side, the area of dispute was widened considerably - with the consent it would seem of both parties - and the defence of the defendants began to be concentrated on another point. Put very shortly it was this : that because young Salzman, when effecting the insurance, was silent about the goods having already been sent from the place of despatch and did not disclose this fact to the insurers, the Company was not liable to pay for the damage even if the goods were lost after the issue of the policy. From the point of view of the trial this change of front was legitimate and I am not prepared to consider it per se as being fatal to the defence. (Compare *Bank Hapoalim Ltd. v Ya'acov Kraftsov* (4), *Amal Ltd. v. Yehoshua Shindler* (5), and there is no difference in this connection between a cause of action and a ground of defence). But the lateness of the plea is an indication of the fact that the defendants themselves did not attach much importance to Mr. Salzman's failure to disclose the date of despatch of the watches. And the learned judge would do well, when the case is remitted to him, in the light of the directions at the end of this judgment, to give this point due consideration and the necessary weight, taking into account all the other factors.

(e) The learned judge did not accept the pleas of the defendants and gave judgment against the New Zealand Insurance Co. for the amount claimed. He struck out the claim against the second defendants (Hamisrad Hameouhad Leahrayout) as it was entered alternatively - "only in the event of it appearing that the second defendant was authorised to act in the name of the first defendant in the said matter", (see paragraph 6 of the Statement of Claim) - and it appeared that the Company was in fact entitled to act in the name of the first defendant. The question which the learned judge put to himself in the fact instance was - did Mr. Salzman know on July 16, 1947, or did he not know that the goods were lost ? And he held that Mr. Salzman did not know of the loss of the goods. Salzman had not been asked by Frankel if the goods had been dispatched from Paris or not, and - in the opinion of the learned judge - Salzman was under no obligation on his own initiative to mention the date of despatch of the goods. The policy contained the clause 'lost or not lost' and the company was also liable for loss which had occurred before the contract was signed. It followed from these findings - and the learned judge gave judgment to that effect - that the company could not escape the liability it had undertaken towards the plaintiff. And it is against this judgment that the appellants are now appealing. Both parties are agreed that the insurance in question is marine insurance and has to be interpreted according to the general rules that apply to this particular branch of insurance.

3. Before I deal with the legal liability of the insurance company arising out of the policy I should like to mention a preliminary point which I regret to say was not sufficiently considered during the hearing. The question is : which law applies in order to discover where legal liability lies? The choice here is between the Ottoman Commercial Code - which was introduced locally by statute and which was based on the French Commercial Code - and the marine insurance rules of the English common law, or even perhaps - as we shall see further on - between these laws and both the common law and the statutory law of the foreign country to which the insurance company belongs. We listened to many ingenious arguments from counsel for

the appellants, Mr. Solomon, but almost all of them were based on the well known rules of the English common law and only incidentally and en passant did he touch on some sections of the Ottoman Code. Mr. Meridor, on the other hand, was more cautious and more comprehensive but he too founded interesting arguments on the principles of the common law applicable in the English law of marine insurance. It seems to me with all respect, that both learned counsel have failed somewhat to give sufficient importance to the basic problem. They dealt with it - I would almost say - with reticence and this is a pity for without doubt they could easily have made a valuable contribution to the solution of this important question. In any case and whatever may be the result of this "reticence" of theirs, we are most grateful to both counsel for the wide range of their arguments, for they have thereby shown us interesting points of similarity and enabled us to examine and consider the differences - if any - of the various systems of law in their approach to the problem before us.

4. The question therefore is which law governs marine insurance in this case? And this question has two aspects.

(a) In view of the fact that there are clear provisions in the local Ottoman mercantile law - that is to say, the Commercial Code, on this very subject, may we apply the English common law rules respecting insurance?

(b) Considering that the contract in question is an insurance contract written in a foreign language, made with a foreign company whose place of domicile is in a foreign country (New Zealand or England) are we not bound in this case to apply the "national" law of the company, that is to say, the law in force in its "place of business"?

5. We shall first deal with the second question which is the more difficult of the two. For the answer to it can help us in solving the first problem. This is the question relating to private international law, and for its solution we must turn to the English Common Law. That is because on this subject there is no local law - apart from some rules in connection with personal status - and here Article 46 of the Palestine Order in Council automatically applies. Under this Article we are obliged in the absence of a local law, to apply the principles recognised by the English common law.

But when we come to examine the English legal literature which deals with this branch of the subject we come across a special - almost peculiar - rule regarding the law that applies to such policies of insurance. The most forceful expression of the rule is found in the well known book on Private International Law by Wolff, second edition, p. 486, where it is said :-

> "Insurance contracts, except for contracts for re-insurance between companies, will in case of doubt be governed by the law of the insurer's place of business. The same is probably true of most other kinds of contracts that are concluded under typical conditions set up by great industrial, commercial, or railway companies, contracts 'where one will predominates, dictating its law not to single individuals but to an undetermined collectivity and leaving to those who want to enter into an engagement nothing more than unreservedly to accept the terms of the contract, to *adhere* to them' ...Such mass contracts, concluded under identical conditions ...can maintain their uniformity only if they are all governed by the same law, and there is a strong inference that this is the law of the place of the enterprise."

A statement of much wisdom and weight ! But I am very doubtful if it truly and correctly sets out the position as it is in English law. The quotation in the above statement is taken from the French book of Saleilles, "De la declaration de la Volonte", and it certainly cannot be considered as an authority binding on our courts.

Of greater weight is another authority which is cited by Wolff - that is the case of *Spurrier v. G.F. La Cloche* (10). But on examining the judgment itself we see that Wolff's opinion as it was expressed by him was not adopted by the English judges but that they made it subject to several qualifications which blunt its edge and deprive it of its potential sting.

For what were the facts in that case? A resident of Jersey (one of the Channel Islands belonging to Britain) insured his stamp collection against loss and fire with an English company. The policy was in English and not French which is the language of this English island - and it was signed in Jersey by the agents of the company. The policy contained a condition to the effect that all disputes between the company and the assured regarding liability to pay for any damage or the amount or extent involved had to be submitted to arbitration in accordance with the Arbitration Act 1889, or any other amending act and that a decision of the arbitrators was a condition precedent to any claim for damages being made against the company unless the company admitted liability to pay the amount claimed. This condition precedent is illegal according to the laws of Jersey - because it restricted the jurisdiction of the courts - but valid according to English law. The question arose whether this was an "English contract" which had to be interpreted according to English law or a "Jersey contract" which had to be interpreted according to Jersey law ? The answer was that the contract was English. And this is what Lord Lindley said in his speech in that case :-

"Their lordships are of opinion that, although this policy was made in Jersey, and any money payable under it would have to be paid to the

> assured in Jersey, the nature of the transaction, the language in which the policy is expressed, and the terms of the agreement and of the conditions, all show that the contract between the parties is an English contract and that wherever sued upon its interpretation and effect ought, as a matter of law, to be governed by English and not by Jersey law. The intention of the parties is too plain to be mistaken; the contract to pay out of the funds of the company is of itself very significant; and the reference to the English Arbitration Acts shews that the arbitration proceedings were to be conducted according to English law and no other." (Ibid., p. 450).
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> And the plaintiff's claim was dismissed in consequence.

We see here something which very often happens in English judgments because of the well known reluctance of English judges to create "dangerous" precedents. The decision was based not on one but on many facts, so that the ratio decidendi of the judgment is in effect the result of all the facts taken together. We do not know what their lordships would have decided if the policy had been drawn up in the language commonly used in Jersey nor if the policy had not mentioned the English statutes although the language of the policy was English. As an authority, therefore, this judgment is meagre indeed and it cannot support the aside and sweeping generalisation as expressed above by Wolff in his book. It should also be noticed that the question in that case concerned the validity of a condition specified expressly in the body of the policy whereas Wolff's opinion, if correct, would mean that in connection with the whole problem of liability ensuing from the contract, one would be obliged as a matter of course to apply the "national" law of the policy - and for this proposition this English case is certainly no authority.

6. A similar rule to that propounded by Wolff is found in Dicey's book where Wolff is quoted (in one of the notes) as authority for it and an English judgment given in 1880 is cited in further support. I refer to Dicey's Conflict of Laws, sixth edition, p. 674 :

> "Rule 149 - A marine insurance policy issued by an underwriter carrying on business in England is governed by English law, except in

> so far as the policy stipulates that it be construed or applied in whole or in part according to the law of a foreign country."

As a comment on this rule it is said :

> "This Rule is an application of the general principle that in the absence of an agreement to the contrary, a contract of marine insurance in governed by the law of the country in which the underwriter carries on his business."

Immediately after this it is added:

> "This will, as a rule, also be the lex loci contractus and the lex loci solutionis."

It is said here "as a rule", that is to say, not always. This means that in the opinion of Dicey the rule will also apply in the case where the lex loci contractus is different from the law of the country where the underwriter carries on his business. But what is the authority for this? We do not have to search long for it because the author himself tells us whence it comes. He directs as to a judgment given in *Greer v Poole* (11), and (in comment 1) says, citing the words of Lush L.J. :

> "It is no doubt competent to an underwriter on an English policy to stipulate, if he thinks fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, ...but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel." (ibid. p. 674).

Again we are bound to be not a little disappointed when we examine the original judgment and inquire into the facts as they appear from the pleadings and the judgment itself. An English merchant insured with an English firm of underwriters certain goods which were on a French ship proceeding from Lagos to Marseilles. The ship whilst on the high seas

was involved in a collision which caused it, but not its cargo, damage and was towed to Gibraltar for examination and repairs. The owner of the ship, for lack of funds mortgaged both ship and cargo with a certain money lender to obtain the money necessary. The ship was repaired and proceeded to Marseilles. The money lender claimed back the loan and the owner of the cargo - the English merchant above mentioned - had to pay from his own pocket some money to release the goods from the money lender. The question arose whether the English underwriters were liable to pay these costs. The problem was this - was the loss a 'loss by perils of the seas' and therefore also included in the insurance covered by the policy, or was it not such a loss and therefore not covered by that policy? This is a question of law which is dealt with by both French and English law - only the French answer is positive and the English - negative. The question therefore is which law applies in this case? And the answer of the English court was that English law applied - because as appears in our citation 'the policy must be construed according to our law without regard to the nationality of the vessel', and the underwriters were consequently not liable to pay for this damage.

Does this judgment support the sweeping statement that all English marine insurance policies even if effected abroad are to be interpreted according to English law? This does not seem to me to be the case. In all the facts mentioned in that case both by counsel for the parties and by the judge, there was not even the slightest hint that the insurance contract in question was made outside England. Had this been the case there would have been no doubt that counsel for the merchant-plaintiff would have pointed it out. Further the words which Lush J. used in parenthesis - "as if it had been made in a foreign state" - indicate that the policy was not effected in a foreign country. We are entitled therefore to presume that all the "factors" in that case were English: the merchant who was insured, the underwriters who effected the insurance, their place of business and the place where the contract was made - all except the ship, which had French nationality. The choice in that case therefore was not between the law of the place of business of the underwriters on the one hand, and the law of the place where the contract was made on the other, but between the law of the place where both the underwriters had their business and the contract was made, on the one hand, and the law of the country to which only the ship carrying the cargo belonged, on the other. Placed with this uneven choice there was no room for hesitation, and so the court ruled in favour of English law. In any case, one cannot take this judgment as authority - and

perhaps Dicey himself did not mean - that an English policy will always be interpreted according to English law even if the contract of insurance was effected outside England.

6. But - and this is the last point which is decisive here - even if we were to adopt the method of Wolff and Dicey in solving this problem and be ready to accept all the consequences involved in it, we would still not be able to answer the question before us. This is simply because we do not know two facts - I repeat, two facts: (a) Where is the place of business of this company - is it in London or New Zealand? (b) What is the national law of the place of business of this company? Even if we were to suppose - and this would be highly arbitrary on our part - that as far as the assured in Palestine was concerned "the place of the company's business" was its London branch, the name of which appeared at the bottom of the policy, we still do not know as a matter of law what is the law on marine insurance which is in force in England as well as what legislation on the subject has been enacted there at least since the year 1906. We have to be careful not to be confused by, and to avoid the mistake of relying purely on, outward similarities. If by following the rule proposed by .Wolff and Dicey, we have to ascertain the law which is in force in England on the subject, this will not be the English common law which, through article 46 of the Order in Council, has become our "own" local law, but the English law as a foreign law consisting of both common law as well as statutes. This law we have to apply by reason of the principles of Private International Law because of the "foreign quality" of the company in the same way as we would have had to apply American law, for example, had "the place of business" of the company been in New York. This English law as a "foreign law" and especially the statutory part of it, cannot be considered as "a notorious fact that requires no proof." Even though it is "English" it has to be proved like all foreign law by evidence of experts and not by reference to text books. For the content of a foreign law is a question of fact and not a question of law (See *Weil v. Barclays Bank* (1); *Baer v. The Palestine Building Syndicate,* (2); *L. v. L.,* (3); and no judge may decide what the foreign law is from personal knowledge except on the most simple points where proof by experts is manifestly unnecessary (See Dicey, ibid. p. 868). The problem here is certainly not one that can be considered as simple as this. Possibly, as regards English law, the position was different on this point when Palestine was a British Mandated territory. But now that Israel is an independent State there is no justification for this difference. We therefore cannot apply in this case foreign marine insurance law unless this law has been

proved before the court below and this has not been done. And because this law has not been proved and as a matter of law we do not know what it is - indeed we do not even know where to look for it, whether in New Zealand or England - we will have to fill the void by adopting the well known fiction of Private International Law which is known as the principle of "identity of laws". As is well known, according to this principle the court must presume - generally speaking - that the foreign law which has not been proved is identical with the local law respecting the matter in question. (Dicey, ibid. Rule 194 pp. 866-867; *Rapaport v. Paldwrowski (6); Yazdi v. Yazdi* (7). We thus in effect return by a round about way to the local law which must apply, although formally we do so by introducing it in the garb of "foreign law".

7. Consequently whether the view of Wolff and Dicey is correct or not, in the appeal in this case at any rate, we must apply the local law because the "national law" of the policy, which is different from it, has not been properly proved.

8. We therefore come back to the first question : what is in first this local law? Is it local law in the narrow sense, that is to say, the Ottoman Law of Marine Insurance, or does it also include the recognised principles of the English common law which have become part of the "local law" in its widest sense through the directive of Article 46 of the Palestine Order in Council, as it has been interpreted? It seems to me that as far as this question is concerned there is no doubt whatsoever. Following precedents from the days of the Mandate, this court has ruled that the courts of this country are not required to apply the English common law "in respect of any legal problem requiring solution if the question can find some kind of answer in parallel provisions of the law of Palestine even though it is incomplete and faulty", *Minkowitz v. Fishtner* (8). And how much more so is this the case when the legal problem, as the one before us, has been provided for in the local law by a statute which is neither incomplete nor faulty? The main question to be answered in this appeal is what is the effect and consequence of silence on the part of the assured concerning the first that the goods had already been despatched? And this question of silence on the part of the assured is answered fully and exhaustively in a special section of a local statute - that is to say, section 193 of the Ottoman Maritime Code, 1863, which is in force in this country by virtue of the first part of Article 46 of the Palestine Order in Council. As is well known, this Ottoman Law adopted most of the principles of the

corresponding French law (Second Book, Chapters 1-14 of the French Maritime Law 1807), and most of its sections were copied word for word. On this subject therefore French law is one of the sources of our own law and we can refer to it - without resorting to the evidence of experts - in order to clarify terms common to both. On the other hand, because of the very close similarity between the two laws, it is particularly important to notice those few instances where the text of the Ottoman law differs from that of the French law. (Compare the judgment of Agranat J. in *Freisler v. Weiss* (9).)

9. When we come to compare article 198 of the Ottoman Maritime Code with Article 848 of the French Commercial Code from which it was copied we notice at once just such a difference. This article of the Ottoman Code is different in that it has a further provision and contains half of a long paragraph which does not appear in Article 848 of the French Code.

The relative articles of these two laws read as follows:

> Article 848 du Code de Commerce (in French):
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> "Toute réticence, toute fausse déclaration de la part de l'assuré, toute différence entre le contrat d'assurance et le connaissement qui diminueraient l'opinion de risque ou en changeraient le sujet, annullent l'assurance..."
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> Article 193 du Code de Commerce Maritime (Ottoman) :
>
> "Rend le contrat nul pour l'assureur, toute reticence, toute fausse déclaration de la part de l'assuré, toute différence entre le contrat d'assurance et le connaissement, qui diminueraient l'opinion du risque, ou en changeraient le sujet, *et qui serait de nature à empêcher le contrat ou en modifier les conditions, si l'assureur eut été avert du véritable état des choses..."*

In translation the articles read as follows:-

> Article 848 of the French Commercial Code*:*

"Any silence, false declaration on the part of the assured (or) any difference between the policy of insurance and the bill of lading that is likely to diminish the assessment of the risk or to change the subject matter, cancels the insurance..."

Article 193 of the Ottoman Maritime Code:

"The contract will be cancelled as far as the assured is concerned by reason of any silence, false declaration on the part of the assured, (or) any difference between the policy of insurance and the bill of lading that is likely to diminish the assessment of risk or to change the subject matter *and which by its nature would have prevented the agreement being concluded of would have called for different conditions if the undertwriter had been informed of the true state of the facts..."*

This translation needs amplification because it lacks something - as happens in all translations - that something which is lost when the text of a passage is transmitted from one language to another. It is not necessary that the reticence, the declaration etc. should actually diminish the assessment of the risk. It is sufficient for them to appear as being "likely" to. This is in my opinion the nearest word that conveys in translation the meaning of the original language used by the authors of these two laws.

Let us now compare the language of these articles. The words at the end of Article 193 of the Ottoman Code, which I have quoted in italics, do not appear at all in Article 848 of the French Code, as we have already noticed. And it is not for nothing that these words were added. It means - and one cannot escape from this conclusion - that the Turkish legislator was unwilling to invalidate an insurance policy by reason of silence, for example, except where not only would the silence, that is to say the non-disclosure of a fact, be likely to diminish the assessment of the risk, but where also the opposite, that is to say where the disclosure of the fact would "by its very nature" have prevented the conclusion of the agreement or changed its terms.

10. And one may well ask what is the meaning and significance of this additional condition? Logically speaking it is not certain that it would follow automatically from the very change in the assessment of the risk. For if the silence of the assured as regards the real facts have the effect on the underwriter of diminishing in his view the amount of the risk, then surely the opposite, that is disclosure of the real facts, must have the effect of increasing in his view the amount of the risk and his reaction would no doubt be either to refuse to insure because it would not pay him to do so or to change the terms in his favour by asking for a higher premium etc. The underwriter knows the terms of his policy well and presumably would not neglect his interests. And if so, how has the Ottoman legislator helped in this by amending Article 348 and what further provision has he added to the previous single condition it contained? On the other hand we cannot possibly ignore the clause that has been added and certainly this was not done just to make it look more attractive. We must, therefore, do our utmost to give the language some sort of practical significance and the only question is what and how?

11. It seems to me that our dilemma can be solved only in one way, that is by putting special emphasis on the words "which by its nature would" which appear in the clause that was added by the Ottoman legislator - either to introduce something new or to increase the emphasis, so as to remove doubts and avoid mistakes. What emerges is that the criterion must be objective and general and not individual and personal (that is to say taking into consideration the special mentality of a particular under-writer). The fact which the assured did not disclose should be of such a nature that had it been disclosed it would have prevented any reasonable underwriter from consenting to the conditions which had been agreed upon. This is the objective quality which if present makes a policy null and void even if the assured had no intention of deceiving. For "dolus" is not necessary to render a policy void on the ground of silence on the part of the assured, as a contract can be avoided on this ground even if the assured acted in good faith. According to the well known commentators Ripert, Lyon-Caén and Dalloz (Ripert, Précis de Droit Maritime, 6-ème éd. paragraph 594); Lyon-Caèn, Traité de Droit Commercial, 5-ème éd. paragraph 1447; Dalloz, Code de Commerce, Article 348) this is the position in French law. And on this point, at least, the French opinion is sufficient legal authority as to the way the term, as used in the Ottoman Law, should be interpreted because the whole conception of silence was copied by the Ottoman legislator from French law.

The importance of the innovation or the emphasis in Article 193 becomes much clearer when this objective quality is absent. That is to say where even though the knowledge of the fact, which the assured had not disclosed, was most likely to increase the measure of the risk in the view of this particular under-writer, and so naturally either prevent the conclusion of the contract or cause a change in its terms, yet it was not a fact which by its very nature, generally and objectively speaking, was likely to have any influence on an ordinary reasonable under-writer. In such a case - this is the effect of Article 193 - the silence per se would not be a ground for cancelling the contract of insurance and only when other factors are added, such as, for example, an intention to deceive, will it become void or voidable in accordance with the accepted rules of the general law of contract. This is the only interpretation - so it seems to me - which it is possible to give to what has been added to Article 193 by the Ottoman legislator. Without it it is impossible to find any justification for the addition of this second qualification.

12 Having investigated the legal background of the problem, let as now consider the grounds of the appeal in the light of the above principles. We need deal, in my view, only with the following three points raised by the appellant.

(a) That the learned judge was wrong in making the verdict depend on whether Salzman knew or did not know of the loss of the watches at the time when he applied for the insurance policy;

(b) that the bare fact that the watches had already been despatched from Paris at the time when the insurance policy was applied for was important in itself as it was likely to have an influence on the assessment of the risk and that it was the duty of Mr. Salzman to inform Mr. Frankel of it even assuming that he (Salzman) did not know or even suspect that the goods had been lost;

(c) the appellant's third point, pleaded in the alternative, was that even if the watches had not been lost before the 16th of July, the day when the policy was applied for, they had already been on the way for some 20 days and that therefore Mr. Salzman was in duty bound to disclose this fact to Mr. Frankel because this long delay alone would have

increased the amount of the risk in the view of Frankel and would certainly have caused him to refuse to issue the policy as he expressly testified before the court.

13. With regard to the first point, I am of the opinion that counsel for the appellant is correct. As I have already pointed out under the conditions specified in Article 193, the cancellation of the contract because of the silence of the assured does not depend on the intention of the assured to defraud. The contract is cancelled as a matter of course even if the assured did not know or did not suspect that the goods had been lost. The learned judge was wrong therefore in his approach when he held that the deciding factor was whether the assured knew or did not know of the loss of the said goods.

14. On the other band I am not prepared to accept the second contention of counsel for the appellants. As Mr. Meridor rightly points out, the answer to this contention is contained in one of the terms of the policy itself. For as will be remembered the policy includes the "lost or not lost" clause. "lost or not lost" in this case means on the way from Paris to Haifa - for the basic purpose of the insurance was to cover the loss that might occur during the transit of the watches from the post in Paris to Haifa. The defendants too in their defence (paragraph 5) speak of the validity of the policy in connection with the transit of the watches from France to Haifa. Hence the language of the defence clearly indicates the possibility that the goods had already left Paris and that even so the underwriter agreed to take the risk on himself. Consequently, therefore, he cannot complain and say that the non-disclosure of this fact increased his estimate of the risk. In the circumstances the underwriter should have been more cautious in his assessment of the whole risk which he was taking on himself. A hint, and also authority for this, can be found by comparing the

language of Articles 210 and 212 (second paragraph) of the Ottoman law to which Mr. Meridor has drawn our attention. It is very possible that the position in English law is different as counsel for the appellants claims, and it is also possible that it is exactly the same as counsel for the respondents maintains. In any case, for the reasons given above, English law does not apply here.

15. As regards the third point, whether it is correct or not depends on the answer to another question which the learned judge, because of his approach to the problem, did not find necessary to give - although he had enough evidence before him to enable him to decide one way or the other.

In paragraph 11 of this judgment I explained the criterion that is given in Article 193 for annulling a contract of marine insurance on the ground of the silence of the assured. This criterion is objective and the question which the court has to put to itself is shortly this : Was knowledge of the fact which the assured had not disclosed likely to increase the assessment of the risk in the view of any reasonable underwriter and so naturally to prevent him from consenting to the conditions which had been agreed upon, or not ? In the context of the facts of this case, the question would be this: Was knowledge of the despatch of the watches from Paris some 19-20 days previously likely to increase the assessment of the risk in the view of a reasonable underwriter - and not just Mr. Frankel - when this ordinary underwriter was prepared to issue a "lost or not lost" policy and to accept responsibility also for past losses? The answer to this obviously depends on the answer to the question, what is the period of time which such a consignment usually takes to arrive at Haifa from Paris, and whether a delay of some 20 days on the way was likely or not to arouse suspicion in the mind of an ordinary underwriter that it had been lost. The learned judge could have decided that point as he had before him evidence from both parties. But he did not consider it necessary to do so as he had held the defendants liable by reason of the criterion he had chosen, as explained above. This is, in my opinion, the only question which is still left open and on the answer to it would depend the fate of the claim. As we

cannot decide this point in this court the case will have to be remitted to the District Court for a decision to be given there in the light of the evidence it had brought before it.

I am of the opinion therefore that the appeal must be allowed, that the judgment of the District Court be set aside and the case remitted to it for completion, subject to the following directions.

That the learned judge who heard the case should decide on the evidence which he had before him - without receiving further evidence - whether the delay of 19-20 days in the months June-July 1947, whilst these watches were on the way from Paris to Haifa, was unusual or not. Should the learned judge, after hearing the parties, hold on the evidence before him, that the defendants had succeeded in proving that this delay was unusual he should give judgment in their favour. Should he hold otherwise - he should give judgment in favour of the plaintiff.

ASSAF, J.: I concur.

LANDAU, J.: I concur.

Appeal allowed, judgment of the District Court set aside, and case remitted.

Judgment given on June 4, 1953.