C. A. 248/53

ELSIE ROSENBAUM
v.
ASHER AND HAYA ZEGER

In the Supreme Court sitting as a Court of Civil Appeal
[April 4, 1955]
Before Silberg J., Goitein J., and Berinson J.

Contract - Loan -Mortgage deed - "Value clause" - Condition for repayment of additional sum as pledge against inflation - Not against public policy - Ottoman Law - Additional sum payable not excessive interest - Jewish Law - English and American Law.

In September 1950, the appellant lent to the respondents for a period of two years the sum of I.L. 800.- secured by a mortgage on land and a building registered in the Land Registry. To ensure the return of a sum equivalent to the amount lent, and having regard to a possible fall in the value of the Israel pound, it was provided by clause 9 of the mortgage deed that, if at the time of payment the value of the land and building had risen, the lender should receive on repayment an addition to the sum of I.L. 800.- representing the change in value.

When the time for repayment of the loan arrived the value of the property had risen owing to a fall in the value of the Israel pound and the respondents offered to repay the sum of I.L. 800.- but refused to pay the additional sum provided for. They sought a declaration in the District Court that they were entitled to redeem the mortgage and have the registration money removed from the Land Registry upon payment of I.L. 800.- and expenses. The respondents contended (a) that clause 9 of the mortgage deed was illegal, being contrary to Ottoman legislation regarding a maximum rate of interest that might lawfully be charged and (b) that clause 9

was unenforceable as being contrary to public policy, in that it encouraged inflation. On the basis of these two contentions the court made a declaration in favour of the respondents and the appellant appealed.

Held, allowing the appeal, that clause 9 of the mortgage deed was not contrary to the Ottoman legislation. A clause in a mortgage deed calling upon the mortgagor to pay in Israel pounds a higher sum than that lent, if at the time of redemption the value of the land and building, subject to the mortgage, had risen because of a fall in the value of the Israel pound, is not contrary to the Ottoman legislation regarding interest and there is nothing contrary to public policy in such a clause.

Palestine case referred to:

(l) C.A. 475/44 - *Estate of the late Habib E. Salem represented by the Executors, Jamil Salem and Others v. Hanna Asfour and Adeeb Jeadeh, Trustees in Bankruptcy of Eugenic Hallasso;* (1945), 12 *P.L.R.* 339.

English cases referred to:

(2) *Feist v. Société Intercommunalé Belge d'Electricité:* (1934) *A.C.* 161.

(3) *Lomax (H. M.Inspector of Taxes) v. Peter Dixon & Co., Ltd.*; (1943) 2 All E.R. 255.

American cases referred to:

(4) *Bates v. United States;* (1939). 108 F. 2d 407.

(5) *Norman v. Baltimore & Ohio Railway Co.;* (1934), 55 *S. Ct. Rep.* 407.

(6) *Die Deutsche Bank Filiale Nürnberg Humphrey;* (1926), 47 *S. Ct. Rep.* 166.

(7) *Gale v. Grannis;* (1857), 9 *Ind.* 140, *American Digest, Vol. 47*, 2124.

(8) *Garvin v. Linton;* (1896), 62 *Ark.* 370, *American Digest, Vol. 47,* 2111.

(9) *Beckwith v. Windsor Manufacturing Co.,* (1842), 14 *Conn.* 594, *American Digest, Vol. 47,* 2112.

(10) *Bade* v. *Kierst;* (1887), 10 N.Y. *St. Rep.* 705, *American Digest, Vol. 47, p.* 2113.

(11) *Hamilton* v. *Moore;* (1846), 26 *Tenn.* 35, *American Digest, Vol. 47,* 2113.

(12) *In Re Mansfield Steel Corp.;* (1929), 30 2d *Fed. Rep.* 832.

Orgler for the appellant.

Barak for the respondents.

SILBERG J. The appeal before us concerns a matter of money, that is to say, a question of money as money. We have been called upon to define the nature of depreciated currency and to determine the significance of a "value clause" contained in the terms of a loan - whether or not it is contrary to the law concerning interest.

2. The facts of the case, which are clear and not in dispute (the action concerning their legal significance only), are as follows:

A. At the end of September, 1950, when the respondents needed money to complete the construction of a house on their plot in Ramat Izhak, the appellant lent them I.L. 800.- for two years, and to secure the repayment of the loan, a mortgage was registered in her favour on the plot and on the building under construction.

B. Clause 7 of the mortgage deed provided that the loan was to bear interest at the rate of 9 per cent per annum, of which a part was payable in advance and the

remainder in equal quarterly installments, which were subsequently paid. However, the parties added one more condition, which is the pivot round which the present appeal revolves. This condition is set out in clause 9 of the deed, which reads as follows:

> "If the value of the mortgaged property is at the time of repayment higher than its value at the time of registration of the mortgage, the lender (the appellant) shall be entitled to demand that the borrowers (the respondents) pay to her in addition to the amount of the loan, such part of the excess value as corresponds to the proportion between the amount of the mortgage and the present value of the mortgaged property. For the purpose of this clause, the parties agree that the present value of the mortgaged property (i.e. of the land, the building and the trees), if it were free from tenants and the building wholly completed in accordance with the approved plan, would be I.L. 4,500.- ... Nothing contained in this clause or in any other provision of the mortgage deed shall give the borrowers the right to pay off the debt by paying an amount of less than I.L. 800.- plus interest and the other amounts due to the lender."

This clause, a "value clause" in technical language, was inserted in the terms of the mortgage in order to protect the lender against such depreciation of the Israel pound as might occur during the validity of the mortgage. It is not in dispute that the increase in the value of the property referred to in clause 9, means "an increase brought about by a decrease", that is to say, such an increase in the value of the

property as would of necessity result from a decrease in the value of the currency. The representative of the appellant has declared before us, too, that his client is not trying to benefit by any increase in the price of the property, other than such an increase as is the expression and exact counterpart of a decrease in the value of the currency.

C. When the date of maturity of the mortgage arrived, the appellant was invited by the respondents to appear at the Land Registry Office for its redemption. They offered to pay the appellant the nominal amount of the mortgage, i.e. I.L. 800.-, saying they were not bound to add anything whatsoever, even if the value of the mortgaged property had increased as a result of a depreciation of the Israel pound. The appellant refused, in reliance on clause 9 of the mortgage and contended that the value of the mortgaged property had indeed increased.

D. The respondents thereupon applied to the District Court of Tel Aviv for a judgment declaring that they owed the appellant the amount of I.L. 800.- only. Their contention was, and is, that the condition laid down in clause 9 is of no legal validity, a) because it requires the borrowers to pay interest in excess of the permitted rate (that is, a plea of 'excessive interest'), and b) because a condition of this kind is contrary to public order being a serious inflationary factor prejudicial to the country's economy. The learned judge accepted both parts of the submission and granted the respondents the declaration prayed. It is against that judgment that the appellant appeals to us.

3. I will say at once that the second part of the above submission does not commend itself to me at all. Matters of public order are, as is well known, limited to a well known list of matters, and any addition to those is scarcely considered possible in these days (see Halsbury, Hailsham edition, Vol. VII, p. 154; 12 English and Empire Digest. 242 paragraph 1979[1]): "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy"). Moreover, experts have not yet decided that the linking of loans to value clauses constitutes an inflationary factor harmful to the State, and even if the experts of other nations had so decided, I would still not be sure that such a general rule applies also to the peculiar economic conditions prevailing in the State of Israel. If, for instance, it should appear that the authorisation of such transactions is likely to attract foreign investors to this country, I should not hesitate to say that it is actually beneficial to the State.

4. It thus remains for us to deal with one remaining question: whether having regard to the interest (9 per cent per annum) payable under clause 7 of the deed, the stipulation in clause 9 is or is not one for excessive interest.

This is a legal question, and we have to consider and decide it with reference to the legal provisions as to interest in force in this country.

5. The following are the three Laws dealing with the permitted rate of interest:

a) the Ottoman Code of Civil Procedure of 1879 (Article 112);

b) the Ottoman Law Concerning Interest of 1887 (Articles 1 and 3);

[1]) See In re Mirams (1891) 1 Q.B. 595.

c) the Usurious Loans Ordinance, 1934 (sections 2 and 3).

Article 112 of the Ottoman Code of Civil Procedure provides:

> "If the contract be for the payment of a sum of money, and there be delay in making such payment, damages may be awarded at the rate of 1 per cent per month on the principal amount, and the creditor shall not be required to prove that he has suffered any loss."

Some eight years later, the Ottoman legislator reduced the permitted rate of interest, fixing it at 9 per cent per annum, and this has been the "legal" rate of interest to this day. The relevant provisions of the Ottoman Law Concerning Interest are:

> "1. With effect from the date of promulgation of this law. the maximum rate of interest for all ordinary and commercial credits shall be 9 per cent per annum.
>
> 3.If it be proved that a creditor and debtor have in a deed of contract agreed to a rate of interest higher than the legal rate, whether this be explicit in the deed or whether the excess be included in the principal amount, the rate shall be reduced to 9 per cent per annum."

Sections 2 and 3 of the Usurious Loans Ordinance, 1934, grant the courts power to re-examine the transaction between the borrower and the lender in order to find out whether it does not involve any obligation to pay interest in excess of the legal rate.

We thus see that a maximum rate of interest - 9 per cent per annum - is in force in this country, but this does not bring us any nearer to the solution of our problem. For the question of interest to us in this appeal is whether an increase in the quantity of pounds intended to compensate for their qualitative decline, constitutes an "additional payment" within the meaning of our law of interest.

It is regrettable and somewhat surprising that the two learned counsel who have very ably presented their arguments before us should not have succeeded in discovering a single judgment, either in Israel or abroad, that deals directly with this question, i.e., which examines the validity of the condition in question or of a similar condition (such as a "gold clause", a "dollar clause" etc.) from the point of view of the payment of excessive interest which it might involve. I do not rely for authority or support on the famous judgment of the House of Lords in *Feist v. Société Intercommunale Belge d'Electricité* (2), or on the case of *Estate Salem v. Trustees of Hallla*so (1), which follows the same lines in coming to a decision. In both cases, the validity of the gold (or dollar) clause was not attacked because of the interest transaction involved - not in the *Feist* case, for there has been no maximum legal rate of interest in England for a hundred years, and not in *Salem's* case, for the representatives of the parties did not raise the problem of interest at all. The principle known as the "Feist construction" merely imports that a gold (or dollar) clause does not lay down the "how", but the "how much", not a "mode of payment", but a "measure of liability", and the clause therefore was held to be neither invalid nor unlawful by reason of a departure from the gold standard or a contravention of the law forbidding the trade in foreign currency. Even this was not really an innovation, for the International Court at the Hague, in the case of the Serbian Loans, had already decided:

"The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be not to construe but to destroy it."

(Case of Serbian Loans, Permanent Court of International Justice, Series A, Collection of Judgments, 1928-1929; Judgment No. 14, p. 32, cited in *Feist's* case, ibid.pp. 173-174).

In the case before us, however, the question is whether the larger amount payable as a result of the increase of the value of the mortgaged property constitutes a prohibited addition of interest, and on this question the two judgments I have referred to do not help.

This question is by no means an easy one. The difficulty lies in the changes that have occured, in the course of history, in the attitude of peoples and nations in the matter of interest and usury, both from a purely ethical and from an economic and practical point of view. To avoid terminological confusion, I shall use the word "usury" (in Hebrew: *neshekh)* in the sense of prohibited or excessive interest. (For the Talmudical definition of the term see Baba Metzia in the chapter on usury, 60 b, *Mishna u-G'mara* ibid.*;* and comp. Maimonides, fourth chapter of the Rules Concerning Borrower and Lender, rule 1). A Swiss scholar has pointed out: -

"The ethical nature of the concept of usury renders it impossible to formulate permanent and definite criteria of what constitutes a usurious transaction. As long as freedom of contract remains the cornerstone of

> economic organization, it is not the economist but the legislator who must decide at what point a voluntary economic transaction constitutes an abuse of economic freedom and thus an act of usury. Transactions which were condemned in the Middle Ages as usurious became recognized in subsequent centuries as normal economic practices, while usages which were outlawed and punished in one country were at the same time freely permitted in another. Moreover in certain periods the moral views of the legislative bodies were identical with those of the majority of the people, while at other times there was a wide divergence in this respect, so that usages which were officially outlawed were nevertheless sanctioned in economic life. Thus while concepts such as price, wage, interest, are economic categories transcending time, usury is a historical category" understood only in the light of the moral and legal norms prevailing in a particular period."
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> (Edgar Salin, Usury, Encyclopaedia of Social Sciences, Vol. 15, p. 194).

Unfortunately, however, purely ethical considerations do not give us a key to the solution of the specific question to be considered by us, and, as stated, we have not found a clear legal norm either in the Israel statute-book nor in the local jurisprudence. We shall therefore have to rely on analogy or on the accumulated experience of other legal systems, making due allowance - where necessary - for differences of time and place.

6. Nearer to the case before us are judgments given, in Enlgand and in the United States of America, in matters relating to the payment of income-tax. I begin with the well-known judgment of the English Court of Appeal in *Lomax v. Dixon & Co. Ltd.* (3).

The facts of that case were as follows:

A Finnish company owed an English company amounts arising out of various loans, which added up in the course of time to a total debt of £ 319,600. These amounts were payable on demand. As the Finnish company was unable to pay the whole of the debt at once, an arrangement was made between the two companies, as a result of which the Finnish company gave the English company 680 bills for £ 500 each, or £ 340,000 in *toto,* i.e. for £ 20,400 more than the original amount of the debt. That is to say, the bills were issued as the usual expression is, at a 6 per cent discount. It was stipulated that the bills should bear interest at the rate of 1 per cent above the lowest rate of discount of the Bank of Finland for that year, but in any case not more than 10 per cent per annum. It was also stipulated that if in any year the net income of the Finnish company should reach a certain amount, each bill due for payment should be redeemed at a 20 per cent "premium". The maturities of the 680 bills were fixed as follows: the first 100 were to be paid several days after the date of the arrangement. and the remainder. in equal instalments, in the course of twenty years. It was proved that in laying down the above terms of payment, the English company had in mind "the element of risk which might arise through trouble between Finland and Russia", on which the learned judge remarks in his judgment (p. 258) that -

"In view of the manner in which that apprehension has justified itself,

(meaning the Russo-Finnish War which broke out seven years later) it

> can scarcely be suggested that .. .the appellants were taking excessive precautions by insisting on the notes being issued at a discount and redeemable at a premium."

The question facing the court in that case was whether that "discount" of the bills - i.e. the difference between the original amount of the debt and the principal of the bills - and the "premium" to be paid in the event indicated were "income" chargeable with tax under the income-tax laws in force in England.

The court decided that the discount and premium were not subject to income-tax, the reason - put shortly - being that the said arrangement was not an interest transaction but a capital transaction, designed to insure the company against the risk it was taking in agreeing that payment, instead of being immediate, be spread over a period of twenty years. This is what was said by Lord Greene, Master of the Rolls:

> "...there can be no general rule that any sum which a lender receives over and above the amount which he lends ought to be treated as income. Each case must, in my opinion, depend on its own facts and evidence *dehors* the contract must always be admissible in order to explain what the contract itself usually disregards, namely, the quality which ought to be attributed to the sum in question." (ibid., p. 260)

Further on, the learned judge says:

"I can find no ground for distinguishing the present case from that of an ordinary issue of debentures by a trading company. If at the date of the agreement the appellants had lent to the Finnish company £ 319,600 to be secured by an issue of notes at 94 repayable over 20 years at 120 and bearing interest at a rate fixed by reference to bank rate in the usual way, the revenue authorities would not have claimed tax on the discount or the premium. The element of capital risk was quite obviously a serious one and the parties were entitled to express it in the form of capital rather than in the form of interest if they *bona fide* so chose. It is said, however, that there is a difference between the case of a security issued for a present loan and that of a security issued to cover an existing loan. This argument found favour with MacNaghten J., but, with all respect to him, I cannot follow it. The parties to the transaction, faced with an existing debt which the Finnish company was obviously not in a position to repay there and then, did what in effect amounted to writing down the capital value of the debt which by the terms of the agreement was now to be repaid over a long period of years bearing interest in the meantime at a normal commercial rate. I can see no difference between writing down the capital value of an existing debt and writing down the capital value of a new debt, which is what is done where a company makes an ordinary issue of debentures at a discount or repayable at a premium. Moreover, it is quite common for a company to issue debentures as security for an existing loan..." (ibid., p. 261).

At the end of the judgment, the learned judge sums up the principles resulting from his analysis of the problem, as follows:

> "It may be convenient to sum up my conclusions in a few propositions. (i) Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security, there is no presumption that a 'discount' at which the loan is made or a premium at which it is payable is in the nature of interest. (ii) The true nature of the 'discount' or the premium (as the case may be) is to be ascertained from all the circumstances of the case... (iii) In deciding the true nature of the 'discount' or premium, in so far as it is not conclusively determined by the contract, the following matters together with any other relevant circumstances are important to be considered, viz., the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, the extent to which, if at all, the parties expressly took or may reasonably be supposed to have taken the capital risk into account in fixing the terms of the contract." (Ibid p. 262 and 263).

With reference to these principles, the Court of Appeal decided that the "discount" and premium were not interest and thus not income, and were therefore exempt from income tax, as the Income Tax Commissioners had already decided previously.

This is the rule established in the *Lomax* case (3), and we cannot ignore it in considering and deciding the question before us. Nor did the learned judge of the District

Court overlook this English judgment, but, with all respect, he did not interpret it correctly. It may be noted in his favour that he was misled by the headnote to the case. The moral to be drawn is, if I may amend the well-known warning of Ecclesiastes : "And more than of these, my son, beware of the headings and summaries of the law reporters". In the passage quoted literally by the learned judge, the editor says:

> "Interest on a loan is properly speaking payable for the use of the money or as a recompense to the lender for being kept out of his money. A payment or recompense made to the lender because there is a risk that the money lent or some part of it may never be repaid is a consideration of a different kind and is, in fact, a provision for capital depreciation. It seems to be clear that interest properly so called is taxable, whereas a provision against capital depreciation is not taxable."

Thereafter the learned judge of the lower court quotes a message from the judgment itself, which says:

> "A good example of the difficulty is to be found in the contracts of loan which used to be made on a gold basis when the currency had left or was expected to leave the gold standard. In such contracts the amount to be repaid was fixed by reference to the price of gold ruling at the repayment date and, if the currency depreciated in terms of gold. there was a corresponding increase in the7 amount of sterling to be repaid at the maturity of the loan. It could scarcely be suggested that this excess ought to be treated as income when the whole object of the contract was

to ensure that the lender should not suffer a capital loss due to the depreciation of the currency."

The learned judge combines these two passages into a stick with which to beat the *ratio decidendi* of the *Lomax* judgment (3). In his opinion, the English judges erred by confusing "depreciation" and "devaluation":

"While the former term denotes the loss in purchasing power, either on the money market or on the commodity market or on both, 'devaluation' is a legislative act designed to alter the relation between the currency and the monetary cover and to create a new, stable position until it is again altered by the legislator...

"Obviously there can be no question with us of devaluation. True, the relation between the Israel pound and foreign currency has been changed several times. We have fixed all kinds of rates for the purchase and sale of currency by the Treasury from or to local residents in connection with foreign trade transactions. But our currency is not linked to any monetary cover. It depends on the economic strength of the Israeli population and of Diaspora Jewry...

"It therefore seems to me that I cannot be guided by the *Lomax* judgment in considering whether the benefit in question comes, or does not come, under the heading "interest" ..." (p. 5 of the judgment of the District Court).

I dissociate myself, with respect, from the conclusion at which the learned judge arrived in the last paragraph of the above passage. The differentiation between devaluation and depreciation is quite correct, and no one will quarrel with it (see Nussbaum, Money in the Law, 1950, p. 172); but I do not agree with the conclusion drawn by the learned judge. For what is the relevance of this difference, and in what way does it reveal an error into which the English judges have allegedly fallen? The decision given in the *Lomax* case (3) is not essentially concerned with either devaluation or depreciation; it is built Entirely upon one idea, namely that the object of the lenders was not to earn profits, but to safeguard the principal; they merely wished to forestall the danger that hung over their heads in view of the likelihood of a Russo-Finnish war breaking out - as in fact it did - during the long period that had to be allowed for the redemption of the bills. I am not defending the headnote to the case. That is indeed wrong and misleading. But there is neither a misconception nor a slip of the pen in the judgment itself. The example given by Lord Greene, namely the insertion of a gold clause in loan contracts made after, or immediately before, the abandonment of the standard, merely illustrates and puts in concrete form the difficulty we sometimes encounter when trying to discover the true meaning of a contract. This is shown by the opening words of the passage I have quoted. Nor is this the only example given by the noble lord, as anyone who reads the text of the judgment, from the last paragraph on p. 258 to the last paragraph but one on the following page, will clearly see.

In short: the *Lomax* decision does not depend at all on the correctness of the distinction between the concepts "devaluation" and "depreciation", and the learned judge, therefore, was not right in refusing for this reason, and for this reason alone, to apply that decision to the case under consideration.

7. The *Lomax* case deals with a question relating to income-tax, and the rule established by it directly is that a payment intended to compensate for or avert a loss of principal is not interest chargeable with income-tax. If it is correct - as I think it is - that the concept of interest referred to in income-tax laws is identical with the concept of interest dealt with by our interest laws, than the Lomax decision would also appear to solve the question before us.

8. Another judgment on tax matters that is relevant to our case was given in 1939 by the Federal Circuit Court in *Bates v. United States* (4). In one respect, the *Bates* case is nearer to our case than the *Lomax case, for* in it, too, the issue hinges on the law concerning the increase and decrease of the value of the currency; but otherwise it is much farther removed, since it has nothing whatever to do with the question of interest.

The matter occurred in 1935, about a year after the American dollar had been officially devalued by 40 per cent by a proclamation of President Roosevelt. dated January 31, 1934. In that year, Bates sold for 175,482 dollars securities which he had bought in the years 1931-1933 for 134,464 dollars, thus realizing a nominal profit of approximately 40,000 dollars. The officials in charge of income-tax or, more exactly, the officials in charge of the tax levied in America on capital profits of this kind, demanded from him tax on that profit, and the matter came before the District Court. Bates' contention was - in a nutshell - as follows: To determine the amount of the profit obtained, one had to compare the selling price of the securities with their purchase price; and as the present, devalued dollar was no longer the "full" dollar that had existed before 1934, there was no common basis for the drawing of the comparison, other than the real, gold value of the two

currencies. If that was so, he had made no profit at all on the transaction, for taken at their gold value, the 175,000 dollars which he had received for the securities in 1935 were certainly not worth more than the 135,000 dollars which he had paid for them in the years 1931-1933.

The Circuit Court rejected this contention relying upon the judgments given by the Supreme Court of the United States in *Norman v. Baltimore and Ohio Railway Co.* (5), and in *Die Deutsche Bank Filiale Nürnberg* v. *Humphrey* (6).

After analysing these judgments, and after concluding from them the "equivalence, dollar for dollar, of cost and selling price money" - this is one aspect of what is known in technical literature as "the nominalistic principle" - the District Court refutes Bates' contention saying that since gold coins had ceased to be legal tender, and one was not permitted to possess them but had to surrender them to the Treasury and to receive for them dollar bills, the value of which corresponded to the gold value of the devalued dollar, it followed that the law regarded the dollars invested by Bates in the purchase of the securities as actually equivalent, dollar for dollar, to the dollars he had received at the time of their sale; and that being so, there was a common basis for drawing a comparison between the purchase price and the sales price, and the calculation of profit was to be made, quite simply, by deducting the number of dollars paid in the past to the seller of the securities from the number of dollars now received from the purchaser.

After further pursuing this line of reasoning, the court concludes as follows:

> "The following hypothetical situation suggested by defendant illustrates the difficulty of plaintiff's position If the taxpayer (i.e. Bates) had borrowed the dollars ($ 134,464.01) necessary to buy the securities in question in 1933 and prior years and had not discharged his obligation until after he had sold the securities in 1935 the taxpayer could have used $ 134,464.01 to discharge his obligation and would have had the excess of $ 41,018.85. And it is clear, as a matter of law, that his creditor who received the taxpayer's promise to pay at a time prior to the changing of the gold content of the dollar would have been required to accept in discharge of the obligation $ 134,464.01 of the so-called "new money", although the obligation represented what the plaintiff calls "cost money".(Ibid., p. 410.)

These are most trenchant remarks, which require no comment. The question arises whether this example does not by itself invalidate the arguments advanced here by the appellant. We only have to substitute "the appellant" for "Bates", "I.L. 800.-" for "134,464.01 dollars" and to add the further hypothetical assumption that the value of the Israel pound decreased between the years 1950 and 1952 by fifty per cent and that the value of the mortgaged property thus increased in the same proportion, in order to arrive at the conclusion that the appellant, who - according to our hypothetical example - borrowed the I.L. 800.- in 1950 from somebody else, has made a "net" profit of I.L. 400.- And if, for the purposes of the capital profits tax laws in force in America, Bates' 40,000 dollars were regarded as profits chargeable with tax, why should not the appellant's I.L. 400.- be regarded as "interest" within the meaning of our interest laws?

This question was put by us, during the proceedings, to counsel for the appellant, and his reply was: It should not. If the appellant had borrowed the amount of the loan from somebody else and had not yet repaid it, the amount in dispute would quite possibly be regarded as interest. But as it was, she did not borrow money from anyone, but expended the amount out of her own pocket. which means that no profit has accrued to her from the "increase" of the amount of the mortgage.

This answer is not satisfactory at all. It is impossible to make the decision dependent on whether the mortgagee lent his own money or money he had previously borrowed from another person. Supposing a man who on the day the loan was given had both money of his own and money he had borrowed that day from another person - will the court in such a case start investigating whether the money given on loan was of the first or of the second "kind", and will the outcome of the case depend on this ? Certainly not.

However, there is another answer to the above question, an answer which counsel for the appellant has himself touched upon, in a different context, while presenting his arguments before us. That answer is : interest is not the same thing as profit, and the fact that a certain sum is regarded as profit for purposes of tax, does not force us to invest it with the character of interest (the reverse is true: where there is no profit, there is no interest). When the State imposes taxes on the profit or income of its citizens, it cannot ignore, or more exactly, it cannot completely ignore, the nominalistic concept of currency, that is to say : it cannot disregard the concept (which is artificial, of course, from a factual point of view) that a dollar is always a dollar and a pound always a pound, in spite of the fall they have undergone on the international money market or on the domestic commodity market. For if it did, the entire tax system of the State would collapse, and the government

budget with it - see Nussbaum *loc cit.*, end of the first paragraph - and in time of inflation, for instance, there would be hardly any taxable profits, for the bulk of the profits would be ascribed to the depreciation of the national currency. Depreciation of the currency is a national calamity, through which everybody suffers, including, of course, the taxpayer who, for instance, in this country, pays land betterment tax on the nominal increase of the value of the property.

However, the line of thought will be a different one, and the test will be quite another, if we examine profit from the point of view of the interest character attributable to it. Here we have to ask ourselves what the lender intended: to obtain something in addition to what he had or merely to preserve what he had. As to this question - the question what it is that the lender had - we do not necessarily have to use the artificial standard of the nominalistic principle, but may also take into account the diminution which has occurred in the actual, real value of the currency. The real value of I.L. 800.- which the appellant lent the respondents was at that time 800: 4500 (eight hundred four-thousand-five-hundredths) of the value of the mortgaged property. And the only purpose of clause 9 was to keep the value of her money at the same ratio. She could have achieved this also in a different manner: by investing the amount of the loan in the purchase of a part of the property in question or some other property, from the respondents themselves or from somebody else, and if she adopted the course she did, this does not testify to a desire on her part to enrich herself by usurious prohibited interest.

9. That the matter of usury depends on the intention of the parties is a principle expressly accepted by American jurisprudence, as appears from the following judgments quoted in the American Digest:

"Usury is mainly a question of intent." *(Gale v. Grannis (7).)*

"A usurious agreement cannot be implied against theintent of the parties, as there must be a corrupt intent to take more than lawful interest to constitute usury." (Bade v. Kierst (10).)

"Usury is a question of intention, to be made out by proof of facts, and not an inference of law, to be drawn from the inequality of the currency loaned and that stipulated to be repaid for it." *(Hamilton v. Moore* (11).)

There are it is true certain judgments which somewhat minimize the importance of intention, but the overwhelming majority strictly adhere to the intention theory. Additional support for it may be found in a much more recent American judgment, the well known judgment given in 1929 in *In Re Mansfield Steel Corp.* (12).

I am not insisting that we, too, in this country, should go mainly by the intention, but the idea expressed in this matter in American jurisprudence may itself give us a certain orientation in groping our way through the dark maze of interest and usury. Let us not forget that the States of the U.S.A. make up an overwhelming majority of the states in the world which have a legal rate of interest - in the whole of Europe, if I am not mistaken, there are only two or three such states - and that they may be presumed to have knowledge, experience and understanding of life's necessities in this legal field. Now if intention is the

main consideration, or even only one of the main considerations, the matter is not so simple, and the general character of the transaction must be very carefully considered.

10. The richest experience in matters relating to interest can be found in the sources of Jewish law. This is one of the most interesting and most developed branches in the whole of Jewish law. On the one hand, there is a strict and fundamental prohibition of anything that smacks of interest, a deep detestation - the heritage of generations - of the type and trade of the moneylender (moneylenders are men who "deny the fundamentals" of Judaism, they "make a mockery of the Law and a fool of Moses", and they are mentioned in the same breath as pig-breeders-Palestinian Talmud, Baba Metzia, end of the chapter concerning usury; Berakhot 55a, and elsewhere). On the other hand, people felt the necessity of taking into account the demands of everyday life, the need for a certain amount of relaxation, since the economic necessity of credit cannot be altogether dispensed with. And lastly, or as a result of these two, the need to lay down legal concepts, patterns and forms, so as to determine exactly the borderline between the lawful and the unlawful. If we add to this the fact that during and after the Middle Ages the lending of money was a special trade which, as is generally known, several historical factors compelled the Jew (and particularly the Jew) to engage in, then we shall not be at all surprised at the thorough work done in this legal field by scholars of earlier and later ages. Interesting problems arose, interesting ideas and rules came to the fore, and although Jewish law does not bind our courts in these matters, a study of this law may broaden our outlook and help us to see matters in their true perspective.

11. Interest was defined with admirable conciseness and accuracy by Rav Nahman, a Babylonian scholar who lived at the end of the Third and beginning of the Fourth Century of the Common Era: -

> "The principle of interest is that a payment in consideration of waiting is prohibited." (Baba Metzia, 63b)

Interest is a "payment for waiting", that is to say: the sum paid to the lender for waiting for the repayment of the money which is temporarily in the possession of the borrower. Any payment due to the lender for anything else, for any other service, and any monetary transaction not constituting repayment of the money lent is not interest within the meaning of the above definition. Hence some monetary transactions were permitted, their lawfulness being based on the idea that the profit receivable by the person providing the money is, as to its legal form, a profit on a sale, or the enjoyment of the proceeds of something disposed of which had belonged to that person, or the like (see the passage concerning the sale of a field, Baba Metzia, 65b-66b; Tosefoth, Baba Metzia, 64b, the passage beginning with the word "v'lo"; Maimonides, 6th Chapter of the Rules Concerning Borrower and Lender, Rule 6; ibid., Rule 8, etc.). A "payment for waiting" is forbidden only if it goes direct from the borrower to the lender, but not if it is given to the lender by a third person. The lender is therefore permitted to accept from the borrower, at a discount, bills which the borrower has received from another. From the strictly legal point of view this is considered as a purchase of bills, and not a loan of money, although when looked at from the economic point of view there is no difference here between them: -

"There are things which are like interest, but which are permitted. A person may buy the bills of another person without scruples, and a person may give another person a denarius in order that he may lend somebody a hundred denarii, for the Torah forbids only such interest as goes from the borrower to the lender."

(Maimonides, fifth chapter of the Rules Concerning Borrower and Lender, rule 14. Source: Baba Metzia, 69b, Palestinian Talmud, Baba Metzia, the chapter concerning usury, and Tosefta, Baba Metzia, chapter 4; but compare Maggid Mishne le-ha-Rambam, ibid., and Tur Shulhan Aruh, Yore Dea, 160(7), which makes several reservations with regard to the above rules).

These and similar rules helped to keep the Biblical prohibition of interest within reasonable bounds and to prevent it from becoming a curse rather than a blessing, a disturbing rather than a regulating factor, in the progressing economic life of successive generations.

12. But this was not enough to overcome one great difficulty attending precisely the ordinary loan - the actual monetary loan. I refer to the fluctuations in the value of the currency, such as were experienced even in those early days. We know this because the prohibition of interest in Jewish law applies not only to interest fixed in advance (ribbit ketzutza) but also to the interests not so fixed (avak ribbit), which latter is forbidden not by the Bible, but by the Rabbinical authorities (Baba Metzia, 61b). In fact, any profit actually and directly accruing to the lender from the borrower, in connection with and in

consideration of the loan, is interest and forbidden even if at the time the loan was given it was not yet certain that this profit would accrue.

The question was raised whether it was permissible to borrow "a denarius for a denarius" or whether it was to be feared that the denarii might have increased in value by the date of repayment, so that the lender would receive more than he had lent, which would be interest. And if the denarii in fact increased in value between the date of a loan and the date of repayment, was the lender entitled to claim the whole of the number of denarii he had lent, or did he have to deduct the number of coins proportionate to the increase in value?

The answer given by the Talmudical authorities is most original and worthy of note: everything depends on the nature of the denarius concerned. There is a denarius which is mere coin ("tab'a"), that is to say, a legal, official means of payment with which all commodities can be bought and which is not susceptible of an increase (or decrease) in value, because its apparent rise in value is spurious, a mere reflex of a fall in the price of commodities ("perot") brought about by other causes; it follows that the prohibition of interest does not apply to it when it is given on loan on a denarius-for-denarius basis. But there is a denarius which is not mere coin which buys, but a commodity which is bought or bartered, and if its value increases or is likely to increase, then this is an actual increase in value, which must be taken into account in the matter of the prohibition of interest. It was decided that a silver denarius was mere coin - being generally current more than any other coin - and that, therefore, it was permitted to lend it even on a denarius-for-denarius basis, and it is not apprehended that any interest might be involved. But a gold denarius is, according to most of the authorities, a commodity, and therefore it is prohibited to lend it

for fear that its value might subsequently increase and the lender thus receive interest: for the lending of commodities on a measure-for-measure basis is forbidden in principle in Jewish law as "interest not fixed in advance" (Baba Metzia, first item on the chapter concerning gold, 44b-45a).

> "For a silver denarius is coin in every respect, and not susceptible to an increase or decrease in value .. .therefore one cannot say that a silver denarius has anything at all to do with interest, and so it is permitted. As for the gold denarius, however, since it is, in contrast to silver, like commodities and movables, it is subject to a rise or fall in value. Thus, a gold denarius may be worth ten silver denarii at the date of the loan, and ten and a half denarii at the date of repayment. There is thus an element of interest in it" (Nimmukei Yosef Commentary to Rif Izhak Alfasi, ibid.).

> "It is forbidden to borrow on a 'measure-for-measure' basis, and a corresponding prohibition applies to everything else except coin... a gold denarius is to be treated as a commodity, it being forbidden to borrow a gold denarius for a gold denarius, for fear that one that is worth twenty-four silver denarii at the date of the loan may be worth twenty-five at the time of repayment; but it is permitted to borrow a silver denarius for a silver denarius, and so to borrow all other coins, that is, if they are current coin..." (Tur Shulhan Aruh, Yore Dea, 162(1). For the interpretation of the words "all other coin" see Beit Yosef, ibid., and the Responsa of R. Yom Tov Tzahalon, 33.)

Concerning the intrinsic, qualitative difference between coin and commodities - we find in one of the early authors: -

> "For in each of the different kinds of things in the world you find differences in value arising from the nature of the things themselves - their taste or smell or appearance - .. .except in the case of coin, the usefulness of which lies entirely in its monetary function, its purchasing power, and if so, what does its rise or fall, its thickness or thinness, matter?" (R. Avraham Ben David, quoted in "Shitta Mekubbetzet", Baba Metzia, at the beginning of the chapter concerning usury.)

These remarks, written in the thirteenth century, surprise by the modernity of the conception reflected in them; they contain, in a single sentence, the theory of "money as a medium of exchange", which was to gain wide currency in the technical literature of the twentieth century (see Nussbaum, ibid., p. 11, notes 43 and 44). Their meaning is as follows: currency is a means of purchase, the value of which is imparted to it from without, by the laws of the State to fix its value or purchasing power, while commodities carry their value within themselves, as a result of the enjoyment derived from their natural use.

The distinction between coin and commodities runs like a golden thread through the whole of rabbinical literature concerned with the lending of money, and is a main consideration in deciding the various questions connected with the law of interest. The idea remained unchanged, or almost unchanged, but its practical application underwent considerable changes, due to the shifting of the boundary-line between "mere coin" and

commodities, as we shall see later. Every change in the value of the currency by order of a ruler, and every reduction of its content or weight for purposes of taxation or as a result of war, rebellion and the like, immediately brought with it a spate of inquiries to leading scholars as to how to deal with the debt when occasion arose, and according to which value, the old or the new, it was to be paid on maturity. There was in these cases not only a clash of interests between the lender and the borrower, but also an inner conflict in the lender himself if he was an honest man. For interest is forbidden by Jewish law both to the borrower and to the lender (Baba Metzia 75b, 6la and all the authorities). It is forbidden not only to take interest, but also to give it. The borrower thus found himself between Scylla and Charybdis, and his choice was a very delicate one: if he gave more than what was due, he infringed the prohibition of interest, and if he gave less, he brought himself under the prohibition of larceny. ("Let the teacher of righteousness teach him what the mode of payment should be, so that it may not involve either interest or larceny", Responsa Darhei Noam, Yore Dea, 24). This, too, is one of the reasons for the large number of questions asked with regard to this legal issue.

An apt description of the situation, both as regards the law and the factual background, is contained in one of the responsa of the Rivash, who taught in Spain and Algiers at the end of the fourteenth and the beginning of the fifteenth century.

> "Reuven owes Levi seven thousand - secured by a mortgage on certain lands - on two promissory notes made out in the old currency, when King Don Enrique introduced a new currency, which was not worth one quarter of the earlier currency. He did so because otherwise he would not have been able to pay his troops. He ordered that this currency be accepted throughout his kingdom like the earlier currency. But years

> later when his rule had become established and he saw that this currency (i.e. the new one) had caused great damage and loss throughout his kingdom and that commodities had become much dearer owing to this currency, he declared it invalid."

The story goes on to tell how Reuven, who "had access to the king's court and perceived the king's desire and intention to declare that currency invalid", deposited with a trustee of the (rabbinical) court six thousand in the bad currency "in order that it might be given to Levi if he surrendered the notes". The sages of Seville decided that this payment was a good payment. Levi disputed this decision, and the matter was brought before the Rivash for final determination. Here is his decision: -

> "Decision: A valid award of the Court of the Holy Community of Seville (may the Lord preserve it) is final, and far be it from me to doubt and question its rulings ...because 'the law of the State binds Jews living in it.' The king ordered expressly that every person must accept the new, debased currency at the rate of the previous one, and that debts could be paid in it; we have here an instance of the principle that the law of the State is the law binding on Jews living in it. It is not a case of extortion on the part of the king, because the matter of the currency is one of royal prerogative. The king has the right by virtue of his being king, to deal with the currency at his pleasure and to fix a specific value for it. He may raise and lower its value at his pleasure. And if sometimes, as need arises - just as he imposes taxes in order to lodge

and pay his army - he greatly depreciates the currency, who can call him to account for it? ..." (Responsa of the Rivash, 197.)

Of course, in the decision of the Rivash the question of interest did not arise, because the lender in question, Levi, received new, debased currency instead of the old, good currency which he had lent Reuven. The question there was whether Reuven was not robbing his creditor by depositing the debased currency, and the answer was no, on the ground that "the law of the State binds Jews living in it" - i.e. the law of King Enrique, which recognised what is known today as the "nominalistic principle" in matters of currency, was the law which bound the parties to the transaction. But what would have been the law if the injured party had not been the lender Levi, but the borrower Reuven? Let us picture the following: the same Reuven borrowed the seven thousand from Levi in the period of the debased currency, and before the time of payment came - and for exactly the same economic reasons as were indicated by the Rivash - i.e. because "commodities had become much dearer owing to that currency" - the same King Enrique invalidated that currency and replaced it by a new currency, worth more than the old, and decreed that all borrowers in the State must pay in the new, good currency. Would, in this case, the rule of the State, which is the "nominalistic principle", have overridden the prohibition of interest, just as in the case of the Rivash it superseded the prohibition of larceny? The rule known to us that coin may be borrowed for coin (except gold coin and the like) would not have provided a simple solution to the problem, for here, ex hypothesi, we have to do, not with an imaginary or "reflected" increase of the value of an existing currency, but with the replacement of an existing currency by a new one, for the definite purpose of "bringing down the prices of commodities", as aforesaid, and this new currency, of course, involved an actual addition of value in comparison with the previous currency.

The above question was thus not before the Rivash but, as we know, the words of the Torah are sparing in one place and plentiful in another, and so we find an answer in the decision of other authorities. A great many responsa have been written concerning the relation between an increase in the value of the currency and interest; the very names of the coins mentioned in them - doros, cordanos, mejidis, venetsianus, perahim, groshosh, hatikhot, levanim, reichsthaler, zehuvim, zolotash and the like - testify to the width of the field covered, both in space and time, and it is easy to understand that no uniformity of language and content can be expected in all the authors concerned. Nevertheless, in spite of the great variety of the opinions expressed, when reviewing the decisions given on this question - namely whether an increase in the value of the currency (otherwise than through an increase in weight) prevents the lender, by reason of the prohibition of interest, from receiving from the borrower the whole of the quantity of coins he lent him - three main groups emerge before us.

13. The first group holds that a law of the State, which in this instance is the "nominalistic principle", is binding and when it puts an end to the inequality between the different values of all kinds of coin, it automatically clears that transaction of the stigma of interest. Thus and only thus - I think - must the use of that rule be here conceived, for otherwise it will not be understandable (and this objection has in fact been raised in the sources) how the law of the State can permit what is otherwise prohibited.

"...and all the more: how are debts to be paid where

it is a question of the law of the State? It is clear that the law of the State is the law that binds and that there is no question of interest in this case" (Responsa Sh'vut Yaakov,II, Choshen Mishpat 175).

"...If the king decrees that every lender be repaid in the other coin, then some say that the principle of the law of the State is the binding law, then the transaction is clearly permitted ...and that there is neither larceny nor interest involved..." (Beit Yosef, to Tur there Dea, 165,in the name of the authorities).

"As for your question concerning the change of the currency in our country, in relation to the payment of debts, I am surprised at that question, for it is agreed that the law of the State is the law that binds" (Responsa Chatam Sofer, part "Choshen Mishpat", 58).

Another group likewise permits the acceptance of coin increased in value, though not with reference to the law of the State, but for specific talmudic reasons derived from the law of interest itself, or for no special reason at all, from a desire to make things easier, in deference to common practice, or the like

"...If it has been expressly stipulated that the same coin as has been lent shall be repaid, then the same coin must be repaid even if it has increased in value by more than one fifth and even if commodities have become cheaper in consequence, and this will not involve the payment of interest." (Sh'vut Yaakov, *loc. cit.*, in another part of the responsum.)

> "In our opinion, all coins forever have a fixed value, and it is therefore permitted to borrow all of them on a Iike-for-like basis (gold for gold and copper for copper); although a change may have taken place and the value may have risen or fallen, one will pay back the same coin as one has borrowed; and as no interest is involved, one has to pay back the same coin." (Chazon Ish, Choshen Mishpat, 16(9).)

There are many more decisions permitting the borrowing of a coin for a coin not only in the case of the silver denarius - which is an actual coin - and permitting the lender to get back all the coins he has lent even if their value has increased between the date of the loan and the date of repayment. A long list of such decisions will be found in the Responsa Chikrei Lev, part "Choshen Mishpat", 154.

On the other hand, there is another group, representing a minority opinion, which prohibits the lending of a coin for a coin and the receipt of coin increased in value (i.e. of the same quantity of it), because "the Gemara does not permit a coin for a coin unless no profit at all accrues to the lender."

14. For the sake of accuracy and completeness, I would mention here the well-known fact that at the beginning of the seventeenth century and later a number of dispensations (haskamot) were granted by Jewish communities with a view to reaching, in the event of an increase or decrease in the value of the currency, a compromise between the lender and the borrower by splitting the difference or "loss" between them in equal shares; but the object of these dispensations was to divide in an equitable manner the loss caused by law to one

of the parties, and not to alter or abrogate the prohibition of interest. The concern was to avoid the "larceny", not the interest, for the frequent changes in the value of weight of the coin brought disorder into the economic life of the masses and also endangered the internal peace of the community.

In 1691, the Governor of Egypt "declared invalid the clipped and debased mejidis and introduced new mejidis, which were good both as to the silver and the weight", and an immediate consequence of this measure was utter confusion among Egyptian Jewry .. .Such were the dangers that threatened the life of the communities. It was to obviate them that in several countries (but apparently not in Egypt) the above-mentioned dispensation and permits were issued. They did not change the law of interest itself; the half-of-the-difference paid to the lender in the case of an increase in the value of the currency was permitted by law and did not give rise to scruples with regard to interest, for the reasons set out above.

15. We have come to the end of our survey of Jewish law. Let us now see to what conclusion it leads with regard to the question before us. It seems to me that an exact analysis of the principles disclosed will show that clause 9 of the mortgage deed, the value clause, would not in Jewish law have been regarded as a stipulation for interest. To make this clear, we have to translate the case into Jewish legal language. What did the appellant do? She wished to insure herself against depreciation of the Israel currency, a process which would entail a proportionate rise in the prices of all commodities in the State. This means: she ensured to herself the right to receive, at the time of repayment, the same quantity of commodities as she would have been able to buy with her money at the time the loan was given. Her actual wealth - in commodities - would not thereby increase; what

would increase was only the number of coins she was to receive, and such an increase, despite the "law-of-the-State" rule of the "nominalistic principle", is not in Jewish law regarded as interest, although, but for that stipulation, the debt due to her could have been redeemed with a lesser number of coins. We have seen that the law-of-the-State rule, with the nominalistic principle arising from it, may level out, in legal respect, the difference between the two values and thereby -- in the case of an increase in value - neutralize the prohibition of interest. But it is not realistic at all - and we have not found any hint to this effect in the sources - that by reason of this principle the depreciated currency should be regarded as actually equivalent to the previous currency, and that because of this fiction any purely quantitative addition to the number of coins originally given to the borrower should be regarded as prohibited interest. We have seen that principle at work as a "neutralizer" of interest, but we have not found it in the role of a "catalyst" of interest. In all the talmudical and rabbinical discussions concerning the rise and fall of the value of the currency, a great deal of attention is given to the question whether this rise and fall of the value is inherent in the currency, so that the latter, when increasing in value, produces the cheapening and multiplication of the commodities, or whether the increase and decrease is inherent in the commodities, that is to say, is due to some economic cause extraneous to the imaginary increase of the value of the currency, so that no benefit accrues to the lender by a mere increase of that value. It follows that the correct test of interest in Jewish law is whether or not the lender is actually enriched - in commodities - by the added quantity of coins. There may be actual enrichment without the transaction being forbidden as involving interest - for various legal reasons peculiar to the law concerning interest - but there cannot be the opposite, namely that the transaction is forbidden as involving interest without the lender being enriched.

Conclusive proof of this may be found, on careful study, in the aforementioned dispensations granted by the said communities. Under these dispensations, the difference in value was to be divided between the lender and the borrower, both in the event of a rise of the value of the coin lent and in the event of decrease thereof. If the groshosh, e.g., at the time of the grant of the loan stood at 120 levanim, and at the time of repayment had dropped to 100, the borrower had to pay the lender 110 levanim, i.e. one depreciated grush plus 10 levanim. These dispensations were accepted and followed even by those authorities who recognised in principle the "principle of the law-of-the State is binding", according to which the borrower may by right repay the debt in depreciated currency without adding anything. This shows clearly that the half-of-the-difference paid to the lender by virtue of the permit, i.e. the 10 additional levanim which the lender receives besides the grush repaid to him, is not prohibited interest according to Jewish law. For those dispensations, as I have already observed, were designed merely for an equitable distribution of the loss and were not intended to change - nor, perhaps, capable of changing - the law of interest itself. Now what is the reason for permitting the addition? Here - in contrast to the opposite case of the increase in value of the currency - the reason is that the addition does not enrich the lender in comparison with his position at the time the loan was granted. And this is the law with regard to the case before us.

16. To sum up, we have seen that English jurisprudence does not regard as interest the additional amount paid in respect of a risk to the principal of the loan; we have seen from American jurisprudence that the intention of the parties is the main thing and that, to constitute usury (prohibited interest), there must be a corrupt intent to get more than the legal interest (it may be assumed that in the transaction entered into by the present appellant there was no "corrupt intent"); lastly. we have seen that even Jewish law, which

is very strict with regard to interest and which deals with the problem of interest more strictly than any legal system at any time and in any country, finds no fault with the stipulation of a value clause. In view of all this, it is unlikely that the Ottoman legislator would have wished to go farther than all the others, and I therefore think that the condition laid down in clause 9 of the mortgage deed does not constitute a stipulation for interest prohibited by the laws of this country.

17. One brief concluding remark. We have not been asked here to express our opinion as to the economic aspect of the problem: whether or not the linking of loans to value clauses is economically desirable. Let others decide this. But at the same time, we should not blind ourselves to reality. The linking of loans - especially long-term ones - to value clauses is of everyday occurrence, both in the private and in the cooperative sector, and nobody seems to object. This is one of those cases where people should be allowed to make their economic arrangements without interference; certainly this matter does not come under the heading of prohibited interest.

In my opinion the appeal should be allowed and the declaration issued by the District Court set aside.

GOITEIN J. I concur.

BERINSON J. I concur.

Appeal allowed.

Judgment given on April 4, 1955.