[BELCHER, C.J., SERTSIOS AND FUAD, JJ.]

MICHAIL SPOURGITIS AND SANTOR NOVACIC

v.

MELIS IDREOS.

Contract—Tripartite agreement—Payment depending on completion of subsidiary contract—Unjustified termination of latter by one party—Effect on his obligation under main agreement.

It was agreed between A, B and C that on completion by B of certain work for C then in progress C would pay part of the remuneration therefor, namely £300, to A, in discharge of pre-existing indebtedness of B to A. Later, before B's work was finished, C purported to rescind his contract with B on the ground that B was not carrying out his part of it, and set up this rescission as a defence to an action against himself by A for a balance of the £300.

Held, affirming the judgment of the District Court, that C having failed to establish his right to terminate his employment of B, and the non-completion of B's work being, therefore, the fault of C and not of B, C remained liable to A as if B's work had been completely executed.

Appeal by defendant from judgment of District Court of Nicosia (action No. 485/28).

Clerides (with him *Triantafyllides*) for appellant.

Artemis for respondent.

The facts appear sufficiently in the headnote and judgments.

JUDGMENT :—

BELCHER, C.J.: Respondent No. 2, Novacic, brought his circus to Cyprus in September, 1928, under a contract with respondent No. 1, Spourgitis, and during its currency made another contract dated 10th October, 1928, with appellant Idreos which led to an action being brought against Novacic by Spourgitis. This was settled, the settlement being based on a trilateral arrangement between all three persons interested, the most important provision of which was that Novacic was to continue to work for Idreos under the contract of October 10th, but that of the remuneration due thereunder a fixed and agreed sum of £300 was to be paid by Idreos to Spourgitis and not to Novacic.

Idreos did not pay the whole amount to Spourgitis and Spourgitis sued him in this action.

The defence of Idreos was that by breaking certain terms of the contract of October 10th (namely that he should use a large tent for performances at Nicosia, that he should continue to employ the same staff as he began with, that he should give due variety to his performances and observe

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punctuality, and that he should keep the circus seats in good condition) Novacic gave Idreos the right to rescind the contract, which Idreos did on 29th October: that he, Idreos, was only bound to pay Spourgitis the £300 in so far as Novacic should completely have performed his obligations towards Idreos, and that he (Idreos) had in fact paid to Spourgitis what was due up to the time of the rescission of the contract.

Taking the alleged breaches of contract in the order in which I have set them out above, the District Court, while apparently holding that failure by Novacic to use the big tent entitled Idreos to rescind, considered that he had lost his right to do so by waiver. As to the allegations of not retaining the staff, lack of variety, and failure to keep the seats in good condition and to start the show as advertised, the Court held that no breaches of the contract had been proved.

The District Court gave judgment for Spourgitis for such part of the £300 as had not been accounted for.

The grounds of appeal are, as I understand them, that while the weight of evidence went to show that Novacic broke his contract there was none of any waiver by Idreos of the right to rescind for such breach.

No grounds except the one relating to the big tent were seriously argued before us, and as regards the minor alleged breaches it is clear to us that not only was the Court below justified in finding as it did on the evidence, but none of them could by any possibility be considered as of sufficient importance to form a justification for rescission.

We are left, therefore, with the matter of the tent, and it becomes necessary to examine the agreement of October 10th in the light of circumstances as they existed on October 24th which was the date of the three-corner arrangement superimposed upon it.

The material clause is No. 6:—"Mr. Santor Novacic undertakes to cover the circus at Larnaca with the provisional tent and at Nicosia with the big circus tent which is actually in Athens."

In fact the big tent did not arrive in Cyprus until the 28th October, and when the arrangement of 24th October was made the performances were being held in the provisional tent as Idreos was aware: but he was also told it would arrive on the 28th at the time he became party to the arrangement of the 24th, and I think we should infer that its arrival and use as from that day was promised to him as part of that arrangement, although the terms of the contract of the 10th were not altered in writing to suit the altered circumstances in that respect.

The big tent in fact was never brought to Nicosia at all at any material time; and the inference to be drawn, in my opinion, from the evidence is that in this respect Novacic broke his agreement, since there is no evidence at all or indeed allegation that there was any obligation on Idreos to pay the freight on it from Athens which was necessary to be paid before it could leave Larnaca.

Was this breach waived by Idreos? He protested the next day (29th) and nothing that I can see in the evidence goes to show that he intended to abandon any of his rights. The District Court, therefore, erred in holding that there was any waiver in relation to the obligation to use the big tent when it reached Cyprus: no doubt there was a waiver of the breach of the obligation to use it for the performance in Nicosia so far as those performances took place previous to its arrival and that may perhaps have been what the Court had in mind.

But partial failure to perform a contract, which failure may properly be compensated by damages, does not put an end to the contract. (I cannot find that Turkish law differs from English in this respect): the other party only acquires the right to abandon it (as distinct from damages) when the party in default has refused to do something which goes to the root or essence of the contract; and whether it does or does not so vitally affect the contract is a question of construction in each case. Looking at this contract I have no doubt whatever that the use of one tent or the other, while it must have had some importance, was not regarded by either party as vital. It is in evidence that in the provisional tent an audience which paid £127 was accommodated at the performance on the evening before Idreos purported to abandon the contract.

No counterclaim for damages was made, Idreos electing to stand or fall on the alleged right of rescission. In my opinion no such right existed and he remains bound to pay what he contracted to pay.

SERTSIOS, J.: I have had an opportunity of reading the written judgment of the learned Chief Justice, and I agree with him as to the result of this appeal, though I take a somewhat different view regarding the inference drawn by the Court below from the evidence before them.

The defendant (appellant) in his evidence in the Court below stated that the *decisive reason* for which he repudiated the contract was the respondent's failure to bring the big tent up to Nicosia. The Court below, however, dealing with this very reason, held that, upon the evidence before them, they were satisfied that defendant (appellant) had waived his right to insist upon this term of the agreement. There is no doubt in my mind, however, that this

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view as to the waiver in question would hold good only as to the performances which took place before the big tent's arrival in Cyprus. But I am not prepared to attach much importance to defendant's statement as regards the conversation alleged to have taken place between respondent (plaintiff No. 2) and himself in respect of the big tent, on the date of the trilateral statement, *i.e.*, on the 24th October, 1928. This was purely a question of fact, and the District Court, which not only heard defendant and his witness Rousso Fani, but also saw their demeanour and manner, was in a far better position to judge of the value of their testimony than we are. I may, therefore, reasonably infer from their judgment that the District Court, having all this in view, did not believe defendant and his witness in this respect.

Clause 6, however, of the agreement of the 10th of October does not seem to have been duly considered by the Court below. Under that clause respondent No. 2 had undertaken to cover the circus at Larnaca with the small tent and at Nicosia with the big tent, *which then was actually in Athens*. It is in evidence that the big tent was pledged in Athens, and, to effect its release, defendant advanced to the plaintiff No. 2 a considerable sum of money. Now, the reasonable interpretation to be placed upon the said Clause 6 of the agreement, should, in my opinion, be that, upon the arrival of the big tent in Cyprus, the performances at Nicosia should have to be continued under it. It was plaintiff's duty, therefore, to comply with the provisions in the said clause of the agreement, but he failed to do so for the only reason that he was unable to pay the freight on it from Athens, which should have been paid before it could leave Larnaca. Had the big tent been brought up to Nicosia in time, defendant naturally would not have been justified in cancelling the agreement. If, however, defendant continued even then to use the provisional tent instead of the big one, the sole reasonable inference to be drawn therefrom would have been that defendant waived his right to benefit by the term in Clause 6 of the agreement, and the Court below would have been then fully justified in finding as they did. The District Court, therefore, was, in my opinion, wrong in holding that defendant had waived his right to insist upon the term of Clause 6 of the agreement.

I agree, however, with the learned Chief Justice that, for the reasons he is so explicitly giving in his learned judgment, plaintiff's inability or refusal to perform the term 6 (six) of the agreement was not one which would go to the root or essence of the contract. I agree that no right existed enabling defendant to rescind the contract, and, therefore, the appeal should be dismissed with costs.

FUAD, J: Respondent 2, a circus proprietor, had entered into a contract with respondent 1 for the giving of performances but before it was fully carried out the former made another agreement with appellant for performances at Amiandos. This agreement was by consent cancelled and another entered into by the same parties on 10th October, 1928, under which performances were given at Larnaca and commenced at Nicosia on 21st October. Respondent 1 sued respondent 2 for breach and a settlement of his action reached on 24th was put in on 26th October. Appellant, though not a party to that action, was a party to the settlement and signed it.

The contract of 10th October provided for evening performances beginning with the 13th and 2 matinées a week for 21 working days (Clauses 1, 3 and 5): they were to be made with the personnel and *material* employed at Limassol (Clause 2); and though the provisional tent was to be used at Larnaca, the big one (said to be then at Athens) was to be used at Nicosia (Clause 6). After five performances at Larnaca appellant had the circus brought to Nicosia and performances made without the big tent.

The tripartite agreement of the 24th October did not rescind or transfer any existing contract or obligation: it was neither a novation nor a havalé: it simply authorised appellant and laid on him the obligation of paying respondent 1 part of what he (appellant) had agreed to pay respondent 2 for the performances provided these were made in conformity with the terms of the original contract.

Clause 3 of the second shows that the first contract was to stand; Clause 4 extended the time for completing the performances to 26th November, 1928; and Clause 5 varied Clause 9 of the first contract by allowing respondent 2 to dispense with minor actors. Both must be looked at together to see what the parties' agreement was.

A telegram was produced on the 24th October showing that the big tent would arrive on the 28th, which it did, and respondent 2 at once went to Larnaca for it. A large sum was wanted for its release and appellant states that respondent 2 asked him for money. Respondent 2 denies this and his witnesses and Colonellos, who seems to be truthful, state that the tent could not be released that day owing to lack of time and because appellant (who was bound to pay them) had left without paying the transport expenses to Nicosia. Appellant states that respondent 2 not only asked for money but also refused to bring the tent to Nicosia, thus repudiating the most essential condition of the contract, which decided him to rescind it forthwith. Respondent 2 denied this and appellant's witness Rousso does not support him about the refusal to bring the tent up. Appellant rescinded the contract on account

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of sundry alleged irregularities of which the Court below rightly found he had no right to complain and because he was asked for money. This in itself did not amount to a refusal to bring up the tent: if appellant had not rescinded respondent 2 might have borrowed the money from someone else, as he did later.

Appellant did not give respondent 2 the time or chance to bring up the tent: he rescinded the contract without offering the transport expenses for the poles and posts which he knew were at Amiandos and for the bringing of the tent from Larnaca. In these circumstances there was not in my view any breach of the condition to use the tent at Nicosia at the time appellant repudiated the contract.

Appeal dismissed.

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IN THE ASSIZE COURT OF LIMASSOL-PAPHOS.

[BELCHER, C.J., THOMAS, J., GREENE, P.D.C., HALID AND STAVRINIDES, D.JJ.]

REX

v.

NOUFRIOS CHRISTODOULOU AND THEODOSI YORGHIOU.

Criminal Law—Evidence—Preliminary enquiry—Witness contradicting own statements—Power to give deposition in evidence—Law 12 *of* 1929, *Section* 6 (1).

On a trial at Assizes for wilfully damaging property (C.C.C., Section 312) a witness called by the Crown denied all knowledge of the matter. The Crown thereupon tendered the deposition containing the evidence of the witness before the committing Magistrate, which would show that on examination-in-chief he made a material statement of fact (implicating accused 1) but that on cross-examination and again on re-examination he denied the truth of what he had said on examination-in-chief.

Held, by the majority of the Court (the Chief Justice and Stavrinides, D.J., dissenting), that the deposition was not admissible.

Trial at Limassol Assizes. (The case is reported on the point of evidence only.)

Law 12 of 1929, Section 6 (1), is as follows :—

" Where upon the trial on information of a person accused of any offence, any witness shall make any material statement of fact in direct contradiction to a statement of fact contained in his deposition taken before a Magisterial Court, or upon commission in accordance