[HUTCHINSON, C.J. AND PARKER, ACTING J.]

KLEANTHES ALEXANDROU, *Plaintiff,*

v.

HAJI THEODOSSI KAKOIANNE, *Defendant.*

June 28

SALE OF FRUIT-TREES: WHETHER THE FRUIT THEN ON THE TREES IS INCLUDED—MEJELLE, 233.

Carob-trees were sold by order of the Court in execution of a judgment and were bought by H. The order did not mention the fruit, but the fruit was nearly ripe at the time of the sale; the auctioneer at the sale specially referred to it as being included in the sale; and the purchaser thought that the sale included the fruit, and he gathered the fruit a fortnight afterwards.

HELD: *that H. was entitled to the fruit.*

An order of the District Court was made, in an action in which the present Plaintiff was Defendant, for sale of certain land and "carob-trees" in execution of a judgment against the present Plaintiff. The sale took place by auction in August, 1899, and the trees were bought at the auction by the present Defendant. Neither the order for sale nor the sale bill specially mentioned the fruit; but the auctioneer at the sale specially referred to the fruit as being included in the sale; and the Court came to the conclusion that the auctioneer intended and the purchaser believed that the fruit was included. The fruit was nearly ripe at the time of the sale; and about a fortnight afterwards the purchaser gathered it.

The Plaintiff brought this action against the purchaser in January 1903, claiming that the fruit was not included in the sale and claiming the value of it from the Defendant.

The first ground of defence was that the Defendant was entitled to gather the carobs by virtue of a custom prevailing in the District; but the District Court found that no such custom had been proved. There were two other issues of fact settled: (1) was the fruit expressly mentioned by the auctioneer at the time of sale? and (2) was the Plaintiff present at the sale and did he hear the auctioneer expressly include the fruit? The District Court answered these questions in the affirmative and held that the Plaintiff, having raised no objection at the time, impliedly consented; and they dismissed the action.

The Plaintiff appealed.

Neoptolemos Pascal for the Appellant.

I. Kyriakides for the Defendant.

N. Pascal: Article 233 of the Mejellé enacts that there are not included in a sale, unless expressly mentioned, things which are not sold with the thing sold as being by use and custom necessary parts of it; and it gives as an example fruit on the sale of a tree, and says that the

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fruit is not deemed to be included unless expressly mentioned in the bargain. This sale was made in pursuance of an order, which did not direct the fruit to be sold; neither did the sale bill mention the fruit; the auctioneer had no power to sell the fruit.

I. Kyriakides: The finding of the District Court is that we bought the fruit; and, even if the sale was invalid, it has not been set aside.

Judgment: We think that the decision of the District Court ought to be upheld on the ground that it was expressly stated by the auctioneer at the sale that the fruit was included; he intended to include it and the Defendant intended to buy it, and it was in fact bought by the Defendant. It is true that neither the order for sale of the trees nor the sale bill expressly mentions the fruit. That might have been a good ground for an application to set the sale aside. But no such application was made; the sale did in fact include the fruit, and it has not been set aside; and therefore it is valid.

We do not think it is necessary that the "express mention" of the fruit need be made in the sale bill. The term "trees" leaves it doubtful whether the fruit is included or not, especially if the fruit were unripe or unformed; according to the rule in some countries the presumption would be that the fruit was always included; according to the Mejellé the presumption in Cyprus is the other way; but the presumption can be rebutted by a verbal statement.

We suggested during the argument that Art. 233 of the Mejellé was intended to give a rule for ascertaining the intention of the parties to an ordinary agreement for sale by private contract and is not applicable to a sale by order of Court in execution of a judgment. It is most unlikely that the Court, having power to order sale of the debtor's trees with their fruit, should intentionally exclude the fruit from the sale. But however that may be we think that in the present case the sale that took place included the fruit and it is too late now to set it aside.

Appeal dismissed with costs.