[TYSER, C.J. AND BERTRAM, J.]

TYSER, C.J. & BERTRAM, J. 1908 Feb. 28

HAJI THEMISTOCLI CONSTANTI, *Plaintiff*,

v.

PARASKEVA HAJI STAVRINOU AND OTHERS, *Defendants.*

PRACTICE—PRELIMINARY OBJECTION—WAIVER.

FIELD WATCHMAN—WAGES—PERCENTAGE—APPORTIONMENT—LIABILITY OF VILLAGE COMMISSION—FIELD WATCHMEN LAW, 1896 (No. 12 OF 1896), SECS. 4-11—INTERPRETATION OF STATUTES—WORDS TREATED AS SURPLUSAGE.

A preliminary objection must be taken at the commencement of the hearing or will be treated as waived.

ALITER: When it takes exception to the jurisdiction of the Court.

Sec. 6 of the Field Watchmen Law, 1896 (which requires a Village Commission to apportion the wages of a field watchman among the occupiers and publish the apportionment), does not apply to cases where the field watchman is to be remunerated by a percentage of the produce.

The words " in proportion to the produce of each occupier " in Sec. 6 are to be interpreted as meaning " in proportion to the estimated produce of each occupier."

The obligation upon the Village Commission under Sec. 6 to apportion the wages of its field watchman among the occupiers is not confined to cases in which the wages of the field watchman are fixed by the District Commissioner.

The words " as fixed by the Commissioner " in Sec. 6 have no meaning and must be treated as surplusage.

The Plaintiff was appointed as a field watchman on the terms that if he served for a year to the satisfaction of the village he should be remunerated by a percentage of the crops gathered. The Village Commission took no steps to apportion this remuneration under Sec. 6. Before the expiration of the year the Plaintiff was dismissed by the District Commissioner for misconduct.

HELD: That the Defendant (who was Mukhtar of the village at the time of the Plaintiff's appointment) was not personally liable to the Plaintiff under Sec. 6.

QUAERE: Whether any remuneration would be payable for the incomplete performance of such a contract and whether the liability of the Village Commission under Sec. 6 attaches to the Village Commission making default, or to the Village Commission for the time being.

This was an appeal from a judgment of the District Court of Kyrenia.

The Plaintiff in the case was a man who has acted as field watchman for the village of Ayios Epictitos. The principal Defendant Haji Constanti Simeo was the Mukhtar of the village at the time of the Plaintiff's appointment, and the action was brought for the recovery of remuneration claimed by the Plaintiff in respect of the discharge of his duties as field watchman.

Two other persons were joined with the Mukhtar as Defendants, but the claim of the Plaintiff against them was dismissed by the District Court.

The facts of the case were as follows: The Plaintiff together with another man, Elia Christophoro, was formally appointed field watchman by a document dated 14th October, 1900. By that document the Plaintiff bound himself to serve as field watchman

for a period of one year and undertook, if he was guilty of neglecting his duties, to resign his position and receive a remuneration of only one piastre a day for the period of his actual service. If however he gave satisfaction for the whole year, he was to receive one per cent. on the crops, and one half per cent. on the caroubs. The document was signed by the two field watchmen, by the Defendant Haji Constanti and by three members of the Village Commission.

After the Plaintiff had served some eight or nine months he was dismissed by the Commissioner, under Sec. 11 of the Field Watchmen Law, 1896, apparently for misconduct. The nature of the misconduct was not clearly explained, but it is not suggested that he was guilty of any " neglect of duty."

After his dismissal the other two Defendants were said to have drawn up a paper estimating the amount of remuneration which he ought to receive at £8. The paper was not produced. The Defendant Haji Constanti Simeo did not sign it, nor did it bind the two Defendants who did. Apparently it was nothing more than an estimate on their part of what they considered was a fair amount for the Defendant to receive.

The amount claimed in the action was the sum of £8 stated in this document.

The Court held the Defendant Haji Constanti Simeo personally liable, under the second paragraph of Sec. 6 of the Field Watchmen Law, 1896, for the payment of the wages of the Plaintiff. As to the amount they accepted the estimate said to have been made by the two other Defendants, " two apparently competent persons, both landowners of the village," and gave judgment for £7 10s. being that amount less the value of certain oil, which the Plaintiff was proved to have already collected towards his remuneration.

The Defendant appealed.

Loizides for the Appellant.

Paschales Constantinides for the Respondent.

Judgment: This was an appeal from the decision of the District Court of Kyrenia.

The amount at issue was only £8 and the appeal was made by the leave of the Court.

In the course of the opening speech of the counsel for the Appellants, counsel for the Respondents interposed an objection against the hearing of the appeal on the ground that the Appellant had not filed a copy of the order of the Court granting leave to appeal as required by Order XXI rule 1. He explained that he had only just observed the omission, but claimed that the words of Order XXI rule 1 were imperative, and that on the point being brought to our notice we were bound to dismiss the appeal.

This objection however is of the nature of a preliminary objection, and we are of opinion that as a general rule preliminary objections must be taken at the commencement of the hearing or not at all. If a party does not take the preliminary objection at the proper time he must be considered to have waived his rights to do so afterwards.

This would not of course apply to an objection which took exception to the jurisdiction of the Court. But this is not a question of jurisdiction. It is not the function of Rules of Court either to create or to restrict jurisdiction. They regulate the jurisdiction which the Court possesses. The present point is not a point of jurisdiction but a point of procedure and under the circumstances the objection is disallowed.

With regard to the method, which the District Court has adopted, of assessing the amount said to be due, it is, to say the least a very rough and ready one. As a general rule, in the absence of the consent of the parties, a statement not under oath, whether in writing or not, is not evidence on which the Court can act. In the view which we take of the case, however, it will not be necessary to discuss this question further.

The principal questions raised before us at the argument were the following:—

(1) The Plaintiff's right to be paid a percentage on the produce being by the terms of his contract dependent upon his serving for a full year to the satisfaction of the village, and he having been dismissed before the completion of the year, is he entitled to any remuneration at all for the portion of the year which he actually served? In other words, is his contract apportionable?

(2) Assuming that he is entitled to a proportionate remuneration, are the members of the Village Commission personally responsible to the Defendant for the amount under Sec. 6 or must the Plaintiff call upon the present Village Commission to collect it for him from the villagers under Sec. 7.

(3) Assuming the "members of the Village Commission" to be personally responsible to the field watchman, under Sec. 6, does this mean the members of the Village Commission who made default in the performance of the duties imposed upon them by the section, or does it mean the "members of the Village Commission for the time being."

The part of the Field Watchmen Law, 1896, which deals with the remuneration of field watchmen is extremely obscure. In the hope of elucidating it we propose to submit its provisions to a somewhat detailed examination.

The manner in which field watchmen are to be appointed is prescribed by Sec. 4. For the purpose of simplicity we will exclude the case of groups of villages and consider the question from the point of view of single villages only.

According to the Sec. 4, in the first week of October in each year a meeting is to be held at which the following things are to be determined:—

(1) The number of field watchmen required.
(2) The persons to serve as field watchmen.
(3) The amount of each field watchman's wages.
(4) The manner in which the wages are to be paid.
(5) The manner in which they are to be collected.
(6) The time at which they are to be collected.

It is not said that this meeting is to make any apportionment of the wages among the individual occupiers. Incidentally there occurs the phrase—" the basis of the allocation of the amount being the produce of each occupier." But this refers to the time of the collection of the wages and probably simply means that each man is to pay in proportion to his produce. It cannot be intended that the meeting should make an allocation—because the next section goes on to declare that if the meeting fails to decide any of the matters required to be decided by Sec. 4, and if this failure is not made good by the Village Commission the District Commissioner shall decide the matter omitted and he clearly is not competent to make an apportionment of this character.

Now if the villagers (as in this case) decide to remunerate their field watchman by a percentage of their crops, there is no further difficulty. The wages allocate themselves, and under Sec. 8 if the proper formalities are complied with each occupier becomes liable at the time fixed to pay to the field watchman the prescribed percentage. If, however, the remuneration is to be a monthly payment, or a lump sum—some further machinery for apportioning this remuneration among the individual occupiers is clearly required.

To proceed with the consideration of the law, Sec. 5 (as already remarked) declares that if the meeting fails to decide any of the matters prescribed for decision by Sec. 4 the Village Commission, or failing the Village Commission the District Commissioner shall decide in its place, and Sec. 6 (in its first sentence) directs that on so deciding the Commissioner shall communicate his decision to the Village Commission.

At this point the scope of the section seems to enlarge, and it is at this point that the difficulty of construing the law begins.

The section seems no longer concerned with the special cases on which the District Commissioner has given a decision in default of a decision by the meeting. It declares in perfectly general terms (subject to certain words to which we call attention immediately), that within 30 days from the appointment of a field watchman, in whatever manner the appointment may have been made (that is to say, presumably, whether by the meeting, or the Commissioner), the Village Commission is to apportion the wages of the field watchman among the occupiers in proportion to the amount of the produce of each occupier. The apportionment is to take the form of a list, and the list (see Sec. 7) is to show the amount to be paid by each occupier. This list when drawn up is to be published. If the Village Commission fails to make an apportionment, or having made it fails to publish it, the members are jointly and severally responsible for the field watchman's wages, and may recover from the occupier any sum they are compelled to pay to him.

The meaning of this enactment is obscure in more than one particular.

In the first place, it directs an apportionment in all cases. But, if as in this case, the wages of the field watchman are to be a percentage of the actual products of the year from each occupier, how is it possible to make an apportionment? The wages in such a case apportion themselves. It seems clear that the obligation to make an apportionment only applies where the amount of the wages is capable of apportionment.

In the second place the section declares that the basis of the apportionment shall be the amount of the produce of each occupier. Now, *prima facie,* this means the actual amount of produce for the year of the field watchman's service. The section does not say the " average produce " nor the " estimated produce." Yet this apportionment is to be made within 30 days of the field watchman's appointment. The only way to give any intelligible meaning to the section is to construe " produce " as meaning " estimated produce." The section nowhere directs the Village Commission to make an estimate, but if the words are to be so construed, such a direction must be implied.

In the third place, what is the meaning of the words at the end of the first paragraph, " *as fixed by the Commissioner.*" Up to this point the section has said nothing about the fixing of the wages by the Commissioner. The section is not in terms confined to cases in which the wages are fixed by the Commissioner. But for these words, it would certainly seem to include cases in which the remuneration is fixed by the meeting. Are these words then to be held to relate back and govern the whole enactment? To say the least this is very inartistic drafting and very peculiar grammar. The probability seems to be that originally the section was intended to be limited to cases in which the wages were fixed by the Commissioner, that the scope was afterwards enlarged (possibly by amendments in Committee) and that these words were left *per incuriam.* It is difficult to give any definite meaning to the words, without construing them as limiting the scope of the section. If however the obligation on the Village Commission to make an apportionment is confined to cases where the wages are fixed by the Commissioner, then the act contains no machinery for apportioning the wages, where they are fixed by the meeting, or by the Village Commission and where, being a lump sum, they need an apportionment. Under the circumstances, as it is not possible to give any meaning to the words consistent with the ordinary rules of grammar and drafting, or with the general scheme of the law the best course would seem to be to say that they have no meaning and to treat them as surplusage.

To come now to the facts of the present case, it is clear that no claim arises on that clause of the contract which provides that if the field watchman neglects his duty, he will resign and accept a remuneration of one piastre a day for the period of his actual service. There is no allegation that he neglected his duty under the contract, nor is there any evidence of any neglect of duty, nor was his claim based upon that supposition. His claim to remuneration, if he has any, must be based upon that part of the contract which declares that his remuneration shall be a percentage of the produce. Now this is not a lump sum. It requires no apportionment. It was not in fact capable of any further apportionment. The Village Commission consequently committed no default in not apportioning it, and are consequently not saddled with any personal liability.

The Defendant is therefore not liable under Sec. 6 nor has he any other liability. He signed the document which states the terms of the Plaintiff's engagement not as a party personally contracting, but in pursuance of the directions of Sec. 8 of the law.

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Under the circumstances it is not necessary for us to give any decision on the other questions mentioned in the argument.

The appeal is allowed and the judgment of the District Court set aside with costs here and below.

Appeal allowed.

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[TYSER, C.J. AND BERTRAM, J.]

REX

v.

YANNI NIKOLA.

CRIMINAL LAW—MALICIOUS INJURY TO PROPERTY—OTTOMAN PENAL CODE, ART. 249—" KHARAB."

The malicious breaking or damaging of the shutters or doors of a house constitutes an offence under Art. 249 of the Ottoman Penal Code.

The Turkish word " Kharab " does not necessarily imply the complete destruction or rendering useless of the thing in question.

The accused pleaded guilty to three counts charging him with wilfully breaking and damaging the shutters of two houses and the door of another house to the extent of 10*s*., 6*s*. and 8*s*. respectively. The Court convicted him of offences under Art. 249.

HELD: By the Supreme Court (on a case reserved for the opinion of the Court), that the accused was rightly convicted.

This was a case reserved under Art. 140 of the Cyprus Courts of Justice Order, 1882, by the District Court of Limassol.

On 24th December, 1907, Yanni Nikola of Limassol was charged before the District Court on an information purporting to be laid under Art. 249 of the Ottoman Penal Code. The first count alleged that he wilfully broke and damaged the shutters of the windows of a dwelling house; the second that he wilfully broke and damaged the door of another dwelling house; and the third, that he wilfully broke and damaged the shutters of the windows of a third dwelling house. The damage alleged in the first case was 10*s*. and in the second 8*s*. and in the third 6*s*.

The accused pleaded guilty to these counts, and the Court then proceeded to consider whether the facts admitted constituted an offence under Art. 249. In the result the Court convicted the accused and stated a case for the opinion of the Supreme Court.

The case stated the contention of defence as follows:—

> " Concisely that argument is (*a*) that Art. 249 of the Ottoman Penal Code does not contemplate an *injuria* coupled with simple damage, but an *injuria* in which the damage renders useless for its purposes the subject of the damage, and (*b*) that the complete damage aimed at by the article must be to immovable property and not to movables or fixtures merely adhering to immovable property."

The case reported that the Ottoman Judge of the Court, Atta Bey, was of opinion that on the true interpretation of the Turkish