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view there was a concluded contract, the Government on its side certainly seems to imply that in the view of the Government there was not, for it says " unless you withdraw your protest the Receiver " General will not sign the contract."

The truth is that the question is not so much what either party thought about the legal aspect of the matter, but whether in fact the negotiations had been concluded. In my opinion they had not. At the time when one party acceded, and before the accession of the other, the former put forward what was practically, in the view of the other, a fresh condition, which the other refused to accept, and consequently no final agreement was reached.

If I am wrong in this view, and if the signature of the written contract did of itself *prima facie* bind the Plaintiffs, then I agree with the Chief Justice, that, even on that supposition, the evidence discloses the fact that that apparent agreement was not a real one as the parties were not at one as to the subject matter of the sale.

Appeal allowed with costs.

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January 13

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

GEORGIOS CH. PETRIDES

v.

NIKOLA DEMETRIOU AND OTHERS.

DAMAGES—PENALTY AND LIQUIDATED DAMAGES—PRINCIPLES TO BE OBSERVED IN THE COURTS OF CYPRUS.

Where an agreement fixes a sum of money to be paid in the event of a breach of it, the Courts of Cyprus, in considering whether this sum shall be treated as damages agreed upon between the parties, or whether it shall be treated merely as a penalty stipulated in terrorem, *proof of actual damages being required, are free to apply the principles of English law, that is to say, the following principles :—*

(1) *It is open to the parties to a contract by their mutual agreement to settle the amount of damages uncertain in their nature at any sum at which they may agree.*

(2) *Where an agreement declares that in the event of one of the parties failing to pay a fixed sum of money he shall pay a larger sum this larger sum is treated as a penalty and not enforced.*

(3) *Where the agreement declares that a certain sum of money shall be paid in the event of one of the parties failing to do a particular act, and this sum is so disproportionate to any actual damages that may be caused by such default that it cannot be regarded as a genuine pre-estimate of the other party's interest in the fulfilment of the obligation, this sum is treated as a penalty and not enforced.*

(4) *Where in the absence of any such disproportion, the sum stipulated for is to be paid on the breach of a single obligation (other than an obligation for the payment of a fixed sum of money), this sum is treated as an agreed estimate of damages although the actual damages in any particular case may be trivial or considerable according to the circumstances.*

(5) *Where the sum stipulated for is payable on the breach of a number of different conditions, one of which is for the payment of a sum of money less than that stipluated for, or is such that any possible damages actually incurred in respect of it must necessarily be utterly disproportionate to the sum stipulated for, this sum must be considered as a penalty not only in respect of that condition, but also in respect of all the other conditions, and only the damages actually sustained can be recovered in all cases.*

(6) *The fact that the parties to the agreement have called the sum stipulated for "damages" or a "penalty" is not conclusive as to its true character.*

The Defendants (being the Village School Committee) engaged the Plaintiff to serve for one year as the village schoolmaster at a salary of £22, and agreed that if they "changed their views" they would pay him the whole year's salary as "ποινικὴ ῥήτρα." Afterwards in breach of this agreement, before the commencement of the scholastic year, they employed another person as schoolmaster.

HELD: *That the Plaintiff was entitled to recover the sum stipulated for.*

This was an appeal from a judgment of the District Court of Famagusta. The Court was divided, the President being of opinion that the Plaintiff was entitled to the amount claimed, the majority of the Court that judgment should be entered for the Defendants, and it was so entered accordingly.

The facts sufficiently appear from the headnote and the judgment.

The Plaintiff appealed.

Neoptolemos Paschales for the Appellant.

Loizou for the Respondents.

The Court allowed the appeal.

Judgment: This is an action brought upon an agreement and the defence is that the agreement was induced by the fraud of the Plaintiff.

The fraud alleged is that the Plaintiff said that he had certain "qualifications," namely, the qualifications prescribed by the Education Law, 1905, Sec. 52. Two of the principal witnesses for the defence however, on cross-examination, explain that what he really said was, not that he had these qualifications, but that he was certain to get them in the course of the year. It also seems clear that, as he had already served as the village schoolmaster for the previous year, the Committee knew that he had not got the qualifications.

To support their plea, the Defendants must shew that the Plaintiff wilfully made a false statement of fact and that they acted upon that statement. It is not sufficient to shew a mere statement of an expectation, however ill-founded.

As a matter of fact it was not in any real sense possible for the Plaintiff to acquire the qualifications. He had not passed through "a full course of education" at the only recognised training school; he was not qualified under the old law; examinations by a Board of Examiners are not in practice held. The only method therefore

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of which he could obtain a certificate of qualifications would be as the effect of a special order of the Board of Education. It does not seem probable that this order would have been made in this case, or that the Plaintiff had the possibility in mind.

His statement as to his expectations (if he made it) might therefore be construed as a statement of fact that it was possible for him to acquire a certificate of qualification during the coming year, and if it were proved that he made this statement knowing it to be false, this might be sufficient to support the Defendants' plea

But this is not proved, and the evidence of the fraud alleged is so indefinite and contradictory, that, under the circumstances, (though the conduct of the Plaintiff was far from satisfactory) we must agree with the minority of the District Court, that the plea of fraud is not proved

It was also pleaded that the Defendants did not themselves dismiss the schoolmaster or appoint his successor, but that both these things were done by the District Committee As however the Defendants referred the matter to the District Committee and adopted their action there seems nothing in this plea

The question on which we reserved judgment was the question of the amount of damages to which the Plaintiff is entitled For this purpose we have to consider the effect of what is commonly known as a "penal clause" ("*ποινικὴ ῥήτρα*") contained in the agreement

The clause in question is in the following terms —

Ἐν περιπτώσει δὲ καὶ ἀλάξομεν (sic) *ἰδίαν* (sic) *νὰ πληρόνομεν* (sic) *ποινικὴν ῥήτραν ἀμφότεροι, ἐὰν ἀλάξῃ* (sic) *ἰδίαν* (sic) *ὁ διδάσκαλος νὰ πληρώνῃ* (sic) *εἰς τὴν ἐπιτροπεία* (sic) *δέκα λίρας Ἀγγλικὰς καὶ ἐν περιπτώσει δὲ καὶ ἀλάξουν* (sic) *ἰδίαν* (sic) *ἡ ἐπιτροπεία νὰ εἶναι* (sic) *ὑπόχρεος* (sic) *νὰ πληρώνῃ* (sic) *ὅλον τὸν μισθὸν τοῦ χρονικοῦ διαστηματος εἰς τὸν διδάσκαλον*

Mr. Loizou contends that this "penal clause" is unenforceable and that the Plaintiff must prove the actual damages he has suffered.

The enforcement of these penal clauses is a point on which the principles of English Law differ in some measure from those of other systems

In French Law the "penal clause" is conclusive. See Civil Code, Art 1152 —

"Lorsque la convention porte que celui qui manquera de l'exécuter "paiera une certaine somme à titre de dommages-interêts, il ne peut "être alloué à l'autre partie une somme plus forte ni moindre."

This principle was adopted as part of the Commercial Law of the Ottoman Empire in 1861 by Art. 98 of the Appendix to the Commercial Code, and in the Ottoman Code of Civil Procedure, enacted just after the commencement of the British Occupation, it was adopted as part of the general law of the Empire, Art. 111 of that Code being a translation, word for word, of Art. 1152 of the French Civil Code above cited. There seems little doubt that the phrase "ποινικὴ ῥήτρα" as used in the country is a translation of the phrase " clause pénale " as used in French Law.*

English Law on the other hand in some cases declines to enforce these clauses on grounds of equity, and insists on the actual damage being proved.†

It is clearly more desirable that, if possible, we should adopt in Cyprus the more elastic principles of the English Law rather than the rigorous principles of the French. We will first therefore more fully define what are the principles of English Law on this point, and will then consider whether anything in the previous decisions of the Court presents an obstacle to their application in Cyprus, and if there is no such obstacle, we will apply them to the present case.

The principles of English Law, as we understand them, are as follows:—

First: It is open to the parties to a contract by their mutual agreement to settle the amount of damages uncertain in their nature at any sum upon which they may agree. " In many cases such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing witnesses to that point." (See per Tindal, C.J., in *Kemble v. Farren* (1829) 6 Bing., 141, 31 R.R., p. 372).

Secondly: Where an agreement declares that a certain sum shall be payable in the event of one of the parties failing to pay a smaller sum, this stipulation is treated not as an estimate of damages agreed in advance, but as a mere penalty *in terrorem*, and is not enforced.

Thirdly: Where an agreement declares that a certain sum of money shall be paid in the event of one of the parties failing to do a particular act, and the actual damages caused by the default must necessarily be comparatively minute and trifling—so that the sum to be paid is out of all proportion to any loss that may actually be

* *The Italian Law in this matter seems substantially the same as the French. See Codice Curle, Arts.* 1209-1217.

† *The German Code of* 1896 *also in certain cases declines to recognise the " penal clause " as conclusive, Art.* 343 *providing that " where a penal clause, of which the penalty has been incurred, is highly exaggerated it may be reduced by a judgment of the Court on the demand of the debtor to a reasonable sum,"*

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sustained—the Court will treat the stipulation not as an assessment of damages, but as a penalty, and will only award the actual damages.

As was said in a very recent case in the House of Lords (*Clydebank Engineering Co. v. Don Jose* (1905) A.C., 6) and repeated in another (*Public Works Commissioners v. Hills* (1906) A.C., 375), the test is " whether the sum stipulated for can be regarded as a ' genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation ' or whether on the contrary it was merely ' stipulated *in terrorem*.' "

Speaking generally however where the sum stipulated is to be paid simply on the breach of a single obligation, then (in the absence of any such disproportion, as that referred to above, between this amount and any damage that may possibly be incurred), the amount is to be treated as an agreed estimate of damages and not as a penalty. It is immaterial in such a case that the possible breaches of the obligation may vary in magnitude, and that the amount of actual damages in any case may be trivial or considerable according to the circumstances. If the obligation is single and the amount is not out of proportion to any possible damage, the stipulation is enforced. See *Law v. Local Board of Redditch* (1892) 1 Q.B., 127.

Fourthly : There is a further principle, which arises out of the second and third principles above enumerated, and it is this. Where the sum stipulated for is payable on the breach of any one of a number of different conditions, one of which is the payment of a sum of money less than that stipulated for, or is such that any possible damages actually incurred in respect of it must necessarily be utterly disproportionate to the sum stipulated for, then this sum must be construed not only as a penalty in respect of this particular condition, but also in respect of all the other conditions, and only the damages actually sustained can be recovered in all cases.

Fifthly : The fact that the parties in the agreement call the sum in question a " penalty," or " damages " as the case may be is not conclusive, and is indeed of comparatively little importance, but it seems that if it is called " damages " in the agreement the burden of proof lies on the party who maintain that it is really a penalty and *vice versa*.

Such are the principles of the English Law on this point. They will be found very concisely summarised in the article on " Damages," in Lord Halsbury's Laws of England. Vol. X., pp. 328-331.

We have now to consider whether there is anything in the previous decisions of this Court to prevent the application of these principles in Cyprus.

Those previous decisions are three in number and are as follows: *Ateshli v. Pavlides & Co.* (1890) 1 C.L.R., 126; *Skutaridi v. Papa Varnava* (1892) 2 C.L.R., 89; and *Selim v. Sofouzade* (1893) embodied in the report of *Gavrilidi v. Georghi* (1893) 3 C.L.R., p. 142.

In the first of these cases (*Ateshli v. Pavlides & Co.*) the Defendant agreed to purchase and the Plaintiff agreed to deliver a certain quantity of silk cocoons on a given day and it was further agreed that either party who made default should pay £40 to the other. The Court said: " We do not view with favour contracts the execution of which is sought to be enforced by a stipulation as to the payment of a sum of money in case of a breach by either party. They are however very common, and we know of nothing in the law to forbid parties entering into a contract containing an agreement, that if either party fails to carry out his obligation, he shall pay a specified sum to the other, and if they do so agree, we see no reason why they should not be enforced." Art. 98 of the Appendix to the Commercial Code was referred to in the District Court, but the Supreme Court seem to have given judgment on a general principle without reference to this Article. There is nothing in the judgment inconsistent with the principles of the English Law above explained.

The second case (*Skutaridi v. Papa Varnava*) was a case of a contract of cultivation. The Plaintiff agreed to provide the seed and water necessary for the cultivation of certain lands of the Defendants of 151 donums in extent. The Defendant agreed to sow the lands, and reap and harvest the crops on joint account, and further bound himself not to cultivate on his own account more than 30 to 40 donums of land. The agreement contained a clause that if either party did anything in contravention of "*the agreements in the present contract*" he should pay £20 as damages to the other. The Plaintiff brought an action claiming this sum, alleging as breaches (1) that the Defendant had neglected to sow a particular piece of land comprised in the agreement, (2) that he had cultivated on his own account more than 40 donums. The District Court gave judgment for the Defendant, on the ground (amongst others) that the Plaintiff had not proved damages. The Supreme Court reversed this judgment and said: " We know of no provision in the Ottoman Law which prevents two persons entering into an agreement providing that in the case of the breach of its provisions by either, one shall pay to the other a specified sum by way of damages, The contract is deliberately entered into by the two parties and if they like to agree that the damages for the breach of it shall be fixed at £20, there is nothing to prevent their doing so. The Ottoman Law certainly contemplates that such

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agreements may be entered into in commercial matters, and we see no reason why a similar agreement should not be entered into in agricultural matters." There is nothing in this judgment inconsistent with English principles. The obligations of the Plaintiff were first, to supply seed for 151 donums; secondly to provide water; the obligations of the Defendant were first, to cultivate these 151 donums; secondly to reap and harvest the crops; thirdly, not to cultivate more than 40 donums on his own account. Each of these obligations must be considered as separate complete obligations, and there was nothing to shew that the sum of £20 was out of all proportion to any actual damage that could possibly result from the breach of any one of them. It is true that in any particular case the breach might be small, *e.g.*, failure to sow a single field, but this is immaterial. The obligation to sow must be treated as a single obligation. This is the effect of the English case, *Law v. Local Board of Redditch* (1892) 1 Q.B., 127, above referred to. There is nothing therefore in this case inconsistent with English principles.

The next case is *Selim v. Sofouzade.* In that case the Defendant agreed to sell a share in a chiftlik for £75 and to register the transfer in 45 days, and there was a clause in the contract that if either party failed to carry it out he should pay £30 to the other. The Defendant sold the chiftlik to someone else and the Plaintiff sued for and recovered the £30 . This was a simple case of agreed damages.

A similar case appears in the records of the Supreme Court though it is not reported, *Andrea Ioannou v. Neophyto Haji Christodoulo,* 30th March, 1906. Plaintiff agreed to sell a vineyard to the Defendant, and the contract is said to have contained "ποινικὴ ῥήτρα" stipulating for £25 in case of non-completion. The Plaintiff sued for and obtained this sum, but the question of the enforceability of the "ποινικὴ ῥήτρα" was not argued.*

With regard to Art. 98 of the Appendix to the Commercial Code itself it should be observed, that it merely refers to a case where a specified sum is agreed as "damages," and does not necessarily apply to a case where the sum mentioned is such that it cannot be fairly described as "agreed damages," but is really a "penalty stipulated *in terrorem.*"

The way being thus clear for the application of the principles of English Law, it only now remains to apply them.

The agreement in this case simply says that if the Committee "change their views," they are to pay the schoolmaster a year's

* Where the "ποινικὴ ῥήτρα." is simply a device for avoiding registration, it has been held not to be enforceable. See *Haji Petri v. Haji Petri*, 2 C L R., 187.

salary by way of "ποινικὴ ῥήτρα." The agreement was made in July and the next scholastic year commenced in October. The meaning seems to be that the sum should be paid, if the Committee in this interval in breach of their agreement appointed any other person in lieu of the Plaintiff to act as schoolmaster for the coming year. This is exactly what actually happened. The Committee, no doubt under the guidance of the District Committee "changed its views," and the schoolmaster now claims the amount stipulated for. This seems a simple case of a "single obligation" and a pre-estimate of damages for its breach. There is nothing to shew that the amount agreed upon is so out of proportion to any possible injury that may be incurred, that it must be construed as a penalty.

It is true that the document uses the expression "ποινικὴ ῥήτρα," but this phrase is so freely used in this country without any reference to the distinction which English Law makes between "penalty" and "liquidated damages," that no real importance is to be attached to it. It is doubtful whether the presumption which attaches to the use of the word "penalty" in English Law ought under the circumstances to apply to the use of the expression "ποινικὴ ῥήτρα," in this country. But, if it does, it requires very little in the circumstances to rebut it, and in this case the circumstances seem clearly to shew that the parties intended to agree to the damages.

The Plaintiff is therefore entitled to the amount claimed and the appeal must be allowed with costs here and below.

Appeal allowed.

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

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CHRISTOPHI HAJI NIKOLA

v.

HAJI MICHAEL HAJI PAVLOU.

ACKNOWLEDGMENT OF DEBT IN CUSTOMARY FORM—EQUITABLE DEFENCE—MEJELLE, ART. 1610.

CIVIL PROCEDURE—LOCAL JURISDICTION OF DISTRICT COURTS—AGREEMENT BETWEEN PARTIES THAT ACTION MAY BE INSTITUTED IN PARTICULAR COURT—ORDER II, RULE 2.

An acknowledgment of debt, though in customary form so as to be prima facie *conclusive under Art.* 1610 *of the Mejelle, will not be enforced if it was given under such circumstances as to render it fraudulent or inequitable for the person to whom it was given to sue for its enforcement.*

The Defendant not being able to agree with his co-heirs as to the division of his father's property and not wishing to bring an action against them, gave a bond to the Plaintiff on the understanding that he would obtain judgment upon it, issue execution against his immoveables, obtain a partition marking off his share, buy in this share at the sale, and settle it upon the Defendant's daughter, who was the god-child of the Plaintiff. This arrangement was never carried out and subsequently the Plaintiff sued upon the bond as acknowledging a personal debt.

HELD: *That the acknowledgment was not enforceable.*