SMITH, C.J. & MIDDLETON, J.

OLYMPIA PERISTIANI v. PANAYIOTI LEFTERI.

The law is silent as to the interruption of the period of prescription by an acknowledgment of the debt or by part payment, and we do not feel at liberty to read into it any such provision. Reference was made to the fact that in the French Law the prescription would be interrupted by part payment, and no doubt this is so: but the French Code contains a specific provision to this effect which is wanting in the Mejellé.

With regard to the second point, the note contained an agreement for the payment of interest, but it appears to us that the claim for interest stands on the same footing as that for the principal, and that if the latter is prescribed the former must be so also.

For these reasons we are of opinion that the judgment of the District Court in favour of the defendant must be affirmed.

Appeal dismissed.

SMITH, C.J. & MIDDLETON, J. 1894.

April 9.

[SMITH, C.J. AND MIDDLETON, J.]

RAGHIB BEY HADJI HASSAN *Plaintiff,*

v.

GERASIMO, ABBOT OF KYKKO *Defendant.*

PRACTICE—NOTES OF EVIDENCE—NOTES TAKEN BY REGISTRAR—CYPRUS COURTS OF JUSTICE ORDER, 1882, SECTIONS 166 AND 167—RULES OF COURT, 1886—ORDER XXV., RULE 2—ORDER XXI., RULE 21.

The Cyprus Courts of Justice Order, 1882, Clause 166, provides that in every case, civil or criminal, the President, or, in his absence, one of the Judges shall take down in writing all oral evidence given before the Court.

HELD: That these words are imperative and not merely directory.

An action in which portions of the notes of the evidence of some of the witnesses were in the handwriting of the Registrar of the Court remitted to the District Court for the evidence of these witnesses to be retaken.

APPEAL from the District Court of Nicosia.

The action was brought to restrain the defendant from digging wells, which were alleged to be an infringement of the plaintiff's rights.

The District Court gave judgment for the defendant.

The plaintiff appealed.

Templer, Q.A. (*Macaskie* with him), for the appellant, raised a preliminary point that portions of the notes of the evidence of the witnesses were taken by the Registrar of the Court and not by the President.

I contend that under Clause 166 of the Cyprus Courts of Justice Order, 1882, the President of the Court is bound to take the notes of what the witnesses say, and that he cannot delegate the duty to the Registrar. These notes are required to be in his handwriting, as they are the records of the Court, and his note alone can be accepted as evidence of what a witness has said. A charge of false evidence could not be laid upon a note in the handwriting of the Registrar. There is no proper file of proceedings before the Court. Order XXV., Rule 2, of the Rules of Court, 1886, specifies the notes of evidence as taken in accordance with the Cyprus Courts of Justice Order, 1882.

Diran Augustin, for the respondent. The President of the District Court was suffering pain in his arm, and for this reason allowed the Registrar to take the notes. It is not suggested that the notes are incorrect and no one has been prejudiced. It was for the convenience of both parties that the notes were so taken, as otherwise the case must have been adjourned. No objection was taken until nearly the end of the proceedings.

April 14.

Judgment: This case comes before us on appeal from the judgment of the District Court of Nicosia.

The Queen's Advocate, who appeared on behalf of the appellant (the plaintiff), raised a preliminary point, which, if decided in his favour, would render it a useless waste of time to go into the merits of the case, and he requested our decision upon it before arguing the other points he desired to bring to our notice. It appeared to us that the course suggested was a convenient one, and we consented to it, and after hearing the arguments addressed to us by the advocates for the appellant and respondent respectively, we took time to consider our decision on the matter.

The point raised is a very short one, but it is, none the less, one of considerable importance, and one which, having regard to the circumstances of the case, is by no means easy to decide.

It is alleged by the Queen's Advocate, and admitted by the respondent's counsel, that some portions of the notes of the evidence of certain witnesses, who gave evidence at the hearing of this action before the District Court, were not taken by the President of the Court but by the Registrar.

It is contended by the Queen's Advocate that, in accordance with the provisions of the Cyprus Courts of Justice Order, 1882, the President is bound to take a note of all oral evidence given before the Court; that it is not competent for him to delegate this duty to the Registrar of the Court, and that there is no file of proceedings or no complete file of proceedings before the Supreme Court.

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For the respondent it is urged, that, during the hearing of the case before the District Court, the President of the Court was at times in such pain that he was unable to continue the taking of the notes of the evidence of the witnesses, and that from time to time the Registrar continued the taking of the notes until the President was able to resume; that there is no reason to suppose, either that the portion of the notes taken by the Registrar is incorrect or that either party has been in any way prejudiced: that almost the whole of the portion of the notes taken by the Registrar was so taken without any objection being raised; that the case was a very important one, and being conducted at great expense, and that both parties were desirous that the case should proceed rather than that it should be adjourned until the President of the Court entirely recovered.

We feel that there is great force in what was urged by the respondent's counsel. It appears to be the fact, that almost the whole of the notes taken by the Registrar were so taken without any objection being raised on behalf of the plaintiff, and, without admitting the accuracy of the notes, the Queen's Advocate does not allege that they are inaccurate or that his client has been prejudiced. It appears to us, that if it be competent for the President in any case to delegate his duty as to taking notes of the evidence to another person, or if it be possible in any case to consent to another person taking the notes of evidence, or for the irregularity relied upon to be waived by the parties, the present is certainly such a case.

The question as to whether the President of a Court can delegate his duty of taking a note of the evidence to the Registrar, depends upon the construction to be placed upon Clause 166 of the Cyprus Courts of Justice Order, 1882, which runs as follows:—

"In every case, civil or criminal, before any District Court, or the President thereof, or before any Assize Court, or before the Supreme Court, the President or in his absence one of the Judges *shall take down in writing all oral evidence given before the Court.*"

Is this provision imperative or is it merely directory? If it be imperative, we think that it could not be waived, as it might be if it were merely directory. There is no ambiguity in the words themselves, which are clear and precise, that the President of the Court shall, when he is present, or one of the Judges shall, in his absence, take notes in writing of all oral evidence given before the Court, and the question as to whether they are imperative must be decided by considering with what intention they were

inserted in the Order in Council. The general rule of construction is, that words which impose a duty on a Court, or public officer, in the exercise of a power conferred upon him, are imperative, when no general inconvenience or injustice calls for a different construction. With regard to the intention with which these words were inserted in Clause 166 of the Order in Council, it is to be observed that, by Clause 167, the notes of evidence taken at the hearing or trial shall be preserved as records of the Court: and they shall at all times without further proof be admitted as evidence of the statements of the witnesses. Our opinion is that the intention of the Order in Council is, that the fact that the evidence given by witnesses is what it appears to be on the notes shall be guaranteed by the notes being in the handwriting of the President of the Court, or one of the Judges in his absence. The handwriting of the President or Judge is known and capable of easy identification; but, if the note be taken in the handwriting of any other person, there is no guarantee that the statements appearing to be made by a witness were so made. Under the Rules of Court of 1886, the files of proceedings may by leave of the President, or in his absence by the leave of one of the other Judges of the Court, be inspected by any person. Supposing that the notes of evidence taken in a case, subsequently, and we will suppose, by way of example, several years subsequently, become very material in another action pending before the Court, and that an interested person obtained leave to inspect the file of proceedings and took the opportunity of interpolating perhaps a whole sheet of paper or perhaps some few sentences purporting to contain a note of the evidence of a witness: it might be that the Judges and perhaps the Registrar present when the notes of evidence were made were all dead or absent, or unable to recollect whether a portion of the notes had or had not been made by some person other than the President or a Judge of the Court. It might be extremely difficult, if not impossible, to prove that the interpolated portion was not what it purported to be, viz.: a note of the evidence of a particular witness. For these reasons, it appears to us that the words of Clause 166 of the Order in Council are intended to be imperative and are not merely directory. We much regret the decision at which we feel compelled to arrive, as we are sensible of the fact that this case has been tried at the expense of much time and money, and we regret the objection ultimately made on behalf of the appellant was not made at the earliest opportunity. However inconvenient an adjournment of the hearing may have appeared to be at the moment, time and expense would ultimately have been saved by the objection having

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been made at once. Whatever private inconvenience and hardship there may be in this case, the considerations which appear to us to require the note of evidence to be in the handwriting of the President, or in his absence in that of a Judge, appear to us to be too serious to be overborne.

We must, therefore, direct the judgment of the District Court to be set aside; but we do not think that the whole of the heavy expense incurred in the hearing before the District Court need be thrown away. Under Order XXI., Rule 21, of the Rules of Court, 1886, it is open to us to make any order that the nature of the case may require, and we think that it will be sufficient for us to direct that the action be remitted to the District Court, for the evidence of those witnesses only to be retaken, the notes of whose evidence appear to be in the handwriting of the Registrar. We consider that the enquiry ought, so far as possible, to be confined to the evidence of these witnesses, though, of course, it may be that on their examination some further facts may be elicited which one party or the other should be allowed to meet with the evidence of some witness who was not called before. Unless this be absolutely necessary, however, in the interests of justice, we are of opinion that it should not be allowed, and that so far as is possible the further hearing should be merely for the purpose of obtaining the proper record of what the witnesses previously examined have already stated.

With regard to the costs, although the appellant has succeeded on this technical ground, we shall not give him any costs of this appeal. The objection to the course that was pursued was clearly present to the mind of his counsel in the Court below and might have been taken and insisted on at once. Had this been done, and the objection overruled, the appellant would have stood in a different position before us to-day; as it is, it is clear that almost the whole of the notes alleged to have been irregularly taken were so taken without any objection on his behalf.

The costs of the hearing in the Court below must be dealt with on the further hearing of the action. In conclusion, we may remark that we do not doubt that the President of the Court considered that he was acting for the interests of the parties to the action in pursuing the course he did; and that it was in order to save the expense of an adjournment that he permitted the note to be taken by the Registrar.

Appeal allowed. Action remitted to District Court for evidence to be retaken.