ANTONIS MOUZOURIS AND ANOTHER,

Appellants-Defendants,

v.

XYLOPHAGHOU PLANTATIONS LTD.,

Respondents-Plaintiffs.

(*Civil Appeal No.* 5731).

Contempt of Court—Committal—Breach of injunction—Order restraining defendants from interfering in any way with an area of land—Disobedience to—Standard of proof—Beyond reasonable doubt—No reason to interfere with findings of fact by trial Court, and conclusions drawn therefrom, that defendants interfered with the land subject-matter of the order—Non-service of the map referred to in the order is not, in the circumstances, such an irregularity as to invalidate the proceedings—Proper measure of punishment.

Contempt of Court—Breach of order prohibiting doing of an act—Committal proceedings—Before procedure therefor is invoked the person to whom the order is directed shall, unless otherwise directed by the Court, be served personally with the order—Order 42A rule 2 of the Civil Procedure Rules.

Sentence—Contempt of Court—Proper measure of sentence.

Decided cases—Decisions of English Courts—They are of great persuasive authority—Reference thereto is useful in construing our legislative provisions whose origin is to be found in the English legal system.

On May 15, 1976, the trial Court made an order* restraining the appellants-defendants from "interfering in any way with an area of land of an extent of 97 donums shown in *exhibit* 1, coloured yellow".

A duly endorsed copy of this order was served on appellant 1 on the 29th May, 1977 and service upon appellant 2 was effected through appellant 1, who is her husband.

* Quoted at pp. 291 - 292 *post.*

The biggest part of the lands, subject matter of the prohibitory order were planted with potatoes, barley and cereals. Appellant 2 and some of her children were repeatedly seen irrigating the potato plantations and moving about freely in the land.

There was no direct evidence that appellant 1 entered the land but he applied for compensation to the British Authorities for damage caused, in the course of military exercises, to the potato crop, situate within the lands subject-matter of the order.

The respondents-plaintiffs applied for a committal order on the ground that the appellants have disobeyed the said order.

The trial Court found that appellant 1, personally or through his agents, cultivated the lands subject-matter of the prohibitory order of the Court, interfering thereby with such lands in contravention of the terms of the order and thus he was liable to be committed for contempt; and that the conduct of appellant 2 was wilful and contrary to the terms of the order of the Court and in defiance of it. It then sentenced appellant 1 to 45 days' imprisonment and ordered appellant 2 to pay the costs of the application.

Upon appeal Counsel for the appellants contended:

(a) That the proceedings against appellant 2 were doomed to failure because personal service was a prerequisite to the invocation of the jurisdiction of the Court under Order 42A of the Civil Procedure Rules for the committal of a person in contempt;

(b) that the trial Court wrongly decided that the appellants interfered with the plots in respect of which they were ordered not to interfere and there was no evidence justifying such a conclusion;

(c) that the non-service of the map (*exhibit* 1) referred to in the order was such an irregularity as to invalidate the proceedings;

(d) that the trial Court wrongly assumed that the English cases decided after independence cannot affect the common law applicable in this Country and/or amend express statutory or other provisions of Cyprus Law;

(e) that the sentence imposed was excessive.

Order 42A of the Civil Procedure Rules provides as follows:

"1. Where any order is issued by any Court directing any act to be done or prohibiting the doing of any act there shall be endorsed by the Registrar on the copy of it, to be served on the persons required to obey it, a memorandum in the words or to the effect following:

'If you, the within-named A.B., neglect to obey this order, by the time therein limited, you will be liable to be arrested and to have your property sequestered'.

2. An office copy of the order shall be served on the person to whom the order is directed. The service shall, unless otherwise directed by the Court or a Judge, be personal".

Held, (1) that under rule 2 of Order 42A the order shall be served on the person to whom the order is directed and the service shall be personal, unless otherwise directed by the Court; and that as appellant 2 was not served personally with the order the appeal will be allowed as far as she is concerned. (Cf. the English rules).

(2) That on the totality of the evidence adduced there is no reason to interfere with the findings of fact and the conclusions drawn thereon by the trial Court; that they were duly warranted by the circumstantial evidence adduced, which conclusively established the interference of the appellant himself and through his servants and agents, members of his family, with the property in question; and that, moreover, the trial court properly directed itself on the standard of proof necessary to substantiate a complaint for contempt which has to be proved beyond reasonable doubt, the disobedience complained of being wilful in the sense of voluntary as opposed to accidental conduct.

(3) That the prohibitory order in question was issued after a long discussion on many points, including the point of the accurate determination of the area affected by the application for the interim order; that the reference to the map *exhibit* 1 at that hearing was made for the purpose of the identification

of the properties in dispute and as appellant 1 attended that hearing he cannot be heard to say that he did not know the boundaries of the land to which the interim order related, quite apart from the fact that the interference was in respect of all 97 donums of land the subject of the proceedings; that the order itself was duly served on him in accordance with the Rules and the fact that an *exhibit* was not served on him is not, in the circumstances, such an irregularity as to invalidate the proceedings (*Regina v. Jones,* 169 E.R. 68 distinguished).

(4) That the trial Court never assumed that the decisions of the English Courts are binding on our Courts; that they are of great persuasive authority as illustrating the common law, which in theory is not changed by particular decisions; that the trial Court simply made a comparative analysis of the situation in England, in view of the fact that the English Rules of Court were the Rules on which our Rules were modelled, though with occasional changes and various modifications; and that, therefore, reference to the English authorities is useful in construing our legislative provisions whose origin is to be found in the English Legal system.

(5) That this was the second disobedience by appellant 1 and that on the first occasion he was fined £25 and, apparently, he was not impressed by the leniency exhibited by the Court on that occasion; that disobedience to an order of the Court is a very serious behaviour which should entail strict sanctions, as it undermines the very administration of justice and ultimately may render it nugatory; and that, therefore, there is no difficulty in dismissing the appellant's contention that the sentence imposed on him was excessive.

Appeal of appellant 1 dismissed.
Appeal of appellant 2 allowed.

Cases referred to:

Mavrommatis and Others v. Cyprus Hotels Co. Ltd. (1967) 1 C.L.R. 266;

Hadkinson v. Hadkinson [1952] P. 285;

Bettinson v. Bettinson [1965] 1 All E.R. 102;

Comet Products U.K. Ltd., v. Hawkex Plastics Ltd. [1971] 2 Q.B. 67; [1971] 1 All E.R. 1141;

Christodoulides v. Christodoulides, 11 C.L.R. 15;

Sheriff of Limassol v. Theodoros, 12 C.L.R. 67;

Churchman v. Shop Steward's Committee [1972] 3 All E.R. 603;

Husson v. Husson [1962] 3 All E.R. 1056;

Westminster C.C. v. Chapman [1975] 2 All E.R. 1103;

Selous v. Croydon Local Board [1885] 53 L.T. 209;

Hudson v. Walker [1891] 64 L.J. Ch. 204;

Regina v. Jones, 169 E.R. 68.

Appeal.

Appeal by defendants against the order of the District Court of Larnaca (Pikis, P.D.C. and Artemis, D.J.) dated the 30th June, 1977, (in an application for contempt of Court in Action No. 27/76) whereby defendant No. 1 was sentenced to 45 days' imprisonment and defendant No. 3 was ordered to pay the costs of the application, for disobeying the order of the Court dated 15th May, 1976.

G. Ladas, for the appellants.

L. Papaphilippou with *F. Valiandis*, for the respondents.

Cur. adv. vult.

STAVRINIDES, J.: The judgment of the Court will be delivered by Justice A. Loizou.

A. LOIZOU, J.: This is an appeal from the judgment of the Full District Court of Larnaca, whereby on the application of the plaintiffs-applicants (hereinafter to be called the respondent Company) the defendant-respondent No. 1 in that application (hereinafter to be called "appellant No. 1") was sentenced to 45 days' imprisonment for disobedience of an order of the Court dated the 15th May, 1976 and his wife, defendant-respondent No. 3 (hereinafter to be called appellant No. 2), was ordered to pay the costs of the application, which was withdrawn and dismissed in the course of the trial against defendant-respondent 2, their son.

The order which was disobeyed was as follows:

"(a) The defendants-respondents to be restrained

and they are hereby restrained from interfering in any way with an area of land of an extent of 97 donums shown in *exhibit* 1, coloured yellow.

(b) The plaintiffs-applicants to furnish a guarantee for damages in the sum of £200 in order to compensate the defendants-respondents for any loss they may suffer on account of the issue of the interim order in case the plaintiffs-applicants fail in their action.

(c) The costs of the present application will be costs in cause but in any event not against the plaintiffs-applicants".

The application for the committal of the appellants was accompanied by an affidavit sworn by one of the Directors of the respondent Company, wherein the facts relied upon were set out.

The appellants opposed the application and an affidavit was sworn by appellant No. 1—personally and on behalf of the other appellant, being, as he stated therein, duly authorised to swear that affidavit—denying the charges brought against them and maintaining that allegations made in support of the application did not make out a case of violation by them of the order of the Court, and, further, that the said allegations were baseless and untrue.

It was further contended in paragraph 2 of the said affidavit that the order of the 15th May was made "after a long discussion on various points, including also the point of the accurate determination of the area affected by the application". As further stated in the affidavit, an appeal was filed against the interim order, but its hearing was adjourned so that the litigants would take steps for the speedy determination of the substance of their differences and so avoid multiplicity of proceedings. On the insistence of the respondent Company that the Court should not proceed to the hearing of the case before the appellants complied with the interim order, the trial Court directed that the complaint for contempt should first be examined before going into the substance of the case, for a party in contempt forfeits his right of audience before the Court and does not recover it until the contempt is purged. In

support of this proposition the trial Court referred to our own case of *Theofylactos Mavrommatis and 2 Others v. Cyprus Hotels Co. Ltd.* (1967) 1 C.L.R. 266, and to the English cases *Hadkinson v. Hadkinson* [1952] P. 285 and *Bettinson v. Bettinson* [1965] 1 All E.R. 102.

Though the issue does not arise before us, yet we would like to adopt and point out what was stated about the law of contempt by Borie and Lowe in their book on the subject, at p. 367,

> "A person who has committed a civil contempt by disobeying a court order may be subject to the so-called rule that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt".

In *Hadkinson v. Hadkinson (supra)* Denning L.J., as he then was, traced the origin of the rule in the Canon law which was later adopted by the Chancery Court and the Ecclesiastical Courts. In Chancery its origin lay in the ordinance of Lord Bacon in the year 1618 which laid down that "they that are in contempt are not to be heard neither in that suit, nor in any other, except the court of special grace suspend the contempt". This practice of the Courts however changed in the course of time and it came to be reconstructed in scope (see *Bettinson v. Bettinson, supra* at p. 106).

The better view seems to be that in those cases where the rule is on the face of it applicable, the courts nevertheless have a discretion whether or not to hear the party. And the rule should be considered in the terms explained by Denning, L.J., in *Hadkinson* (*supra*) at page 298, as follows:

> "I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed".

The rule does not bar applications made in other causes, although they may involve the same parties, and it is inapplicable to an application to purge the contempt or to the bringing of an appeal with a view to setting aside the order upon which the alleged contempt is founded. It may also be stated that a party will also be heard to support a submission that upon the true construction of the order alleged to be disobeyed his action did not constitute a contempt or that having regard to all the circumstances he ought not to be treated as being in contempt. As stated by Borrie and Lowe, op. cit. at p. 368,

> "The reason that a party is allowed to be heard in these latter cases is that the object of the further application is to clear the very contempt complained of; on the other hand the rule does *prima facie* operate where the party in contempt seeks to invoke the aid of the court in the same cause upon some other issue than the issue of the contempt itself".

Having referred to this question because of its significance in the administration of justice, we turn to the facts in hand.

Four witnesses testified for the respondent Company, including the deponent of the affidavit sworn in support of the application, who adopted its contents and offered himself for cross-examination. The other three witnesses were Zacharias Papanicodemou, who produced the drawn-up order of the Court and affidavits of service (*exhibits* 1, 2 and 3); Antonis Peratikos, a rural constable, who gave evidence touching the behaviour of the appellants in relation to the properties, the subject matter of the order, and Andreas Trisveys, a forester, who testified on the state of the lands on the 28th January, 1977, and whose evidence was intended to establish that the lands in question had been cultivated by persons other than the respondent Company during the period complained of. The last two witnesses, apparently, were also the source of the information of respondent's affiant. The two appellants chose not to give evidence, as they were in law entitled to do, not being compellable witnesses in contempt proceedings, whether they be criminal or civil in nature, though if such a defendant chooses to give evidence voluntarily he cannot, as of right, refuse to be cross-examined. (*Comet Products U.K. Ltd. v.*

Hawkex Plastics Ltd. [1971] 2 Q.B. 67, [1971] 1 All E.R. 1141 C.A.).

A duly endorsed order of the Court was served on appellant No. 1 on the 29th May, 1977. The service upon appellant No. 2 was effected through appellant No. 1. This failure to serve appellant No. 2 personally was the subject of extensive argument, to the effect that the proceedings against her were doomed to failure, personal service being a prerequisite to the invocation of the jurisdiction of the Court under Order 42A of the Civil Procedure Rules for the committal of a person in contempt.

It was submitted on behalf of the respondent company that personal service was not indispensable in the face of evidence that the terms of the order had come in some other way to the notice of the person concerned. As pointed out by the trial Court, they did not find the problem easy to solve, nor did clear answers offer themselves. They appreciated the need for personal service, considering the basically criminal nature of the proceedings that may befall a contemner, possibly resulting in imprisonment and they referred to the two Cyprus cases, *Christodoulides v. Christodoulides,* 11 C.L.R. 15, and the *Sheriff of Limassol v. Theodoros,* 12 C.L.R. 67, to the effect that regularity in procedure is essential in proceedings which are instituted with a view to punishment for contempt of Court, but they followed the view expressed in *Churchman v. Shop Steward's Committee* [1972] 3 All E.R. 603, that the requirement of personal service of an order of the Court involving a prohibition may be relaxed under certain circumstances, provided it is proved beyond reasonable doubt that the order came to the notice of the person sought to be restrained. They also referred to *Husson v. Husson* [1962] 3 All E.R. 1056, and *Westminster C.C. v. Chapman* [1975] 2 All E.R. 1103, and concluded that the evidence of the affiant for the applicants that appellant 2 was present during the proceedings and took cognizance of the order made was uncontradicted and that being so the objection raised on her behalf should fail.

Order 42A reads as follows:

"1. Where any order is issued by any Court directing any act to be done or prohibiting the doing of any

act there shall be endorsed by the Registrar on the copy of it, to be served on the person required to obey it, a memorandum in the words or to the effect following:

'If you, the within-named A.B., neglect to obey this order, by the time therein limited, you will be liable to be arrested and to have your property sequestered'.

2. An office copy of the order shall be served on the person to whom the order is directed. The service shall, unless otherwise directed by the Court or a Judge, be personal".

As indicated in the marginal note, rule 1 was intended to correspond to the old English Order 41, rule 5, which, to the extent that is material, reads as follows:

"Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment, or order, within which the act is to be done, and upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, etc.".

As pointed out in the note thereto, this rule only applies to a judgment or order *to do an act*. It does not apply to merely prohibitive orders; and the English authorities given for that proposition are the cases of *Selous v. Croydon Local Board*, [1885] 53 L.T. 209, and *Hudson v. Walker* [1891] 64 L.J. Ch. 204, where North J. referred to *Selous* case and followed it observing that he did not see how any other construction could be put upon Order XLI, rule 5. In the *Selous* case it was held that Order XLI rule 5 had no application to a prohibitive order like the present one.

Husson v. Husson [1962] 3 All E.R. 1056 also turned on the interpretation of R.S.C. Ord. 42, r. 7 and reference is made therein to the Annual Practice, 1963 edition, at p. 1004. where it is indicated that a distinction has to be drawn between mandatory and prohibitive injunctions and it is stated that an order requiring a person to do an act must be served on him. If, however, the order is to

restrain the doing of an act, the person restrained may be committed for breach of it, if he in fact has had notice of it either by his presence in Court when it is made or by being served with it or notified of it by telegram or in any other way.

Order 45, rule 5, of the English Rules of the Supreme Court (see 1965 Annual Practice) deals (a) with a person required by a judgment or order to do an act or (b) a person disobeying a judgment or order requiring him to abstain from doing an act and under rule 7, thereof an order shall not be enforced under rule 5, unless (a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question, and (b) in the case of an order requiring a person to do an act the copy has been so served before the expiration of the time within which he was required to do the act.

By paragraph 6 of that rule an order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with that rule if the Court is satisfied that the person against whom it seeks to enforce the order had notice thereof either (a) by being present when the order was made or (b) by being notified of the terms of the order whether by telephone, telegram or otherwise. In a note in the Supreme Court Practice for 1973 to Order 45/7/1, at p. 668, it is stated that

> "The new para. (6) has been added presumably to resolve any doubt that under this Rule, as under the former practice, the Court has the power to proceed to the enforcement of a negative order by writ of sequestration or by order of committal even though the original order has not yet been served in accordance with the requirements of this Rule, provided however that the Court is satisfied that the person or party in question has had notice of it either by being present when the order was made or by being notified of its terms by telephone, telegram or in such other manner as the Court may deem sufficient. A negative order is often made *ex parte* in circumstances of great urgency to preserve the *status quo*, and it would be highly inconvenient if it could not be enforced until it was first served as required by this Rule. The new

para. (6), therefore, is designed to enable the Court, if necessary before service, to prevent disobedience or further disobedience or to compel obedience to a negative order".

By contrast in the old Order 41, rule 5, there was no reference to orders prohibiting the doing of an act. Hence it was held that the order did not apply to prohibitory orders. In the new English Rules, where prohibitory orders are also included in Order 45, rule 5, it was thought necessary to make express provisions under para. 6 of Order 45, rule 7, about enforcement of such an order before service of the copy thereof has been effected and pending such service. In the absence of such a provision in Order 42A of our Rules and the existence only of rule 2 hereinabove set out whereby the order shall be served on the person to whom the order is directed and the service unless otherwise directed by the Court, shall be personal, the English Rules are of no assistance. Therefore the appeal is allowed as far as appellant 2 is concerned.

Having dealt with this point, it is opportune to deal now with the first ground of appeal—namely that "The trial Court wrongly decided that the appellants interfered with the plots in respect of which they were ordered not to and/or that there is no evidence justifying such a conclusion and/or because the plan produced is not on scale and/or that there is no evidence that they really interfered". The main witnesses in support of the allegations for contempt are A. Peratikos the rural constable and A. Trisveys, a forester, apart from the affidavit of one of the directors of the respondent Company. Further the Court visited the *locus in quo* at the conclusion of the hearing of the application in order to appreciate the evidence in its proper perspective, and its findings of fact are as follows: "After careful consideration of the evidence of Peratikos and Trisveys it emerges beyond doubt that the biggest part of the lands, subject matter of the prohibitory order of the Court, were planted in December, 1976 with potatoes, barley and other cereals. Respondent 3 and some of the children of respondents 1 and 3 were repeatedly seen irrigating the potato plantations and moving about freely in the land. This was wilful conduct on the part of respondent 3 contrary to the terms of the order of the Court and in defiance of it. There is no direct evidence that respondent

1 entered the land. However, he applied for compensation to the British authorities for damage caused to the potato crop situate within the lands subject matter of the order as well as pipes used for the irrigation of the lands claiming to be the owner of the crop and the person who sufferred damage thereby. Such damage had been caused in the course of military exercises. The behaviour of respondent 1 in the matter constitutes an admission on his behalf that the potato crop within the aforesaid lands was his own. And this explains at the same time the interest of his children in the cultivation of this crop as well as the statement of his wife to witness Trisveys that she and her husband were the owners of the crop.

In the light of the totality of the evidence before us we find that respondent 1 personally or through his agents, cultivated the lands subject matter of the prohibitory order of the Court, interfering thereby with the lands subject matter of the order in contravention of the terms of the order and thus he is liable to be committed for contempt".

On the totality of the evidence adduced we find no reason to interfere with the findings of fact and the conclusions drawn thereon by the trial Court. They were duly warranted by the circumstantial evidence adduced, which conclusively established the interference of the appellant himself and through his servants and agents, members of his family with the property in question, over which he claimed proprietary rights and in respect of which he received compensation for damage to crops. Furthermore the trial Court properly directed itself on the standard of proof necessary to substantiate a complaint for contempt which, as stated, has to be proved beyond reasonable doubt, the disobedience complained of being wilful in the sense of voluntary as opposed to accidental conduct.

We turn now to the second ground of appeal, *viz.* the non-service of the map (*exhibit* 1) referred to in the order, for the purpose of indentifying the property subject matter of the proceedings. It is an admitted fact (see para. 2 of the affidavit of applicant 1) that the prohibitory order of the 15th May, 1976, was issued after a long discussion on many points, including the point of the accurate determination of the area affected by the application for the interim order. It appears that the reference to this map (*exhi-*

bit 1) at that hearing was made for the purpose of the identification of the properties in dispute and as the appellant No. 1 attended that hearing, he cannot be heard to say that he did not know the boundaries of the land to which the interim order related, quite apart from the fact that the interference was in respect of all 97 donums of land the subject of the proceedings. The order itself was duly served on him in accordance with the Rules, and the fact that an exhibit was not served on him is not, in the circumstances, such an irregularity as to invalidate the proceedings. The case of *Regina v. Jones,* 169 E.R. 68 relied upon by counsel for the appellant, must be distinguished. In that case there was express provision in the relevant regulations that in all cases the taxed bill of costs and the justice's certificate of costs before the trial had to be attached to the warrant of the taxing officer and be delivered with it to the county treasuser. For all the above reasons this ground also fails.

Ground 6 was that the trial Court wrongly assumed that the English cases decided after independence cannot affect the common law applicable in this country and/or amend express statutory or other provisions of Cyprus law. The short answer to this ground, which, rightly, was not pressed, is that the trial Court never assumed that the decisions of the English Courts are binding on our courts. However, they are of great persuasive authority as illustrating the common law, which in theory is not changed by particular decisions. The trial Court simply made a comparative analysis of the situation in England, in view of the fact that the English Rules of Court were the Rules on which our rules were modelled though with occasional changes and various modifications. Therefore reference to the English authorities is useful in construing our legislative provisions whose origin is to be found in the English legal system.

With regard to the last ground of appeal, to the effect that the sentence imposed was excessive, we have no difficulty in dismissing this contention. This was the second disobedience by appellant No. 1; on the first occasion, he was fined £25, and, apparently, he was not impressed by the leniency exhibited by the Court on that occasion. Disobedience of an order of the Court is a very serious behaviour which should entail strict sanctions, as it under-

mines the very administration of justice and ultimately may render it nugatory.

For the reasons given the appeal of appellant No. 1 is dismissed, the appeal of appellant No. 2 has already been allowed but in the circumstances we make no order as to costs.

Appeal of appellant No. 1 dismissed.
Appeal of appellant No. 2 allowed.
No order as to costs.