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of actual monetary loss arising out of the loss of the agency can be or have been given by the appellant so as to bring the damages claimed by him within the definition of pecuniary damages.

This appeal must therefore fail because of the provisions in section 30 that the plaintiff in an action for causing breach of a contract can only recover pecuniary damages. This is yet another example where the Civil Wrongs Law, which has been the subject of critical comment in this Court on more than one occasion, has again denied to plaintiff relief, which, on the merits, he should be given. In England a plaintiff in such an action is entitled to claim damages at large (*Mayne on Damages*, 11th Edition, page 519).

With reluctance we must therefore hold that this appeal be dismissed with costs.

1953
April 15

THE ESTATE OF THE DECEASED OSMAN AHMED PASHA
v.
MEHMED KADIR OSMAN PASHA.

[HALLINAN, C.J., AND ZEKIA, J.]

(April 15, 1953)

THE ESTATE OF THE DECEASED OSMAN AHMED PASHA, *Appellants*,

v.

MEHMED KADIR OSMAN PASHA OF ANOYIRA, *Respondent.*

(*Civil Appeal No.* 3966.)

Ottoman Land Code—"Private Sales" not intended to be registered—Claim by donee from heirs of donor—Judicial decision followed but critically considered.

In 1944 O. A. on the marriage of his son, the plaintiff, executed a "Dowry List" giving his son immovable property. In 1950 O. A. died; no attempt had been made to register the property. The heirs of O. A. other than plaintiff claimed the land; the plaintiff sued the other heirs (the defendants) claiming registration or alternatively £425 the value of the property. At the date of the "Dowry List", the law applicable was not the Immovable Property (Tenure, Registration and Valuation) Law, (Cap. 231), but the Ottoman Land Code.

The trial Court held that it had never been the intention of the parties to register the transaction, and this "private sale" was void; however, on the authority of *Evangeli* v. *Nicola* (5 C.L.R., 49) the defendants must compensate the plaintiff before they took back the property.

Held: (1) If the plaintiff claimed as against O. A., his father, the trial Court's decision based on Evangeli's case would be correct: but plaintiff claimed against O. A.'s other heirs and because of the decision in *Constanti Haji Antoni* v. *Kyriacou Haji Antoni* (4 C.L.R., 66) he could not recover.

(2) The doctrine of estoppel cannot be invoked to render valid a transaction void for reasons of public policy.

The judicial decisions which declare "private sales" invalid (and which also gave remedies to the purchaser or donee in certain circumstances) considered critically from point of view of the correct interpretation of the Ottoman Law, of public policy and of logic.

Appeal by defendants from the judgment of the District Court of Limassol (Action No. 113/51).

A. Anastassiades for the appellants.

Z. Rossides for the respondent.

The facts of the case sufficiently appear in the judgment of this Court which was delivered by:

HALLINAN, C.J.: In this case one Osman Pasha, on the occasion of the marriage of his son, Mehmed Kadir Pasha (Plaintiff-Respondent), executed a document entitled "Dowry List" dated 17th November, 1944. There he stated that he gave *inter alia* the immovable properties stated in the list which included *arazi mirié* and *mulk*. The marriage was completed and the son went into possession of the immovable properties. No attempt has been made to register the immovable property in the name of the respondent. His father, Osman Pasha, died in May, 1950, whereupon some of his heirs (defendants-appellants) claimed the property in which the plaintiff-respondent had been in possession since his marriage. As a result the respondent brought proceedings against the appellants claiming that the appellants should transfer and register the immovable properties mentioned in the dowry list or in the alternative £425, the value of these properties. The trial Court found that the properties had not passed to the respondent nor could the Court compel the appellants to transfer them but the Court awarded the respondent £425 claimed by him in the alternative.

In November, 1944, when the respondent's father purported to grant the immovable property, subject of this action, to the respondent, in consideration of the marriage, the Immovable Property (Tenure, Registration and Valuation) Law (Cap. 231), had not been enacted and the matter is regulated by the Ottoman Law then in force. In regard to the *arazi mirié*, article 36 of the Land Code provides that "any transfer of State Land without the leave of the official is void." And 7 Shaban (1276) provides: "No one in future for any reason whatever shall be able to possess State Land without having a title deed." With regard to the immovable *mulk* the provisions of 28 Redjeb (1291) apply: "Henceforth possession of *mulk* property (that is immovable *mulk*) without title deed is forbidden,"

There is a long line of cases in the Cyprus Law Reports in which the Supreme Court has considered what rights, if any, a person obtains who purports to take land by way of sale or under a contract of dowry where there is no intention by the parties that the transaction should be registered.

The Court have referred to these transactions as " private sales ". The authorities cited in the course of the arguments on this question start with the case of *Assinetta Haji Georghi* v. *Haji Georghi Brutso*, 1 Cyprus Law Reports, p. 45, and end with the case of *Savvas Haji Pascali and another* v. *Panayi Haji Togli*, 7 Cyprus Law Reports, p. 76, where the effect of the previous decisions is lucidly and concisely set out in the judgment. From these decided cases it is clear that this Court has treated these " private sales " as void for illegality, being contrary to public policy.

This view of the Ottoman Law led to many hard cases and the Court did not maintain its position that it would not assist persons who were given land under transactions of this nature. Where the vendor claimed the land back as the legal owner the Court refused relief unless he refunded the purchase price to the defendant. Later in the case of *Myrianthi Haji Yianni Marcouli and another* v. *Yianni Haji Marcouli*, 5 Cyprus Law Reports, p. 49, this Court went a stage further in affording relief to the persons and their heirs who took immovable property under contract of dowry as in the case of other " private sales " and they or their heirs were ousted by the grantor under the contract of dowry. The Court awarded these persons compensation assessed at the value of the land which the grantor had taken back. The ground on which the Court awarded compensation to a person who had been ousted from land acquired in a " private sale " is stated clearly in Pascali's case (7, Cyprus Law Reports) at pages 79–80 :

> " The Court, therefore, in such cases will award damages—but it should be borne in mind that these damages are not damages for breach of contract, nor are they damages of the kind that are awarded as compensation for injury to person or property. They represent a sum of money, which on equitable principles apart from either contract or tort, the Court declares the Defendant liable to pay.
>
> The facts in the present case go rather beyond the two cases last cited, but the case seems to us to be governed by the same principle. The principle on which we decide the case is this—that where the owner of immovable property in return for good consideration moving from another person enters into an agreement purporting to transfer to that other person the possession of the property, and afterwards by his own deliberate act, in

breach of the agreement, dispossesses him, the Court will compel him to make compensation to the person dispossessed. It is not equitable that he should retain the benefit of the consideration—in this case the benefit of having his daughter settled in marriage—and should at the same time repossess himself of the property on which the consideration was based."

However, this Court has refused to extend these " equitable principles " so as to give the right of compensation to a person who, in breach of an agreement for a " private sale ", is ousted from possession not by the other party to the agreement but (after his death) by the heirs of each person. This point was decided in the case of *Constanti Haji Antoni* v. *Kyriacou Haji Antoni* 4 C.L.R., 66, the *ratio decidendi* being that since the heirs were not parties to the illegal transaction, they need not pay compensation for what the law gives them as of right.

A recent attempt to mitigate the law relating to these " private sales " was made in the case of *Ali Selim* v. *The Heirs of Emette Filo Ali*, 17 C.L.R., p. 143. In that case the heirs of a deceased person had resumed possession of immovable property on the ground that a " private sale " of the property by the deceased was void. It was argued that under section 65 of the Contract Law (Cap. 102) they, having received an advantage under the void agreement, must make restoration; but this Court held that, there being no evidence that the heirs had received any advantage, they were not obliged to repay anything when they took possession of the land the subject-matter of the private sale.

The law concerning " private sales " made prior to 1946 (when the Immovable Property Law (Cap. 231) came into operation) cannot be considered as satisfactory. The Courts on an interpretation of the Ottoman Law which is at least questionable decided that these unregistered transactions not only failed to pass title to land but created no contractual obligation. Apart from any question of the interpretation of Ottoman Law, it is difficult to see why public policy required that the contractual obligation of the parties to the transactions should be declared void so that no damages might be awarded for a breach of these obligations. The Courts apparently soon realised that their decisions with regard to private sales caused hardship, so they afforded relief on grounds which it is easier to understand from the point of morality than for that of legal principle. The only law which the Courts had power to apply was the Ottoman Law and the Statute Law of Cyprus. However, the Courts appeared to have relied on some " equitable principles " whose origin it is difficult to trace unless the Court was referring to some such action as " unjust enrichment " which has in recent years been so much discussed. Nor is it easy to understand why relief

should be given against the party who resumed possession in breach of his agreement and not against his heirs. For if one is basing the law on some such principle as " unjust enrichment " it is surely not just that the heirs of a deceased person should inherit his property and not be bound by a liability of the deceased to make compensation for properties taken back in breach of his agreement.

For the same reason the decision in Ali Selim's case on section 65 of the Contract Law cannot be regarded as a satisfactory result. The heirs inherit land from a deceased person and repudiate the deceased's liability with regard to that land. If under section 56 (1) of the Wills and Succession Law (Cap. 220), heirs were responsible not only for the debts of the deceased but also for his liabilities, the decision in Ali Selim's case might well have been different.

I come now to consider the decision of the trial Court in the light of the law as to " private sales " already discussed in this judgment. The learned trial Judge considered that the appellants who were the heirs of the respondent's father must compensate the respondent before they took back the immovable property which their father had given to the respondent under a " private sale " and he based his decision on the authority of *Evangeli* v. *Nicola* (5, C.L.R., p. 49). The trial Court expressed the view that it made no difference in principle that the respondent's claim should be against the heirs of Osman Ahmed Pasha and not Osman himself. For the reasons already given I agree with the Court below that on principle it is difficult to make any distinction between the present case and Evangeli's case; but unfortunately there is the decision of the Supreme Court in the case of *Constanti Haji Antoni* v. *Kyriacou Haji Antoni* (4 C.L.R., p. 66) where it was held that the " equitable " principles which the Courts in Cyprus evolved for granting relief where a person in breach of his agreement resumes possession of land that he had given to another under " private sale ", does not apply in an action against the heirs. This case has stood since 1897 and we are obliged in this Court to give effect to that decision.

Counsel for the respondent has invited us to hold that the parties in the present case had the intention to register the " private sale " and this fact renders the sale valid. The " dowery list " of November 1944 made no mention of any intention to register, no evidence was given by the respondent that he ever intended to register and, apparently, the trial Court concluded that this transaction was a " private sale " to which the Court's decision as to " private sales " applied. In these circumstances it would be contrary to the practice of this Court to upset the finding of fact made by the trial Court. At the same time, in case such a question should again come before the Courts, I should like to express the opinion that a transaction ought

to be presumed lawful unless the contrary is shown and the fact that registration was not effected is but slight evidence as to what the parties intended at the date of the transaction whose legality is in question.

Since the decisions of this Court on " private sales ", section 28 of the Courts of Justice Law has been enacted and the common law and rules of equity in force in England apply save where any other provision has been made. I have considered whether there is any principle of law or equity in England which could be applied to the decisions of the Court relating to " private sales ", so as to provide a remedy for the respondent in the present case. I have been unable to find such principle. This is not surprising since, if a contract is void for illegality as being against public policy, it is unlikely that the law should invoke any principle which should countenance such a transaction. In *Chitty on Contracts*, 20th Edition, page 110, the learned author states : " Where an illegal contract has been executed, in whole or in part, and both parties are in *pari delicto*, no action lies to recover back money paid under it . . . . If the plaintiff knew that the contract into which he was entering was unlawful, the fact that he was induced to enter into it by the fraud of the defendant does not excuse him." It might be thought that the doctrine of estoppel could be prayed in aid by the respondent, for he contracted a marriage on the faith of his father that he would be given the immovable properties mentioned in the " dowry list ", and now the heirs of his father repudiate the transaction. However, it is clear that the law of estoppel cannot be applied in this case. In 13 *Halsbury 2nd Edition*, page 402, it is stated :

> " The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of public policy, enacted should be invalid."

Again at page 462 :

> " The party to a deed which is declared to be void by statute on the grounds of public policy is not precluded from setting up the invalidity of the deed by having assented to and taken advantage of it . . . . "

So long, therefore, as " private sales " are illegal the principle of the law as to contracts void for illegality must be upheld and the Courts must reluctantly refuse relief to any party to such a contract.

For the reasons stated I have come to the conclusion that the learned trial Judge was wrong in holding that the respondent was entitled to be compensated by the appellant.

The decision of the trial Court on the claim but not on the counter-claim must therefore be set aside and judgment on the claim entered for the appellants with their costs

here and below. No arguments have been addressed to us as regards the counter-claim on the hearing of this appeal, and we see no reasons to disagree with the decision reached by the trial Court as regards this counter-claim. *The appeal on the counter-claim must therefore be dismissed with costs against the appellants which they may be set off against the costs recoverable by them in respect of the claim.*

ZEKIA, J. : The father of the respondent by a document dated 19th November, 1944, bearing a heading " Dowry List ", on the occasion of the marriage of his son, the respondent, gave him a number of cattle and some immovable property with trees standing thereon all described in the said document. The cattle which consisted of a number of oxen and goats were delivered to the said son and he was also allowed to enter into possession of the immovable property given to him by his father. The father Osman died in May, 1950, he having failed during his lifetime to transfer or register the immovables mentioned in the contract of dowry in the name of his son, the respondent. The heirs of the deceased father Osman claimed their share of inheritance in the immovable properties given by the deceased father to the respondent and refused to recognise him as the exclusive owner of the said properties. Respondent brought an action against the heirs claiming an order of the Court directing them to transfer the properties in question in the name of the respondent (plaintiff) and in the alternative £425 representing their value or as damages of the breach of the contract.

The learned President has taken the view that the facts of the case fall within the four corners of the decision in *Evangeli* v. *Nicola*, 5 C.L.R., p. 49 and adjudged the estate of the deceased to pay £425 as damages to the respondent.

The main point raised by the appellant in this Court is given in grounds 1 and 2 of his appeal and it is to the effect that the learned President misdirected himself as to the law, having wrongfully applied the case of *Evangeli* v. *Nicola.* Instead he ought to have been guided by *Constanti Haji Antoni* v. *Kyriacou Haji Antoni and others*, 4 C.L.R., p. 66. In the former case the father in consideration of his son's marriage promised to give to the latter a house. The marriage took place and possession of the house was taken by the son but no registration of the house in his name was effected. The son died leaving an infant daughter and a widow. The father ejected the widow and her daughter and resumed possession of the house. It was held that the widow and the infant daughter, as heirs of the deceased son, were entitled to recover damages for the breach of the agreement.

In the latter case Haji Antoni, by a private document of sale, purported to sell to Constanti, his son, certain lands with trees and water for the sum of 1550 piastres which sum appears to have been received by Haji Antoni, the father. The vendor died without registering the property in question in the name of Constanti. Constanti brought an action claiming the return of the purchase money from the heirs of Haji Antoni. The Court held that "inasmuch as there was no intention to register when the private document of sale was made and that the same was an illegal transaction to which the defendants were not parties no equitable grounds existed on which the defendant could be made liable to repay the purchase money to the plaintiff."

With all due respect to the view of the law taken by the Courts in these cases it is difficult to follow the *ratio decidendi* in both of them. The law governing the transfer of immovable properties is to be found in the (1) Land Law, dated 7th Ramadan (1274); (2) Regulations as to title deeds (*tapou senets*) dated 7th Shaban (1276); and (3) The Law as to title deeds for pure *mulk* dated 28th Redjeb (1291).

The relevant section in the Land Code is section 36 which reads:

> "A possessor by title-deed of State Land can, with the leave of the Official, transfer it to another, by way of gift, or for a fixed price. Transfer of State Land without the leave of the Official is void. The validity of the right of the transferee to have possession depends in any case on the leave of the Official, so that if the transferee dies without the leave having been given the transferor (*farigh*) can resume possession of it as before. If the latter dies (before the leave is obtained) leaving heirs qualified to inherit State Land as hereafter appears they inherit it. If there are no such heirs it becomes subject to the right of *tapou* (*mustehiki tapou*) and the transferee (*mefroughunleh*) shall have recourse to the estate of the original vendor to recover the purchase money. In the same way exchange of land is in any case dependent on the leave of the Official. Every such transfer must take place with the acceptance of the transferee or his agent."

It is clear from this article that if the transferee dies without the leave of the official having been given, in other words before registration, the transferor can resume possession of it as before and the land goes to the heirs and if the purchase money is paid the money is recovered by the transferee or his heirs. In *Zenobio* v. *Osman*, 1893, 2 C.L.R., this part of the article has been interpreted as referring to the case of a vendor who dies during negotiations for the purchase of property and that provision is made to enable the would-be purchaser to recover back from the estate of the deceased the money he has paid. It seems

to me that the view taken in this case is neither consistent with the text nor with the comments on this article made by any of the Turkish commentators on the subject. The text relates to transfers or conveyances and has nothing to do with agreements in the nature of executory contracts. In the comments made on this part of the section nothing is mentioned as to the intention of the parties to complete the transfer by registration at some time later and there is nothing to indicate that this part of the law was intended to cover the case where the death of one party intervenes pending negotiations. On the contrary it speaks of private transfers or informal transfers which are not accompanied with registration and the legal effect of such transfers being a nullity, the money paid is recovered by the informal transferee and provision is made for the heirs of such transferee to recover the purchase price paid, for the transferor or his heirs. We read one paragraph from page 477 of commentator Zihaeddin on the Land Code :

> " If the land official does not give his leave although the owner contends that he has sold the land to the purchaser and to that effect he has furnished the purchaser with a bond no attention will be paid to what the vendor says but the land will remain as his own because the law recognises him only as the legal owner."

One has, however, to concede that the view taken in the said case has been acted upon for many years and followed in a series of cases and it would be too late in the day to question its authority. It is also worth mentioning that article 36 and regulations for title deeds of 7 Shaban (1276) and the law as to title deeds for pure *mulk* of 1291 in their country of origin were never interpreted as rendering a private sale of immovable property illegal in the sense the English law treats contracts contrary to public policy. In my view it is foreign to the Ottoman Law this conception of illegality which renders persons taking part in it to forfeit all remedies in law such as for instance depriving the vendee in a private sale of immovable property from receiving back the purchase price he paid to the vendor while the latter or his heirs having no obligation to effect a formal conveyance in the name of the purchaser.

Article 97 of *Medjellé* gives one of the legal maxims which together with others given in the first part of *Medjellé* form the foundation of the Moslem jurisprudence. The article reads : " Without legal cause it is not allowed for anyone to take property of another ". Ali Haydar, the eminent commentator, commenting on this article in page 380, volume 1, quotes as a rule of jurisprudence the following :

> " He who gives or pays something or money to somebody else without being bound in law to do so and without the intention of making a gift thereof he can recover it back. For instance if somebody bribes a judge or some-

body else for some favour he can recover back what he pays or gives."

This illustrates clearly that the English rule that the Court will not assist a party in *pari delicto* does not conform to the Moslem jurisprudence.

Assuming that Colonial Courts like English Courts were not expected to enforce an illegal contract considered so under an English law irrespective of the *locus contractus* and would not assist a party in *pari delicto* it appears to me very unlikely that an English Court applying English law would have considered unregistered private sales of immovables to be void for illegality as being against public policy.

Before the passing of the Contract Law, 1930, a gift made by a father on the occasion of the marriage of his son whether of movables or immovables could only have binding effect if perfected by delivery or by conveyance, i.e. registration, as the case may be. There was no special law protecting or enforcing incomplete donations made to a marrying son or daughter unless such acts complied with the law relating to gifts. Of course obligations created in connection with prompt or deferred dower payable to a married woman are governed altogether by special law, the sacred Moslem Law.

It seems to me there was no room for common law or rules of equity in this Colony up to the year 1935. Section 23 of the Cyprus Courts of Justice Order, 1882, reads:

"Every Court and judge exercising civil jurisdiction in an Ottoman action, or exercising criminal jurisdiction where an Ottoman subject is accused, shall apply Ottoman Law, as from time to time altered or modified by Cyprus Statute Laws."

The Cyprus Courts of Justice Amendment Order, 1917, section 4, reads:—

"Every Court and Judge exercising civil or criminal jurisdiction shall apply Ottoman Law, as from time to time altered or modified by Cyprus Statute Law, unless it shall be proved or admitted that the action or civil or criminal proceeding is one in which English Law, as from time to time altered or modified by Cyprus Statute Law, is applicable."

Clause 27 of the Cyprus Courts of Justice Order, 1927, reads:

"Every Court and Judge exercising civil jurisdiction in any action or exercising criminal jurisdiction in any criminal proceeding, shall apply Ottoman Law, as from time to time altered or modified by Cyprus Statute Law."

After the passing of the Cyprus Courts of Justice Order and Law of 1935 for the first time by section 49 provision was made for the application of the common law and rules of equity where there was no law in the colony and no provision in the Ottoman Laws enumerated in the schedule attached to the said law.

The Courts might introduce, not necessarily, the principle that parties in a private sale of immovables were to be considered as persons taking part in an illegal transaction and therefore as parties in *pari delicto* would not be assisted by the Court. But even if this principle of law could properly be applied, it is difficult to see how in its application one might make a distinction between the liability and non-liability of a party to such a transaction and the liability of his heirs. It seems to me that if a father intended privately on the occasion of the marriage of his son to convey to his son immovable property in contravention of the law requiring registration of sales, at any rate before September, 1946, such transaction would be void and would have had no legal consequences. On the other hand if there is an agreement to transfer immovable property in consideration of marriage to a son or daughter unaccompanied with an intention to contravene the registration laws and complying in form with section 77 of the Contract Law that agreement is enforceable and if specific performance cannot be granted the son or daughter is entitled to damages. If one examines the present case unfettered with any previous decisions of this Court he would, in my humble opinion, come to this conclusion.

It appears equally difficult to apply section 65 of the Contract Law and compensate the son for a void contract on the ground that the father having purported to convey to him immovable property to the value of £425 he (the son) got married. A father might derive an advantage from the marriage of his son but it would be, I am afraid, in the absence of any authority on the point, stretching too far the meaning of the word " advantage " and also travelling beyond the scope of this section.

Counsel for the respondent contended that there was no evidence to hold that respondent and his father did not intend to comply with the law of registration of transfers. The trial Court found that the facts of this case were similar to those in *Evangeli* v. *Nicola* and in this case parties had no intention to comply with the law. There was sufficient evidence for the learned President from the document of dowry and from the facts of the case, especially by allowing many years to elapse before the death of the father without attempting to effect a valid transfer, to find that parties did not intend to comply with the law. It cannot be said that this finding was an unreasonable one.

I think, therefore, that whether the rule in *Constanti Haji Antoni* v. *Kyriacou Haji Antoni and others* (4 C.L.R., p. 66), or *Ali Selim* v. *The heirs of Emette Filo* (17 C.L.R., p. 143), is followed or not, the result would be the same that the respondent will not be entitled to compensation against the heirs of the deceased.

I agree with the Chief Justice as to the orders given in the disposal of the appeal.