

SMITH, C.J.
&
MIDDLE-
TON, J.
1893.
Nov. 27.

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

THEODOULO ZENOBIO AND ANOTHER *Plaintiffs,*

v.

MEIREM OSMAN AND OTHERS

Defendants.

IMMOVABLE PROPERTY—SALE OF UNACCOMPANIED BY REGISTRATION—RIGHTS OF PURCHASER—SUBSEQUENT SALE BY ORDER OF COURT FOR DEBT OF DECEASED VENDOR—CLAIM BY HEIRS OF FORMER PURCHASER TO RETURN OF PURCHASE MONEYS—IMPLIED CONTRACT FOR QUIET ENJOYMENT—LAND CODE, § 36.

On a sale of immovable property unaccompanied by registration there is no implied contract on the part of the vendor that the purchaser shall have quiet enjoyment of the property.

A. in the year 1881 purported to sell to B. by so-called "private contract of sale" certain immovable property. B. paid the purchase money and took possession of the property, which still remained registered in the name of A. In the year 1889, up till which time B. held the property without dispute, it was sold by the order of a Court in satisfaction of a judgment debt due by A. Subsequently to the year 1889 A. and B. both died, and in the year 1892 the heirs of B. commenced an action against the heirs of A. claiming the return of the moneys paid by B. for the property.

HELD : That the heirs of B. had no greater rights than B. himself had, and that the purchase moneys could not be recovered, on the ground that in such transactions as the one in question no contract for quiet enjoyment of property so purported to be sold would be implied, and that as A. and B. had entered into the transaction with the object of evading the law, B. by allowing the property to remain registered in A.'s name, must be held to have acquiesced in any consequences that might ensue, amongst which was the liability of the property to be sold by A.'s creditors.

Article 36 of the Land Code discussed.

The principle on which the Supreme Court has acted in cases of so-called "private sales" is, that so long as the vendor leaves the purchaser in possession of the property he purported to sell him, the latter has no right to maintain an action against the vendor to compel him either to procure the property to be registered in the purchaser's name, or to recover the purchase money. If, however, the vendor should, whilst

retaining the purchase money, attempt to regain possession of the property he will not be allowed to do so without repaying the purchase money, on the equitable principle that the vendor should be forbidden to take a wrongful advantage of his own share in a transaction which he knows is without any legal effect.

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APPEAL from the District Court of Larnaca.

Pascal Constantinides for the appellants.

Diofanto Themistocles for the respondents.

The facts and arguments sufficiently appear from the judgment.

Dec. 2.

Judgment : This is an appeal from the judgment of the District Court of Larnaca dismissing the plaintiffs' claim to recover from the defendants the sum of 5,000*cp.* alleged to be due under the following circumstances.

It appears from the very meagre statement of facts contained in the notes, that a man, Osman Hassan, purported to sell in the year 1881, to one Zenobio certain land and carob trees for the sum of 5,000*cp.* This sale was never completed by registration, but it is admitted that the 5,000*cp.* were paid, and that possession of the property was given to Zenobio. Some years subsequently (in the year 1889, as was alleged before us), this property was seized in execution, and sold to satisfy a debt of Osman Hassan. We assume that the property was at the date of the alleged sale to Zenobio, registered in the name of Osman Hassan, and continued to be so registered down to the year 1889, when it was sold to satisfy his debt as above mentioned.

At the time when the property was thus sold, both Zenobio and Osman Hassan are stated to have been alive. They subsequently died, and in May of the present year this action was brought, in which the plaintiffs, who are the heirs of Zenobio, claimed from the defendants, the heirs of Osman Hassan, the 5,000*cp.* which Zenobio had paid on the so-called purchase of the property.

As no facts appeared to be in dispute, the District Court dismissed the plaintiffs' claim. on the authority of the decision of the Supreme Court in the case of *Christinou Starrinou v. The Queen's Advocate* (C.L.R., Vol. I., p. 46).

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Against this decision the plaintiffs appealed, and it is contended for them, that although the legal right to the possession of the property did not pass by the contract, that nevertheless the Supreme Court had decided in cases between purchaser and vendor, that if the latter after receiving the purchase money for property which he purported to sell, by what have become known as "private contracts of sale," claimed to recover possession of his property, possession would only be given to him on his repayment of the moneys he had received. That on the same principle, where property which has thus purported to be sold, has been taken from the purchaser's hands owing to its having been seized and sold in satisfaction of a judgment debt of the vendor, the purchaser has a right to recover from the vendor the moneys he had paid to him. It is contended that the contract exists, that the fact that the purchaser's possession has been disturbed forms a breach of it, from which arises an obligation on the vendor's part to repay the purchase moneys and it is pointed out that otherwise, the vendor obtains a double advantage, as he retains the purchase money, and at the same time gets his debt satisfied by the sale of the property. It was also contended that the case relied upon by the District Court was distinguishable, as the real point decided in that case was, that the Crown was not liable after the death of a deceased person to pay his debts, and was not decisive of the present case, in which it was sought to make the heirs of a deceased person liable. Our attention was also directed to Article 36 of the Land Code, which was relied upon as strengthening the views put forward on the plaintiffs' behalf.

For the respondents it was contended that Osman Hassan had given up to Zenobio possession of the property and had never interfered with that possession; that the sale of the land in execution was no act of his, and could not be treated as a disturbance by him of Zenobio's possession, but was one of the risks Zenobio had chosen to incur by not taking the necessary steps to protect himself by getting the property registered in his name. It was further contended that the case of *Christinou Stavrinou v. The Queen's Advocate* was decisive of the present case, inasmuch as in that case, in which a precisely similar transaction to the present one had been entered into, the Supreme Court had stated

in their judgment, that as no debt was in existence at the date of the death of the assumed vendor, none could subsequently have arisen. With regard to the argument founded on Article 36 it was contended that it referred only to the cases therein mentioned, that is to say, to the cases in which a vendor or his heir had retaken possession of the property, or to cases in which a person had died without heirs.

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We proceed to consider the arguments addressed to us, and the law applicable to the facts of this case.

The document termed the contract of sale put in evidence in this case, is in form only a declaration stating that Osman Hassan had sold the property therein mentioned for the sum of 5,000*cp.*, the receipt of which he acknowledged; it contains no reference to registration, or any agreement for the return of the purchase money, in case the property were not transferred by the vendor to Zenobio by obtaining the registration in his name. In terms, therefore, this document is not a contract to sell, but an acknowledgment that the vendor has sold. We understand it to be admitted, though there is no evidence of the fact, that Zenobio took possession of the property at the date of this document, and held it down to the date when the property was taken from him and sold in satisfaction of Osman's debt to some third person. The result of the transaction between the parties is, that the legal right to the possession of the property remained vested in Osman Hassan, and as against him, Zenobio became entitled to hold and enjoy the property. We have in previous cases laid down the principle, that so long as the vendor leaves the purchaser in undisturbed possession of the property he purported to sell him, the latter has no right to maintain an action against the vendor to force him to procure the property to be registered in the purchaser's name, or to recover the purchase money. We are not sure that there has ever been an actual case before the Supreme Court, in which the vendor having received the purchase money, has attempted to retain it and to regain possession of the property as well. It is no easy matter to search through the records of the Court for the past 11 years; and it is possible that there may be an actual decision on the point, though at present we are unable to find it. It is not,

SMITH, C.J. however, a matter of much importance, as no doubt we
 & have more than once expressed the view that the vendor, if
 MIDDLE- he desires to obtain possession of the property, must repay
 TON, J. the purchaser the amount of the purchase moneys. See
 THEODOULO *Asinetta Hadji Georghi v. Hadji Georghi Brutso* (C.L.R.,
 ZENOBIO Vol. I., p. 45) and *Christinou Stavrinou v. The Queen's*
 v. *Advocate* (C.L.R., Vol. I., p. 46).
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In stating this view we cannot find any case in which the Court has laid down the principle on which it rests. It appears to us to rest, not on any implied contract between the parties, whereby the vendor guarantees the purchaser the quiet enjoyment of the property he purports to sell, but rather on principles of general equity which forbid the vendor to take a wrongful advantage of his own share in a transaction which he knows is without any legal effect. Both parties to a transaction of this nature know, or must be presumed to know, that the effect of it is not, and cannot be, to confer on the purchaser the legal right to the possession of the land purported to be sold; and to enable the vendor to take advantage of this, and retain the purchase money, whilst he recovers the possession of the land, would be a species of fraud upon the purchaser which it would be inequitable to allow. It is on this principle that the Supreme Court, though not without some hesitation, has laid down the rule referred to above, and not on the ground that there is any implied contract on the part of the vendor that the purchasers shall have peaceable possession of the property purported to be sold. We are of opinion that in such cases as the present, the law will not imply any contract on the part of the vendor, that the purchaser shall have peaceable enjoyment of the property. The policy of the law, undoubtedly, is to discourage such transactions as these so-called "private sales" of property. The law requires the registration of the property to confer a legal right to the possession of it. Article 36 of the Land Code to which we have been referred says in the clearest words, that the alienation of State land without the permission of "the Official," a permission which is evidenced by registration, is not valid, and the regulation relating to Tapou Seneds, dated 7 Shaban 1276, commence by stating "Henceforth no one shall be allowed under any circumstances to hold State land without a kochan." Where two parties deliberately enter into a transaction intending

to evade the law, as they did in the present case, and to effect that which the law says shall only be effected by registration, the Courts will give no greater effect to that transaction than they are compelled to do. Zenobio then entered into an agreement to purchase this property, without intending to take, and without, as a matter of fact, taking the steps the law required of him to obtain the registration of the property in his name. He allowed the property to continue to be registered in the name of Osman Hassan, and to quote the words of the judgment of this Court, in the case to which the appellant's counsel referred us, *Eleni Dimitri Hadji Petri v. Ephrosyne Hadji Gligori* (ubi sup. p. 108). "He must be taken to have acquiesced in any of the consequences that might ensue" . . . and consequently to have acquiesced in the liability of his property to be sold in satisfaction of Osman Hassan's debts. He could have protected himself against this contingency by complying with the law, and obtaining the registration of the property in his name, at the time he purported to purchase it. As he did not do so, but chose to evade the law, he must take the consequences; one of which is that the property has been taken from him, and sold in satisfaction of Osman Hassan's debt. The result is no doubt, as was pointed out by Mr. Pascal, that Osman Hassan obtains the value of the property twice over; but if Zenobio has deliberately chosen that this should be so, he has no right to complain.

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The question at issue in the present action has been already decided in the case of *Stavrinou Christodoulo v. Xenophon Christodoulo* which came on for hearing before the Supreme Court on the 2nd September, 1889.

In that case it appeared that three brothers were entitled by inheritance to certain property, which remained registered in the name of their father. They agreed upon a division of the property amongst themselves; but the property was not registered in their names. The defendant purported to sell by "private contract of sale" his share to the plaintiff. The third brother got into debt and a judgment creditor procured the sale of his share in the property. The property thus sold included some portion of that which the defendant had affected to sell to the plaintiff. The plaintiff thereupon brought his action to

SMITH, C.J. recover from the defendant, the purchase money he had
 & paid, and on the appeal it was said the question was,
 MIDDLE- whether the sale of this property by a judgment creditor
 TON, J. was such a disturbance of the plaintiff's possession by the
 THEODOULO defendant, his vendor, as to bring the case within the
 ZENOBIO principle we have alluded to in this judgment.
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The Supreme Court, affirming the decision of the District Court, dismissed the plaintiff's action, holding that he was not entitled to the relief he sought, on the ground that he was a party to an attempt to effect the transfer of this property by means which the law did not recognise, and must take the consequences of his act.

That decision is directly in point, as the plaintiffs only represent their ancestor Zenobio, and have no greater rights than he could have had, if he were still alive. We should feel ourselves bound by this decision of the Supreme Court, and it is perhaps unnecessary for us to have discussed the matter at the length we have, though we think it convenient that we should do so, as the principle upon which this decision rests has not been gone into fully before. It may also be convenient that we should examine the argument founded on Article 36 of the Land Code, especially as we find that it has not been relied upon, so far as we can discover, in any of the cases before the Supreme Court.

The object of Article 36 of the Land Code is unquestionably to lay down the rule that in all cases of alienation of Arazi Mirié property, whether by way of sale, or gift, or exchange, the consent of the State, which is evidenced by registration, is necessary to a transfer of the legal right of possession. To such an extent is this the case that although a man may have paid his purchase money, if the consent of the State has not been obtained, the property remains legally in possession of the vendor; or if he die, passes to his heirs, or if he die without heirs reverts to the State. The Article no doubt states, that in either of the two latter cases the would-be purchaser has the right to recover the money he has paid from the estate of the deceased. We consider that the meaning of this provision is that, where during the negotiations for the purchase of property, the vendor dies, then the would-be purchaser has a right to recover from the estate of the deceased the moneys he has paid.

A man may validly contract with another to sell him his property, and under the contract the person agreeing to buy, may pay a part of the purchase money. Such a contract is good, as a contract, and has been recognised as a valid one, inasmuch as it is capable of specific enforcement here under the provisions of the Sale of Lands Law, 1885.

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In such a case, if before the registration in the purchaser's name can be effected the vendor dies, the provisions of Article 36 of the Land Code would apply ; and whilst the legal right to the possession of the property passes to the vendor's heirs by right of inheritance, the vendor may recover his purchase money from the vendor's estate. But that is a very different case to such as we have been considering, where both vendor and purchaser deliberately agree to act in defiance of the law, and to endeavour to vest in the purchaser a right to the possession of property, which the law says he shall only acquire by registration. We cannot suppose that the legislature assumed that persons were going to act in direct contradiction to the provisions of the law ; or that they intended to recognise in any way the validity of any legal rights as resulting from these transactions.

Owing to one cause or another delays, sometimes of considerable duration, take place before registration can be effected ; and if, whilst the proceedings are pending, if, that is to say, whilst both parties are desirous of carrying out the law and not of evading it, the vendor die, then the purchaser undoubtedly would have the right to recover the purchase money he had paid from the vendor's estate. If a man be prudent he will not of course pay his purchase money until the time when registration is effected, or until he is assured that it will be effected without delay, and he would thus save himself an infinity of trouble.

In the present case the facts are clear that both parties had no intention whatever of complying with the law, but intended to evade it, and on the principles we have above stated, and following the decision of this Court, we hold that the plaintiffs have no right to recover the moneys they claim.

It is perhaps unnecessary for us to refer to the case of *Christinou Stavrinou v. The Queen's Advocate* (C.L.R., Vol. I., p. 46). We agree that the main point of that decision was

SMITH, C.J. to lay down the rule that the Crown is not responsible for
 & the debt of a person whose Arazi Mirié reverted to the
 MIDDLE State on failure of heirs. So far as it goes, however, the
 TON, J phrase in the judgment as to there being no debt in existence
 THEODOULO at the time of the death of the deceased, and that none
 ZENOBIO could, therefore, arise afterwards, supports the respondents'
 v contention, and the view of the law we have here taken.
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For these reasons we think that the judgment of the District Court was right and this appeal must be dismissed with costs.

Appeal dismissed.