

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

GEORGHİ HADJİ PETRİ AND BY ORDER
OF THE COURT KALLISTHENE GEORGHİ
HADJİ PETRİ AS GUARDIAN OF THE
INFANT SON OF GEORGHİ HADJİ PETRİ
DECEASED

Plaintiffs,

v.

KYPRIANO HADJİ PETRİ AND OTHERS
AS HEIRS OF YUSTINI HADJİ SAVA
DECEASED AND HADJİ PETRİ KARA
GEORGHİ DECEASED

Defendants.

IMMOVABLE PROPERTY—SALE OF WITHOUT REGISTRATION TO SON
OF VENDORS—DEVOLUTION ON HEIRS OF PROPERTY PURPORTING
TO HAVE BEEN SOLD—ACKNOWLEDGMENT OF RECEIPT OF
PURCHASE MONEY—FALSIFICATION OF—BURDEN OF PROOF
OF FALSITY—PENALTY IN DOCUMENT OF SALE—EVASION OF
THE LAW—GIFT—MEJELLE, ARTICLE 1589.

An acknowledgment of the receipt of purchase money made by a vendor either *viva voce* or in a document purporting to convey immovable property without registration, is an acknowledgment which it is open for the vendor or his heirs to falsify.

Where the falsity of such an acknowledgment is pleaded by the person or the heirs of the person who has made the acknowledgment, the burden of proving that the acknowledgment is a true one is thrown on the person in whose favour the acknowledgment is made.

A. and B. the father and mother of C. in the year 1885 purported to sell to C. certain immovable property by a document in which A. and B. acknowledged that they had received the sum of 12,000*cp.* as purchase money from C. The document further contained a covenant purporting to bind A. and B. and their heirs to return the alleged purchase money in a certain event, and a further covenant purporting to bind A. and B. to pay a penalty to C. "λόγω στρεψοδικίας." C. had possession of the property till A.'s and B.'s deaths but it was never registered in the name of C. Upon A.'s and B.'s deaths their other heirs assumed rights of ownership over the property.

In an action brought on behalf of the heir of C. to recover the 12,000*cp.* and the penalty of £40, the heirs of A. and B. pleaded that the acknowledgment contained in the document given to C. by A. was false.

SMITH, C.J.
&
MIDDLE-
TON, J.
1893.
Dec. 12.

SMITH, C.J.
 &
 MIDDLE-
 TON, J.
 GEORGI HJ.
 PETRI
 v.
 KYPRIANO
 HJ PETRI.

HELD: That the burden of proving that the acknowledgment was true devolved upon the heir of C.

HELD FURTHER: That such a document as that relied upon by the heir of C. amounted to an attempt on the part of A. and B. to compel the acquiescence of their heirs in what they knew to be an evasion of the law, by a means which the law did not recognise, and that the Courts would not enforce the covenants contained therein.

APPEAL from the District Court of Kyrenia.

Templer, Queen's Advocate (Diran Augustin with him),
 for the appellants.

Pascal Constantinides (Artemis with him) for the respondents.

The facts and arguments sufficiently appear from the judgment.

Dec. 18

Judgment: This is an appeal from the judgment of the District Court of Kyrenia, by which the defendants as heirs of Yustini Hadji Sava and of Hadji Petri Kara Georghi are ordered to pay to the plaintiff the sum of 12,000*cp.* and a further sum of £40.

The claim of the plaintiff is made under the following circumstances. In the year 1885, Yustini Hadji Sava and Hadji Petri Kara Georghi, who were the mother and father of the original plaintiff Georghi, and of the defendants to this action, purported to sell certain properties to the plaintiff Hadji Georghi Hadji Petri. Hadji Georghi died subsequently to the institution of the action, and by consent the action has been continued in the name of his widow, as guardian of her infant child. There was no registration effected in the name of Hadji Georghi of the properties purported to be sold to him; he took possession of them and held them apparently without dispute for some years. Hadji Petri and Yustini subsequently died, although there is no evidence of the date of their deaths.

The defendants admit interference with the properties above mentioned, and we presume such interference has taken place subsequently to the death of the father and mother. The legal title to the possession of these properties is not contested by the plaintiff, but she claims the return of 12,000*cp.*, being the purchase money alleged to have been paid by Hadji Georghi for the properties, and £40 damages for breach of contract.

At the time when Hadji Petri purported to sell these properties a document was drawn up, signed by him and Yus'ini, headed "document of sale," which, after reciting that they had sold the properties therein mentioned to Hadji Georghi for the sum of 12,000*cp.*, the receipt of which they acknowledged, goes on to declare that both they and their heirs have no rights over the property, and that, "should we or our heirs ever *acquire* a claim on the said property, we will return without any gainsaying the above sum of 12,000*cp.*, together with all the expenses which the acquirer may incur in repairing the properties and all other consequences."

SMITH, C.J.
&
MIDDLE-
TON, J
—
GEORGHİ HJ
PETRI
v.
KYPRIANO
HJ PETRI
—

"Moreover, in case of an action on the part of us or anybody else, in connection with the properties in question, we are further bound (to pay) all judicial and advocates' expenses, which we may cause by our contravention or any other reason ; and further a penalty of £40 on account of cheating (cavilling). "And this present was made by us and the undersigned trustworthy witnesses, and was given by us into his hands, in order that it may be of service to him to prove the truth."

At the hearing of the action before the District Court, evidence was adduced on behalf of the plaintiff, to prove the making of the document, that the father and mother had acknowledged having made the sale and received the money, and that Hadji Georghi had to a greater or less extent, maintained his parents. No evidence of the actual payment of the 12,000*cp.* was adduced, and after hearing the evidence of one of the heirs, which went to shew that Hadji Georghi was not in a position to pay a sum of 12,000*cp.* the Court gave judgment for the plaintiff, on the ground that the admission of Hadji Petri that he had received the money was sufficient to enable the plaintiff to recover.

The President of the Court dissented from this judgment, holding that the whole evidence showed that the money had not in fact been paid, and that in his opinion the action should be dismissed. We do not gather from the notes, whether the other judges of the Court considered that it had been proved that the money had in fact been paid ; but from the wording of the notes of the learned President, and the fact that there was no evidence of actual payment, we believe that we are correct in assuming that this judgment was founded on the acknowledgment alone.

SMITH, C.J.
 &
 MIDDLE-
 TON, J.
 GEORGI HJ.
 PETRI
 v.
 KYPRIANO
 HJ. PETRI.

We do not find any statement of the reasons which induced the Court to give the £40 damages or penalty.

Against this judgment the defendants appealed; and it was contended for them that the claim was founded on an attempt to transfer property illegally, that there was no evidence of the payment of the purchase moneys, and that the case came within the principle laid down by this Court in the case of *Theodoulo Zenobio and another v. Meirem Osman Hassan and others* decided on the 2nd inst., (ubi sup. p. 168).

For the respondents it was contended that that decision was distinguishable from the present case, inasmuch as in the former case the rights of third parties were involved, the property purported to be sold without registration having been subsequently sold at the instance of a judgment creditor; whereas in the present case, it was taken possession of by the heirs of the deceased vendor. It was admitted that there was a difficulty about proving the payment of the 12,000*cp.* as Hadji Georghi had died. It was further suggested that the transaction might be valid as an acknowledgment of the ownership of property, or as a gift as there had been delivery.

These suggestions, however, do not affect the present case, as the claim in the action is not to recover possession of the property, but to recover certain moneys alleged to have been paid for it, and a penalty for breach of an agreement, but there appear to us to be difficulties in the way of holding that this was a valid gift of property, the law requiring registration to complete any transfer of immovable property. Of course if there were a valid gift of the property, the plaintiffs would have no right to recover the purchase moneys alleged to have been paid.

Dealing first with the ground on which the Court below has decided that the defendants are liable to pay the 12,000*cp.*, we are of opinion that the acknowledgment of Hadji Petri that he had received the money, whether made in the document of sale, or *viva voce*, is an acknowledgment which it would have been open to Hadji Petri himself to falsify, and in our opinion as we foreshadowed in the case of *Louka Hadji Andoni Pieri v. Eleni Hadji Yanni and another*, (ubi sup. p. 153) it is open to his heirs to plead the falsity of, likewise. They do contest the truth of this acknowledgment, and consequently the burden of proving its

truth, *i.e.*, that the money was in fact received by Hadji Petri, is thrown upon the plaintiff. There is practically no evidence that the money was in fact received by Hadji Petri.

SMITH, C.J.
&
MIDDLE-
TON, J.
—
GEORGI HJ.
PETRI
v.
KYPRIANO
HJ. PETRI.
—

The respondent's counsel pointed out that Hadji Georgh, who is said to have paid the money, being dead, it was extremely difficult to establish the payment. However unfortunate this may be, it does not absolve the present plaintiff, his widow, from establishing the fact that the money was in fact received by Hadji Petri, and in reading through the notes of evidence it seems to us that she wholly failed to do so. We are, therefore, of opinion that so far as the obligation to pay 12,000*cp.*, is concerned the judgment of the District Court cannot stand.

There remains to be considered the question of the liability to pay the sum of £40 as damages. No argument was addressed to us by the Queen's Advocate for the appellant on this point. Although the payment is ordered by way of damages, there is, we believe, no doubt that the sum is claimed and, therefore, awarded as the penal sum mentioned in "the document of sale." The meaning of the document as worded is very obscure. It says "moreover in case of an action on the part of us or *anybody else* in connection with the properties in question, we are bound to pay "all the judicial," *etc.*, expenses and further a penalty of £40 on account of chicanery or "shuffling" (λόγω στρεψοδικίας). What the precise meaning of the last words of this sentence are it is not easy to see. They might apply to the case where an action had been brought by Hadji Petri himself against his son, to recover the possession of the property he had purported to sell him, but it is difficult to see how they have any meaning in the present case, where the heirs of Hadji Petri are claiming their share in a portion of the property which was still vested in him at the time of his death and which passed to them by the law of inheritance. They might have some meaning too, if all the heirs of Hadji Petri had been parties to this document of sale, and agreed to pay a penalty of £40 if they disturbed Hadji Georgh in the possession of the property purported to be sold; though we do not wish it to be understood that we should decide even in that case, that the amount of the penalty could be recovered.

SMITH, C.J. There is no doubt that the parties to the "document of sale" were well aware that the sale of the property to Hadji Georghi was not a valid one. The terms of the document itself, the reference to claims by the heirs and to litigation, abundantly prove that Hadji Georghi and his father and mother were perfectly alive to the fact, that no valid transfer of the properties had been effected; and if we felt ourselves at liberty to give the widest possible meaning to the words of the document we have just quoted, and to hold that Hadji Georghi and Yustini had agreed that if their other heirs disturbed the possession of Hadji Georghi, they or their heirs would pay a penalty of £40 it seems to us that they amount to an attempt on the part of Hadji Petri and Yustini, to compel the acquiescence of their heirs in a transfer of the property by a means that the law does not recognise, and that we should decline to enforce an agreement, made with that object. The parties to this so-called sale were endeavouring to evade the law, which requires registration of property to effect a valid transfer, and as we have said on other occasions and repeat now, we will give no greater effect to their transactions than we are obliged. It if could be held that the literal meaning of the document included any undertaking on the part of Hadji Petri and Yustini, entered into with the intention of binding their heirs, it seems to us to amount to this, that they are to pay a penalty if they decline to recognise as legal a transaction which is directly contrary to the law. We must decline to enforce any such undertaking, and as regards the payment of £40 the judgment of the Court below must be set aside.

&
MIDDLE-
TON, J.
GEORGI H.
PETRI
v.
KYPRIANO
HJ. PETRI.

This case affords one more illustration of the difficulties in which people find themselves, who attempt to evade the law requiring the registration of immovable property on a transfer. Whether the transaction between Hadji Georghi and his parents was really intended to be a sale, or whether it was intended to be a gift under the guise of a sale, all difficulties would have been avoided if the parties had done as they should have done, and procured the registration of the properties in Hadji Georghi's name.

For the reasons we have given above, we must direct the judgment of the District Court to be set aside, and this action dismissed with costs.

Appeal allowed.