

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

YOANNI NICOLAIDES

*Plaintiff,**v.*

YOSIF IERODIACONOS

Defendant.

SMITH, C.J.

&
MIDDLE-
TON, J.
1892.

Dec. 7.

PRE-EMPTION—ADJOINING OWNERS—CONDITIONAL SALE—DECLARATION OF INTENTION TO EXERCISE RIGHT OF PRE-EMPTION—MEJELLE, §§ 1008, 1012 AND 1026.

The defendant purchased from Y. a shop which adjoined a shop owned by the plaintiff, but the beams of the plaintiff's shop did not rest upon the wall of the shop purchased by the defendant.

In an action brought by the plaintiff, claiming a right of pre-emption over the shop purchased by the defendant the District Court decided that the plaintiff was not an adjoining owner within the meaning of Section 1008 of the Mejellé, inasmuch as the beams of his shop did not rest upon the walls of the shop purchased by defendant.

HELD (reversing the decision of the Court below): That the intention of section 1012 of the Mejellé is only to point out to which class of persons having a right of pre-emption that person belongs, the beams of whose house are supported by his neighbour's wall; and that the plaintiff was an adjoining owner.

The shop purchased by defendant was registered in his name, but the defendant had an agreement with Y. that if he did not retransfer the property to Y. within two years on Y. tendering to him the amount of the purchase money, he would be bound to pay Y. £30 more.

HELD: That this was not a conditional sale, within the meaning of Section 1026 of the Mejellé.

APPEAL of the plaintiff from the District Court of Paphos.

The action was brought to enforce the plaintiff's claim to a right of pre-emption over a shop which had been sold to the defendant in 1891, by one Yanni Maltezo. The defences set up were, (1) that the plaintiff was not a neighbour within the meaning of Article 1008 of the Mejellé; (2) that the sale to the defendant by Yanni Maltezo was a conditional sale, and consequently that the plaintiff's right of pre-emption had not arisen.

SMITH, C.J. The District Court gave judgment for the defendant.

&
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TON, J. The plaintiff appealed.

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NICOLAIDES *Pascal Constantinides* for the appellant.

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The facts and arguments sufficiently appear from the judgment.

Dec. 27. Judgment: The plaintiff in this action claimed that the defendant should be ordered to transfer to him a shop over which he asserted that he had a right of pre-emption.

It appears that the defendant in November, 1891, purchased from a relative of his, Yanni Maltezo, a shop in the bazaar of Paphos, which at present is separated from a shop owned by the plaintiff, by the wall of defendant's shop. When the plaintiff was informed of the sale, he immediately, in conformity with Article 1029 of the Mejjellé, asserted that he had a right of pre-emption over the property, and the next day in compliance with Article 1030 he took two witnesses to the shop, and stated that he had a right of pre-emption and intended to exercise it. The defendant refusing to give up possession of the shop this action was at once brought.

At the settlement of the statement of the matters in dispute, two points only were relied upon for the defence. One was, that the plaintiff was not "a neighbour" within the meaning of Article 1008, and the other, that the sale to the defendant by Yanni Maltezo was a conditional sale, and, therefore, the plaintiff's right of pre-emption had not arisen.

At the hearing of the action witnesses were called on the part of the plaintiff, who proved that he had taken the necessary steps to assert his right of pre-emption; and also to prove that the property in respect of which he claimed his right of pre-emption, adjoined the defendant's.

With regard to this latter point, the evidence showed that some time ago a water channel belonging to the plaintiff's father separated the shop of the plaintiff from

that of Yanni Maltezo ; that the plaintiff purchased this water channel from his father, and included it in his shop, obtaining a registration for his shop including the water channel, and shewing Maltezo's shop as a boundary ; so that the condition of the plaintiff's property at the time of the sale by Maltezo to the defendant was, that the wall of Maltezo's shop formed the actual boundary between the plaintiff's and defendant's properties.

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For the defendant, an agreement was put in, made between him and Maltezo, which stated that defendant had agreed to buy the shop of Maltezo for £100, "with a private agreement," that if Maltezo, within two years of the date of the registration of the property in defendant's name, should return the purchase money, the defendant was bound to retransfer the property to him, and that if he declined so to retransfer it, he should be bound to pay to Maltezo £30 more.

The property was registered in defendant's name absolutely.

The District Court decided that as the dividing wall between the two properties was Maltezo's own wall, and as plaintiff had put no rafters into it, he had failed to prove that he was a contiguous owner so as to enable him to exercise his right of pre-emption according to the law.

The Court gave no decision on the question as to whether the sale was a conditional one.

On the appeal before us, it was contended that the decision of the Court was based upon a mistaken construction of Article 1012 ; that the sale was an absolute one, and that the plaintiff had proved his right to pre-emption.

Mr. Economides for the defendant contended, that the words "συνεχῆς γειτνίασις" have reference to something more than merely adjoining properties, otherwise the word "γειτνίασις" would have been sufficient by itself. With this contention we are unable to agree, as it appears to us the law intends precisely such a case as the present, where one person's property actually adjoins another's..

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We are unable to understand the grounds of the decision of the District Court on this point. If it be based, as seems probable, on Article 1012, we are of opinion that it has been given under a misapprehension of the meaning of that Article.

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The law provides that three classes of persons are entitled to claim a right of pre-emption, viz. : (1) a joint owner of the property sold ; (2) a person having a servitude over it ; and (3) an owner of adjoining property ; and that the right of pre-emption belongs, in the first place, to the joint owner, in the second to the person having the servitude, and in the third to the adjoining owner. The exercise of the right by the first of these will defeat the right of the other two, and by the second of these, will defeat the right of the third. Article 1012 provides that a person who is not the joint owner of a wall, but only has the beams of his house supported by it, is considered as an adjoining owner, and cannot be considered as a joint owner, or as a person having a servitude. It does not say and could not, having regard to the law, be intended to mean that, if as in the present case, the beams of a person's roof were not supported by his neighbour's wall, he is not an adjoining owner. The article is only intended to point out to which class of persons, having a right of pre-emption, a person belongs, the beams of whose house are supported by his neighbour's wall.

With regard to the point, that this was a conditional sale and that, therefore, the plaintiff's right of pre-emption had not come into existence, this contention is based upon Article 1026 of the Mejlé. That section says, that in order that the right of pre-emption should come into existence, the property must pass from the ownership of the seller. It might be sufficient to say that in this case the property has passed from Maltezo, and has been registered as the absolute property of the defendant. Even taking into account the collateral agreement entered into between them, Maltezo could not recover the property back again ; the utmost effect that could be given to that agreement would be, that he might compel the defendant to pay him £30 more. In our opinion, then, the sale by Maltezo to the defendant, was a complete sale in which the property has passed from Maltezo, and is vested absolutely in the defendant, and that so far as this is concerned, the plaintiff's right of pre-emption has come into existence.

It was contended before us by the respondent's counsel that the plaintiff had not taken all the steps required by the law to preserve his right of pre-emption. This point was not mentioned at the settlement of the matters in dispute, and we think was, therefore, not properly raised. However, as a considerable amount of evidence was adduced on the subject in the District Court, we did not stop the respondent's counsel in addressing us on the subject, though we felt that if it were relied upon as a defence, it ought to have been mentioned when the matters in dispute were settled, and that the Court below ought to have ruled at the hearing that it was immaterial. We have perused the notes of evidence, and it appears to us that the plaintiff was careful to take the measures which the law prescribes. Mr. Economides contended that the plaintiff should have taken his witnesses at once to the shop on hearing of the sale, and have stated before them that he had a right of pre-emption. The law provides that the person intending to exercise his right of pre-emption shall immediately upon hearing of the sale, declare that he intends to exercise his right; and after that he shall take witnesses to the property, and declare before them that he has a right of pre-emption and demands the property. The law does not say that he shall take this step immediately after the other one; and in some cases it would be impossible for him to do so, *e.g.*, if he was in a distant place and engaged in other business. It is sufficient, in our opinion, if he take his witnesses to the property within a reasonable time, having regard to all the circumstances of the case. In the present case the plaintiff heard of the sale on the Sunday, and on the following day he took his witnesses to the shop he claimed.

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In our opinion, therefore, the plaintiff is a person having the right of pre-emption over the shop he claims, and has taken all necessary steps to enforce his right.

The appeal will be allowed, and the judgment of the District Court must be set aside; and we shall direct that upon tender by the plaintiff to the defendant of the sum of £100, the defendant do forthwith deliver up to the plaintiff the possession of the property described in the writ of summons in this action, and that the Land Registry Office be at liberty, upon production to them of an office copy of

SMITH, C.J. the judgment of this Court, to do all acts and things necessary to be done to register this property in the name of the plaintiff.

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The defendant must pay the costs of the action and appeal.

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Appeal allowed.
