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

HUTCHINSON, C.J. & MIDDLETON, J. 1898

Nov. 14

MICHAIL GAVRILIDES, *Plaintiff,*

v.

STILIANO HADJI KYRIAKO AND ANOTHER, *Defendants.*

EX PTE. YANNI HADJI KYRIAKO.

ARAZI-MIRIE, VINES PLANTED ON—MULK—JUDGMENT DEBTOR REGISTERED FOR THE ARAZI-MIRIE AND ENTITLED TO BE REGISTERED FOR THE VINES—ATTACHMENT OF THE VINES BY ONE JUDGMENT CREDITOR AND SUBSEQUENT ATTACHMENT OF THE ARAZI-MIRIE AS REGISTERED BY ANOTHER JUDGMENT CREDITOR—REGISTRATION OF JUDGMENT—SALE OF THE ARAZI-MIRIE AS REGISTERED—SUBJECT MATTER OF SALE NON-EXISTENT—MERGER OF THE ARAZI-MIRIE IN THE MULK—INHERITANCE—SALE—DOUBLE REGISTRATION—PRACTICE OF THE LAND REGISTRY OFFICE—OTTOMAN LAND CODE, ARTICLES 2, 25, 28, 35, 44, 49, 68, 81, 83—IMPERIAL KHAT, 17 MOUHARREM, 1284, ARTICLES 1, 2—REGULATIONS REGARDING TAPU SENEDS OF 7 SHABAN, 1276, ARTICLE 7—INSTRUCTIONS REGARDING TAPU SENEDS OF 15 SHABAN, 1276, ARTICLE 2—LAW CONCERNING THE ISSUE OF TITLE DEEDS FOR EMLAK, 28 REJEB, 1291—LAW CONCERNING THE CONFISCATION OF PUBLIC LANDS, NO. XIV. OF 1885, SECTION 2—MEJELLE, ARTICLE 197.

A. being registered for Arazi-mirié, and having planted the land with vines, possessed it, until he was entitled to be registered for the vines. B., a judgment creditor of A., attached the vines by memorandum of his judgment duly lodged. C., another judgment creditor of A., attached by a memorandum of his judgment the land registered in A.'s name, and on which the vines were planted. The land was put up to auction according to the registration, and knocked down to Y., the highest bidder. Y. having paid a deposit of the purchase money under protest applied to the Court to be released from the purchase, on the ground that the property purporting to have been sold under the registration of the Arazi-mirié did not exist at the date of the sale, and that consequently there was nothing sold to him for which he was bound to pay.

HELD *by Middleton, J. (Hutchinson, C.J. not dissenting, though deciding in favour of Y. on another ground): that at the date of the sale to Y. the land on which the vines were planted had merged for the time being in the Mulk created by their planting, and that, consequently, there was no land represented by the registration under which Y. bought which could be sold or conveyed to Y., and the subject matter being non-existent there was no sale to Y.*

HELD *further: that registration in the Land Registry being mainly for fiscal purposes, the fact that double registration for Arazi-mirié and the vines on it may exist, does not necessarily imply that the law recognizes that each registration represents a specific property subject to separate ownership and possession, and the rights and liabilities incidental thereto.*

APPEAL from the District Court of Limassol.

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Pascal Constantinides for the Appellant.

Lanitis for the Respondent.

The Defendant did not appear.

Hutchinson, C.J., being of opinion that the Appellant had made a *bonâ fide* mistake from the consequences of which he was entitled to relief, and Middleton, J., dissenting from this opinion, though agreeing in the conclusion finally arrived at, that the Appellant was entitled to relief, only so much of the judgment and arguments as are material to the judgment delivered by Middleton, J., are set forth.

Judgment. This was an appeal made by Yanni Hadji Kyriako from an order dismissing an application made by him that the District Court should set aside a sale of one-third of a piece of land of 16 donums called Anemika, described in title deed No. 1254, dated July, 1291, and of which the Appellant had become the purchaser as being the highest bidder at public auction.

The ground of the application was, that the Appellant was under the impression, when he finally bid for the property, that it was a vineyard, whereas the property sold or purporting to be sold was simply land.

The facts seem to be, that the Defendant Stiliano, a brother of the Appellant, was originally registered for land under the registration No. 1254 of July, 1291, but that, subsequently, having planted the land with vines, they were on July 21st, 1890, attached for his debt by a judgment creditor named Constanti Pavlides, under a judgment dated July 12th, 1890, while the registration for the land still remained standing in the books of the Land Registry Office.

It appears that the vines were not registered in the books of the Land Registry Office, but were attached as property for which Stiliano was entitled to be registered.

We gather this from the documents furnished to us from the Limassol Land Registry Office, but at any rate it seems clear from the statements of Counsel, that, at the time of the auction at which the Appellant was the highest bidder, the vines were under attachment by some judgment creditor.

The Plaintiff, as another judgment creditor of the Defendant, registered his judgment so as to attach the property purporting to be registered under No. 1254, and this was put up to auction by the Mukhtar of the village and knocked down to the Appellant for £25 10s.

The Appellant says he thought that he was buying his brother's share in the vineyard. He admits, however, that before it was knocked down he heard it was land, and not vineyard, and that when the bidding was at £24, the Auctioneer announced he was selling vine-land, but says he did not hear it.

Having bid up to £25 10s., he preferred to pay the requisite deposit of the purchase money rather than have the property put up again, at the risk of bearing the loss which would accrue on its being sold a second time for less than it fetched on the first occasion.

The Mukhtar who was selling the property stated, that he sold it in accordance with the auction bill, that people asked him at the sale whether the vines were to be sold, and he replied " No, only the land." and that the Appellant could have easily heard what he said.

The Mukhtar also said, that about an hour after the property was knocked down, the Appellant came to him and said " Now I have bought the land they say I cannot take the vines; " but that when he made him pay the deposit on the purchase he said nothing.

Another bidder also gave evidence that he bid up to £20, when he heard it cried out loudly, that land only was being sold, and then left off bidding. This witness says that the Appellant could have heard what the Auctioneer said, as he was sitting on a ladder close by.

The Auctioneer, and a Tax Collector who was present at the sale, also testified that the property was called out as " *χωράφι* " in a loud voice, which the latter said might have been heard at a distance of 5 donums.

Beyond what the Mukhtar says, which possibly might not have been heard by the Appellant, there is no evidence that either he or the Auctioneer publicly declared, that the vines were not being sold.

The District Court were of opinion that the Appellant had made a mistake as to which he was entitled to relief had he not shown gross negligence in persisting in bidding after he heard the Auctioneer crying out that he was selling only land, and dismissed his application.

On the appeal to this Court it was contended for the Appellant that the District Court should have granted relief; (1) on, the ground that the sale was void as relating to a subject matter which did not exist, although contemplated by the parties as existing; inasmuch as if the land was planted with vines it had become merged in the vineyard, and no separate registration could therefore legally exist for the land: and that in fact nothing existed which could be sold and nothing consequently was sold [Land Code, Articles 2, Sub-section 2, 81, 83; Law of 28 Rejeb, 1291; Article 2 of the Instructions regarding Tapu Seneds of 15 Shaban, 1276]; (2), that there was a *bonâ fide* mistake on the part of the Appellant who was not proved to have heard that the land and nothing else was being sold. For the Respondent the preliminary objection was put forward that the Appellant should have taken proceedings by a separate action instead of by an application in the present

action, and it was further contended that the Auctioneer made it perfectly clear he was only selling the land, and that the Appellant acted with his eyes open; that separate registrations constantly exist for land and the vines on the land, and that they represent separate subjects of property which can be held by different people and are distinctly governed by the laws of inheritance respectively applicable to Arazi-mirié and Mulk. (Article 28 of the Land Code.)

. . . . . .

There is, however, the other point raised by the Appellant's Advocate, *i.e.* that the subject matter of the sale was not in existence at the time of the sale.

The property purported to be sold was one-third of 16 donums of land at Anemika, with certain boundaries appearing under registration No. 1254, dated July, 1291. Was there any such property for which registration could stand in existence at the date of the sale?

In dealing with any question of law touching Arazi-mirié, it is important to bear in mind the fact that the ownership (*dominium*) of such land always remains vested in the State; and that the possession of cultivable Arazi-mirié is granted solely for the purpose of cultivation and the production of a tithe; and that under Article 68 of the Land Code, if its possessor failed to cultivate for the space of three years without such valid excuses as the Code names, the State was entitled to resume possession and its former possessor could only have it transferred to him again on paying Bedel Misl or its equivalent value. It is true that Article 68 has been repealed by the Law concerning the confiscation of public lands, No. XIV. of 1885, and the period of non-cultivation enlarged to ten years; but the principle underlying the article in question is manifest throughout the Land Code, which by Article 21 goes so far as to protect the cultivator and tithe payer, even though as regards the rightful possessor he may be a wrong doer.

So far as I am able to gather from the Land Code, there appear to be three different sorts of Mulk, *i.e.*, I. Sirf or Pure Mulk which is divided into the four kinds described under the 4 Sub-sections to Article 2 of the Code; II. Mulk on Mukata Arazi-mevkoufé; and III. Mulk on Arazi-mirié.

It is with this last class that we have to deal, and with that particular species of it created by the planting of vines. From Articles 25 and 44 it may be gathered, I think, that the converse of the English and Roman rules of law "*solo cedit quod solo inaedificatur*" prevails under the Turkish Land Code; and that where vines and buildings (Mulk) are lawfully planted or put upon Arazi-mirié then the Arazi-mirié becomes subject to the Mulk.

In using the word lawfully, I intend to include vines which, although they have not originally been planted with the consent of the competent authority, yet having been left for more than three years without any action on the part of the Official, who could, on behalf of the Government, have had them pulled up, have obtained a legal and recognized status. It is to this class that I gather from the evidence that the vines in question in this case belong.

It is probable that the intention of the Legislature was, that, if land was planted with the permission of the Official, some record of the fact that the land was so planted should be made in the books of the Defterkhané.

It is not unlikely, therefore, that if the vines in question had been so permissibly planted some note or record of the fact would have been made in registration No. 1254, and this case could never have arisen.

This theory of the subjection of the land to the Mulk is, I think, confirmed by Article 49 which enacts that where a sale of Mulk, vineyard, &c., which has been planted through the medium of the Official on land possessed by Tapu takes place " the land also is caused to be alienated " to the person who buys the Mulk.

That is to say, the Law would appear to recognize the impossibility of a proper enjoyment of the Mulk without the possession of the land on which it stands, and to contemplate the prevention of a separate ownership for the land when subject to Mulk.

This is the view held by a Turkish Commentator on the Land Code to whom I have had access, and it would seem to be supported by the terms of Article 44 which, in the case of a separate ownership arising for land, and for Mulk trees or buildings thereon, prevents the possessor of the land from alienating to anyone else while the owner of the Mulk is willing to take it for its Tapu value. It may be noted that Article 44 makes no specific mention of vineyards, although they are distinctly mentioned in Article 49, and from their nature it is difficult to suppose the case of a separate ownership arising except by usurpation, and this the Code provides for under Article 35. It is possible also that an apparent separate ownership might arise on a careless and incomplete Yoklama.

Article 81 which contemplates Mulk, vineyards, &c., planted or put on land held by Tapu with the permission of the proper authority enacts, that such vines, &c., on the death of the owner are inherited like any other Mulk property and only succession duty on the assessed value of the land on which such vines, &c., stand is charged. " Such land " the article goes on to say " is granted gratis (that is, I presume, without

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"the payment of Muajellé) to the heirs in proportion to the shares "they get respectively in inheriting such trees, vines and buildings." And the records in the Imperial Defterkhané are rectified accordingly "and a marginal note is made in the title-deeds in their possession." This article would seem to imply, that there would be no separate inheritance of the land on which the Mulk stood; and would permit, it seems to me, heirs who would not inherit Arazi-mirié under the Imperial Khat of 17 Mouharrem, 1284, to take it, from the fact that it was covered with vines, and, therefore, heritable as Mulk.

This would seem to show, that, at any rate, while covered with vines the Arazi-mirié is merged in the Mulk, and for the time being has no independent existence, and is incapable of being inherited separately from the Mulk upon it.

Is there then any property or interest in the Arazi-mirié capable of sale and purchase while it is covered with vines?

If we look at Article 83 we find that when the vines are dried up and disappear, the land on which they stand becomes liable to Tapu with a preferential right to the late owner of the vines to purchase it for its Tapu value. That is to say, it reverts to the Beit-ul-Mal, which takes it again into the category of simple Arazi-mirié. The only exception is, that if the land has come to and been held originally by the owner of the vines as Arazi-mirié, either by inheritance or by other means, then it is left in his hands without any interference from the Beit-ul-Mal. It is pretty clear from the first part of this article, that under the circumstances mentioned, there is no separate property or interest capable of disposal by sale. The reversion to the Arazi-mirié devolves upon the Beit-ul-Mal.

Now assuming in the case before us, that the land is entirely covered with vines, and that these vines are sold in pursuance of the judgment in regard to which they are attached, what present or future interest would be conveyed to the Appellant by registering him for the land described under the registration 1254 of July, 1291? The present possession of the land must go with the vines to their purchaser, and so long as the land remains covered with vines it must go with them either to the purchaser's heirs or to his transferees. If the vines disappeared by drying up or otherwise in the purchaser's lifetime, then the land would become liable to Tapu, and he, as the owner of the vines, would have a preferential right to take it on paying the Bedel Misl or equivalent value. But the registration which would follow on a sale to the Appellant would be for land, and not for a reversionary interest in land, and as the land would on a sale of the vines go with

them, there would, in fact, be no land which the registration could represent.

It seems, therefore, to me, that if the land is covered with vines the registration, under which the Appellant bought, represents nothing: that nothing could have been put up to auction, and nothing bought or sold, and that, in fact, the supposed subject matter of the sale was non-existent.

If this be so, the Appellant would, in my opinion, be entitled to the relief he seeks.

If, however, the land is only partly covered with vines, then there would appear to be a mistake on both sides as to what was being sold and bought. The Auctioneer was purporting to sell one-third of 16 donums of land while, possibly, there was only half a donum within the boundaries which could be sold, as not being covered with vines, while the Appellant must be considered as having agreed to buy what the Auctioneer was purporting to sell, *i.e.* one-third of 16 donums of land within certain boundaries at a certain locality. This, however, was not, and could not have been sold, and, therefore, there was in effect no contract between the parties. Consequently, on this ground also, the Appellant would be entitled to relief.

In holding that the terms of the Land Code support the theory, that the land goes with the vines on a transfer of the latter, it may be said that I have overlooked the fact that Articles 49, 81 and 83 all refer to vines planted with the consent of the competent authority on land held by Tapu which implies the like consent; and that, assuming the vines in question, planted without the consent of the authority were sold, so to speak privately, there would be no sale of the land, which requires the consent of the competent authority to its transfer. This, perhaps, would have been so before the Law of 28 Rejeb, 1291, up to which time sales of Mulk property privately appear to have been deemed to be good sales and to validly transfer the Mulk, though not the Arazi-mirié on which it stood.

At the present time, however, no such sales of Mulk would be deemed valid if disputed, and the legal ownership of the vines, if sold as Mulk alone, would not actually and finally vest in the purchaser till they were registered in his name.

This registration would be granted by the Land Registry Office on application after due proof and provided there was no legal impediment; and would evidence the consent of the competent authority to the purchaser's holding vines on Arazi-mirié; and I presume that Article 49

would then be brought into force and " the land would also be caused to be alienated " to the purchaser of the vines, and thus the unity of ownership contended for would be accomplished.

The same train of reasoning may be applied to the case of the inheritance of the vines in question. Their owner, Stiliano, from the evidence, though unregistered for them, is entitled to be registered, and, if he had died, the heirs to his Mulk would have enjoyed a similar right, and could have obtained registration for the vines, and would, under Art. 81, absorb in their shares of the Mulk the Arazi-mirié vested in their predecessor in title of the Mulk.

I come now to the question of registration, about which, I think, I should say a few words, in view of the fact that the independent existence of registration for Arazi-mirié which has merged in Mulk and vested probably under another registration in someone else, is likely to cause expense and annoyance to suitors before the Courts who make use of the privilege of registering their judgments.

It is hardly likely that this case could have occurred if the Defendant, Stiliano, had obtained registration for the vines when he planted them or afterwards. If he had done so, either the registration for the land on which they stood would have been cancelled, or some note would, I suppose, have been made on it to show that it had, for the time being, Mulk upon it.

I do not see how such a case could have otherwise been prevented, except by a careful Yoklama, which, perhaps, would have enabled the Land Registry Office to correct its Arazi-mirié registration. So far as I can see under the existing regulations the Land Registry Office could not have prevented the attachment and sale of property, which, in fact, did not exist. The judgment creditor, however, would have been wise if, in registering his judgment, he had made enquiries as to whether there were vines on the land, and attached them also, or had attached vines on the chance of their existing. As a matter of fact, however, we gather that the vines were already attached before he had the opportunity of doing so.

There can be, no doubt, from a perusal of the Land Code and the Tapu regulations that the whole system of registration is designed for fiscal purposes, and with a view to a complete taxation of all Arazi-mirié.

At the time of the promulgation of the Land Code in 1274, there was no provision for the registration of Mulk property but only for Arazi-mirié. Looking, however, at Article 7 of the Regulations regarding

Tapu Seneds, dated 7 Shaban, 1276, we find that a fee of 5 per cent. was to be taken on the value of lands when a title-deed was issued "in accordance "with the law for the sites of Chiftlik buildings, gardens, vineyards, "&c." And the rule was that the 5 per cent. should only be estimated on the actual value of the land without regard to the value of the Mulk on it.

This would almost appear to me, as if it were intended that the fact of Mulk being on the land should appear on these title-deeds together with the value of the land and the value of the Mulk on it.

Again in the Instructions regarding Tapu Seneds, dated 15 Shaban, 1276, which put into force the triple certificate scheme of registration, Article 2 lays down the form of the certificate; and under the heading of Ushrli (titheable) arable land the description of its species was to be set forth, whether grass, vineyard, garden or orchards, &c.

Certain other species of land paying the equivalent of tithe, in which vineyards are not included, was to be registered according to another form; while in the case of Chiftlik buildings it would appear that it was intended that separate certificates should be granted for the land and buildings.

Up to the issue of the Law 28 Rejeb, 1291, or 28th August, 1290, there was no provision for the registration of Emlak; and it is probable that up to that date such registration as there was for these properties was carried out under the terms of the instructions I have alluded to: and before their issue probably by notes recorded on the Arazi-mirié kochans, an opinion I derive from a perusal of the latter part of Article 81. All this would tend to support the theory that the existence of Mulk on Arazi-mirié was recorded in the Defter Khané upon the Arazi-mirié registration and kochans till the promulgation of the Law of 28 Rejeb, 1291.

By the courtesy of the Registrar General, we have been furnished with copies of three Emirnamés addressed to his Office and bearing date, respectively; (*a*) 7 Ramazan, 1291, or 5th October, 1290; (*b*) 18 Zilkadé, 1291, or 15th December, 1290; (*c*) 12 Shaban, 1291, or 31st August, 1291, bearing on the question before us.

From (*a*) we gather that only one title-deed was to be issued for Sirf or pure Mulk, while for Mukatalou places a Mulk title-deed for the building or trees was to be issued, and a separate one for the Arazi-mirié or Arazi-mevkoufé on which they stood was also to be given. I think, however, from the terms of Article 25 of the Land Code, that a vineyard would not be a Mukatalou place. That article says that

Mukata cannot be assessed on the land of these vineyards and gardens on which tithe is taken on the produce.

Again the Law of Rejeb in its heading and Article 2 only appear to refer to pure or Sirf Mulk, and to Mulk which pays the equivalent of tithe (Bedel Ushur) and Mukatalou.

It would not include what we may call titheable Mulk upon which the tithe has not been commuted, and Bedel Ushur fixed, such as vineyards and gardens. It is doubtful, therefore, in my opinion, whether under the Law of Rejeb a kochan for what I have called titheable Mulk as opposed to Mulk paying Bedel Ushur or Mukata could issue. It is possible, however, that the word Mukatalou is wide enough in its meaning to embrace titheable Mulk.

Emirnamé (*b*) directs that if a Tapu Sened does not exist for the land on which vines or gardens stand when Mulk kochans are issued for them, the same must be dealt with and the fees charged in conformity with the prescriptions and regulations on Tapu Seneds. This would seem to me to mean that the Tapu Officials must take care that there was no loss to the revenue by failing to ear-mark as Arazi-mirié, land of that nature, which had been absorbed by the planting of gardens and vineyards, and for which, perhaps, no Muajellé had been paid, when it was first appropriated by the person who planted the vineyards and garden. It does not follow from the above that separate Tapu registration and kochans were necessary, although it might have been so from the fact that the Emirnamé goes on to say that separate entries for the fees were to be made in the Emlak and Tapu returns respectively.

I have little doubt that the object of such registrations was that, in case the Mulk disappeared, the land could be easily identified as property reverting to the Beit-ul-Mal.

The Emirnamé (*c*) ordains that the Tapu Officials in forwarding Emlak returns should show in the column for remarks the nature or the category of the ground on which the Emlak stood.

From these Emirnamés, Instructions, &c., therefore, we gather that it might have been the custom in the Land Registry Office to have separate registrations for the land and the Emlak upon it. This, however, was not, in my opinion, done to show that in every such case the land might exist as a property apart from the Emlak on it, but, as I have said, for fiscal purposes.

It is clear that, in the case of fruitful trees, such as caroubs and olives, the ownership of the land may be quite distinct from the ownership of the trees, and also that a house or building covering only half a donum might be put on an Arazi-mirié field of 5 donums, and the

house and the land would be quite capable of distinct and actual ownership. In the case, however, of vines or garden trees or bushes, there seems to be no possibility of a distinct actual ownership and enjoyment by two different people of the land and the Mulk. A registration, therefore, for the land as the law stands, while useful as indicating to the Land Registry Office the category of the land, would not show, save in the case, perhaps, of the contingencies set forth in Article 35, that there was any land existing capable of ownership.

I think, however, that the practice of registering the land and the vines as two separate properties, if permitted to take place without some indication on each register, that the one included the other, would be likely to lead under the existing law as regards the registration of judgments to many such cases as the one we are now concerned with.

I cannot see that the Arazi-mirié on which vines stand might not be as well ear-marked by making one registration in which the category of the land might be stated, and its assessed value, as well as the nature and value of the Mulk on it declared, and from a specimen title-deed which has been furnished to us by the Registrar General, this appears to be the practice at present.

If the present numerous registrations which we understand exist, were corrected in this way, it would probably be a great boon to the public.

The foregoing observations only apply to Emlak on Arazi-mirié and Arazi-mevkoufé, and not to Sirf or pure Mulk. In this latter class there is, of course, no necessity even for the Land Registry Office to make a double registration, as the land belongs absolutely to the owner of the Mulk and there is no reversion to the Beit-ul-Mal.

Lastly, to consider the question raised by the Respondent's Advocate as to the form of these proceedings, I see no reason why the Appellant should not have sought the relief he asks by application in this action rather than by a separate action and I should not interfere on that ground.

My judgment, therefore, will be for the Appellant, and I think that the order of the District Court must be set aside, and that he should be granted the relief he seeks.

Appeal allowed.