TYSER, C.J. & BERTRAM, J. 1907

Nov. 20

[TYSER, C.J. AND BERTRAM, J.]

SAVA HAJI PASCALI AND KYRIAKOU PANAYI, *Plaintiffs,*

v.

PANAYI HAJI TOGLI, *Defendant.*

IMMOVABLE PROPERTY—LIFE INTEREST IN ARAZI MIRIE—GIFT IN CONSIDERATION OF MARRIAGE—UNREGISTERED TRANSFER—EQUITABLE RULE AGAINST UNCONSCIENTIOUS ADVANTAGE—PROSPECTIVE DAMAGES.

The Defendant in consideration of the Plaintiff S. marrying his daughter the Plaintiff K. agreed that the Plaintiff S. should have the use and enjoyment of certain Arazi Mirie properties during his (the Defendant's) lifetime. It was understood that the properties should not be registered in the name of S. Some time after the marriage the Defendant resumed possession of the properties and repudiated the agreement.

HELD: *that the Plaintiff S. was entitled to damages.*

HELD: *further: that the measure of damages was the capitalised annual value of the properties calculated on the basis of the actuarial expectation of life of the Defendant.*

Damages may be calculated prospectively.

The equitable rule against unconscientious advantage considered.

Where the owner of immovable property, in return for good consideration moving from another person enters into an agreement purporting to transfer the possession of the property to that other person, and afterwards by his own deliberate act in breach of the agreement dispossesses him, the Court will on equitable principles compel him to make compensation to the person dispossessed.

The question, whether with the consent of the Government a grant of a life interest in Arazi Mirie would be entitled to registration, reserved.

This was an appeal from the judgment of the District Court of Famagusta.

So far as is material to the appeal the facts were as follows:

The Plaintiff Sava Haji Pascali alleged and the Court found as a fact that at the time of his marriage with the Plaintiff Kyriakou Panayi (who was the daughter of the Defendant) and in consideration of the marriage, the Defendant promised to put the Defendant into possession of 50 donums of immovable property.

The principal passages in the evidence relating to this promise were as follows:—

(1) By the Plaintiff Sava Haji Pascali "He said he would give me 50 donums of land . . if I would marry his daughter . . I said, he must give us qochans. . . . He said Georgi and Mariana are still minors. I do not wish to wrong them. I do not want to marry again, and all my land and property will go to my children. I am not going to take them back from you."

(2) By the Plaintiff Kyriakou Panayi, "He named the fields he gave us. My husband said he must give qochans. He said, I am not giving it to strangers but to my daughter, as dower. He said he did not like to register in my name, because then I should take another share in the rest of the land and the other children would be wronged."

Three years after the marriage, the Defendant, having married again, quarrelled with his son-in-law, repudiated the agreement and resumed possession of the properties.

This action was accordingly instituted claiming the value of the properties.

The Court made the following finding of facts:—

" There was an agreement before marriage and as a condition of the marriage that the land should be given . . . not in full ownership, but on the terms that the father during his lifetime should not interfere with the possession. He did not intend to bind his successors, but he did intend to bind himself."

Judgment was given for the Plaintiff for £17 10*s*. being the estimated rental value of the fields in question from the date of the resumption of possession by the Defendant to the date of judgment. The majority of the Court, differing from the President, declined to assess prospective damages.

The Plaintiff appealed against that part of the judgment which declared that the agreement was limited to a life interest in the properties and also against the principle on which the Court assessed the damages.

The Defendant entered a cross-appeal as to the whole judgment.

Theodotou for the Plaintiff.

A life interest in Arazi Mirie is a thing unknown to the Ottoman law. The conception first appeared in Cyprus in Sec. 23 of the Intestate Succession Law, 1884, but that provision is now repealed. What the parties intended was a dower and a dower in the customary form. Such a thing as a dower limited to a life interest has never been heard of, and this cannot have been the intention of the parties. All that the words which the Court has construed as limiting the gift to a life interest really mean is simply that the transfer was not to be registered. For the purposes of assessing the damages for breach of a contract of dower this is a stipulation which the law will ignore. See *Haji Kalliope Evaggeli* v. *Haji Pavli Nicola* (1900) 5. C.L.R., 49. We are entitled to the full value of the properties.

Secondly, assuming that the agreement was limited to a life interest the damages are assessed on a wrong basis. The normal method of working such lands is by an agreement of partnership, and the damages should have been assessed upon the average profits that would have been realised on this basis. Further the damages should have been assessed once for all.

Artemis for the Defendant.

Assuming that the finding of the Court must stand as a finding of fact, I say that this is an agreement which the law will not enforce.

It is an attempt to create an interest unrecognised by the law—an estate for life in Arazi Mirie—and as such is invalid altogether.

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Further it is invalidated by the stipulation against registration. In previous cases it may be true that incidently the parties did not intend to register (as in *Haji Kalliope Evaggeli* v. *Haji Pavli Nicola*, above cited), but here the condition against registration was of the very essence of the contract.

As to prospective damages it is impossible to assess damages upon the basis of anything so uncertain as the duration of human life.

Judgment: The finding of fact which the District Court has come to in this case, though at first sight singular, on an examination of the evidence seems to us accurately to represent the actual intention of the parties.

It is not necessary for us to decide whether the law would recognise a life estate in Arazi Mirie. It is possible that if made with the assent of the Government, the grant of such an interest might be registered. It is clear at any rate that, if it is not registered (and it was not registered in this case), it will not be recognised.

Mr. Artemis contends however, that, quite apart from this point, the parties having agreed to effect a transfer of immovable property on the express terms that the transfer should not be registered, the whole transaction was void, and that the Plaintiffs are not entitled to any remedy whatever in respect of it.

The principles on which the Court deals with these informal transfers of property have been considered in a great number of cases.

On the one hand it has been decided that where two parties agree for the sale of a property *and for the registration of the sale*, and one party refuses to carry out the agreement, damages can be recovered by the other for the breach. *George Chacalli* v. *Kallourena* (1895) 3 C.L.R., 246.

On the other hand it has been equally clearly decided that where there has been an agreement to sell and the purchaser has been put into possession, *but the facts show that neither party intended to register*, then if either party, whether vendor or purchaser, subsequently repudiates the transaction, the Court will decline to give damages to the other for the breach of such a contract. *Michael Gavrilidi* v. *Sava Georghi* (1895) 3 C.L.R., 140.

This Court has however developed an equitable principle which mitigates the rigour of this doctrine. The first reported case in which that principle was referred to is *Asinetta Haji Georghi* v. *Haji Georghi Brutso* (1887) 1 C.L.R., 44. It is again referred to in *Christinou Stavrino Yanni* v. *The Queen's Advocate* (1888) 1 C.L.R., 45, in *Theodulo Zenobio* v. *Meirem Osman* (1893) 2 C.L.R., 168, *Michael Gavrilidi* v. *Sava Georghi* (1895) 3 C.L.R., 140, and *Georghio Anastassi* v. *Haji Iosifi Haji Kyriaco* (1895) 3 C.L.R., 243. In all these cases the principle is enunciated *obiter*. None of them are instances of its application. It is spoken of as an old established principle and the case in which it was first put into operation is not reported.

The rule adopted by the Court, as laid down in the case of *Michael Gavrilidi* v. *Sava Georghi* is this—that "it would be inequitable to allow the vendor to recover possession of the land and at the same time retain the purchase money" and it was accordingly declared that "*in a suit by the vendor to turn the purchaser out*" . . . "such an order would only be made on the terms that the vendor refunded to the purchaser the amount of the purchase moneys." In *Theodulo Zenobio* v. *Meirem Osman* (p. 172), the rule is said to be based "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 legal effect" but both in that case and in the other cases above cited, the state of facts contemplated was that of an unconscientious vendor who had received his purchase money coming into Court and claiming to recover possession by virtue of his registered title. The rule in effect declared that the Court would not give to such a person the legal remedy to which he was entitled, unless he first "did equity" by repaying the purchase money. It was no doubt based upon the old English principle that he who invoked the aid of a Court of Equity to obtain an equitable remedy should not be allowed to obtain it except on terms of doing equity to the person against whom he sought it.

The principle received an important extension in two cases arising out of agreements for dower. Those cases are *Markouli* v. *Markouli* (1894) 3 C.L.R., 32, and *Evaggeli* v. *Nikola* (1900) 5 C.L.R., 49. In these cases no purchase money could be recovered for by the very nature of the transaction no money had passed. Moreover, the registered proprietor, having already assumed possession of the properties, had no occasion to invoke the assistance of the Court. It was the dispossessed party who appealed to the Court and sought and obtained compensation for disturbance. The only method by which the Court could inforce the equitable principle above enunciated was by an award of damages. In neither case did it appear that the parties had any intention of registering the transfer of the properties. In both cases damages were awarded. In the first cases they were spoken of simply as damages for breach of contract, but if this was the principle of the decision, it would have been very difficult to reconcile with the case of *Michael Gavrilidi* v. *Sava Georghi* (1895) 3 C.L.R., 140. In the second case, however, the decision in *Markouli* v. *Markouli* was explained as being based upon the equitable principle above explained, namely, that "the Court will not allow a vendor to take a wrongful advantage of a transaction which he knows is without legal effect." It is worthy of note that this case (*Evaggeli* v. *Nikola*) is the first reported case in which that principle was actually applied.

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.

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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.

As to the amount of the damages, the cause of action is complete and there is no reason why they should not be calculated prospectively. In the two previous dower cases, where the agreement was to transfer the whole interest in the properties, the measure of damages was the value of the properties. Here the agreement was merely to transfer a life interest, and the measure of damages in this case is the value of that life interest. To ascertain this, the annual value of the properties to a non-cultivating owner must be capitalised upon the basis of the expectation of life of a person of the age of the Defendant at the date of the dispossession. This can be ascertained from the ordinary actuarial tables used by insurance companies.

The evidence before us being of too meagre a character to allow us to ascertain this amount, the case must go back to the Court below to take further evidence and to determine the amount of the damages on the principles we have indicated.

Appeal and cross-appeal dismissed.

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ONOFRIOS J. JASSONIDES, *Plaintiff,*

v.

ADA N. KYPRIOTI, *Defendant.*

PRE-EMPTION—ADJOINING PROPRIETORS—"FIRST CLAIM"—"SECOND CLAIM"—MEJELLE, ARTS. 1028, 1029, 1030, 1033.

A person entitled to a right of pre-emption does not lose that right by not immediately making the first claim as soon as he hears a report of the sale, unless he either:

(1) *Actually believes the report, or*

(2) *Receives it from a person reasonably entitled to credence.*

It is not necessary that the "second claim" should be made at the first available opportunity after the "first claim." It is sufficient if it is made within such an interval as is reasonably necessary for the purpose in view of all the circumstances of the case.

This was an appeal from the decision of the District Court of Limassol, dismissing a claim of pre-emption by the Plaintiff, as adjoining owner on the ground of his delay in asserting his right.