TYSER, C.J. & BERTRAM J.

NICOLAOS J. DIMITRIOU AND ANOTHER v. KING'S ADVOCATE

BY THE COURT: *A bond according to the English form is not in Ottoman law an "acknowledgment in customary form" within the meaning of Art. 1610 of Mejellé so as to be conclusive on the person making it.*

An acknowledgment that a certain sum will be due in the future upon a contingency is not a valid acknowledgment according to Ottoman law.

D. and E. Ottoman subjects resident in Cyprus, applied to the Government in 1892 for licenses to manufacture tobacco under the Tobacco Regulations, 1292. The Government informed the applicants that licenses would be granted to them on condition of their paying an annual license duty of £55 a year, as a contribution to the cost of supervision of their factories. The applicants consented to this condition and entered into bonds in the ordinary English Form binding themselves to pay this license duty In 1896 the license of E. was transferred to his widow and subsequently to his daughter, the Plaintiff Helene Zanetto, and in 1899 the form of the bond was changed, and a new bond was given binding the licensee only to conform to the laws and regulations in force for the time being. In 1908 the licensees discovered that the Government were not entitled to impose the license duty

HELD: PER TYSER, C.J. (*applying Ottoman law*), *that all the payments of license duty in both cases within 15 years were recoverable without interest.*

PER BERTRAM, J. (*applying English law*), *that only such payments as had been made in respect of the license originally granted to E. as had been made within the previous six years were recoverable (without interest) and that the payments made by D. were not recoverable.*

Where a District Court is equally divided, the claim must be dismissed on the principle Semper præsumitur pro negante.

NOTE.—"*In view of the alterations effected by the Cyprus Courts of Justice Amendment Order, 1910, which now regulates actions against the Government, it has been thought unnecessary to print the judgments in this case.*"

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

ANTONI ENGLEZAKES, *Plaintiff,*

v.

IOANNI LOIZOU, *Defendant.*

IMMOVABLE PROPERTY—EXECUTION—FORCED SALE—MERGER OF ARAZI-MIRIE IN MULK—PERMISSION TO ERECT STRUCTURE ON ARAZI-MIRIE—RIGHT OF PURCHASER OF SITE TO REQUIRE REMOVAL—MEJELLE, ART. 831.

The doctrine of Gavrilides v. Haji Kyriako (4 *C.L.R.*, 84) *that an Arazi-Mirié site on which mulk property is situated has no separate existence, being for the time being merged in the mulk has no application to mulk in respect of which the occupier is neither registered nor entitled to be registered.*

The owner of Arazi-Mirié who has allowed another person to erect a structure upon his land, is in the position of a person who has lent his property for use, and is entitled at any time to demand the removal of the structure.

An owner of Arazi-Mirié sold a piece of his land to his son in order to enable him to build a mandra. The son built a mandra and remained in possession of it many years but never had it registered in his name. Subsequently the whole property, including the site of the mandra was sold at a forced sale to the Plaintiff.

HELD: *That the Plaintiff was entitled to the removal of the mandra.*

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

The claim of the Plaintiff was for an injunction restraining the Defendant from interfering with a field of five donums in extent

belonging to the Plaintiff, and for an order calling upon the Defendant to remove a certain mandra, belonging to him, and situated upon a corner of the Plaintiff's field.

It appeared from the evidence that a field, of which the field in question formed a part, was originally registered in the name of the Defendant's father and four others in undivided shares. Thirty years before action brought an informal partition took place and the portion now in question fell to Defendant's father. This partition however remained unregistered.

In or about the year 1893 Defendant's father died. In 1804 Plaintiff who had an old unexecuted judgment against Defendant's father obtained an order for the sale of his interest in the property and himself bought in this interest at a public auction for £7. Defendant himself was present at this auction.

Subsequently the Plaintiff applied to the Land Registry Office and obtained a partition. The partition followed the lines of the old informal partition and consequently the part allotted to the Plaintiff was the five donums previously occupied by Defendant's father, upon which the mandra in question was standing. A qochan in accordance with this partition was now issued to the Plaintiff.

The Plaintiff now brought the present action, which in effect claimed the site of the mandra as being within the boundaries of his qochan, and called upon the Defendant to remove the mandra.

The Defendant pleaded in effect that three years before his father's death (*i.e.*, about the year 1890) his father had sold him the site of the mandra to enable him to build the mandra upon it; that he had then built the mandra and had been in occupation ever since, and had consequently acquired a prescriptive title. He did not however bring a cross-action to set aside the Plaintiff's qochan, and to obtain registration on the basis of this alleged prescriptive title. As to the sale he alleged that he did not know that the mandra passed by the sale.

The District Court gave judgment for the Defendant on the grounds stated below:

The Plaintiff appealed.

Paschales Constantinides for the Appellant.

Artemis for the Respondent.

The Court allowed the appeal.

Judgment: In this case the District Court has found for the Defendant apparently on two grounds:

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1. That the site of the mandra being subject to the mandra had no separate existence, the Arazi-Mirié being merged in the mulk, and that consequently it did not pass by the sale, which was advertised as being a sale of Arazi-Mirié only.

2. That even though the sale legally included the mandra, the Defendant had a " valid reason " for not raising his objection at the sale, since " as the auction bill was worded no one could possibly " understand that the mandra was on sale."

With regard to the second point the judgment of the District Court seems to proceed upon a misapprehension. The Plaintiff does not claim the mandra. He wishes it removed. The question is not whether the mandra itself passed by the sale, but whether the site of the mandra so passed.

Plaintiff at the auction sale bought an undivided share of a piece of land, and the boundaries of this piece of land included the site of the mandra.

Subsequently he arranged a partition with the other co-owners and received as his share a certain portion which included the site of the mandra.

Before the partition the Defendant could *prima facie* have been called upon by the co-owners, or any one of them, to remove the mandra, as being within the boundaries of their qochan.

After the partition the Defendant could *prima facie* have been called upon by the Plaintiff to remove the mandra as being within the boundaries of *his* qochan.

The District Court hold in effect that he cannot be called upon to do so, because the site of the mandra has no separate existence, being merged in the mandra itself. The decision seems to be based upon the case of *Gavrilides v. Haji Kyriako* (1898) 4 C.L.R., 84. The doctrine of that case can have no application here, inasmuch as the mandra is neither registered nor entitled to be registered and under the Law of 28 Rejeb, 1291, unregistered mulk immoveables cannot be recognised.

Mr. Artemis puts the case on another ground. He says that the Defendant erected the mandra by the license of his father, and that consequently the Plaintiff as claiming through his father, cannot demand its removal. But a license to erect a structure on a man's Arazi-Mirié does not bind him to allow it to remain for all time. If this case were simply that of a license to build the legal effect of it would be that the land was lent for the purpose. The case would be covered by Art. 831 of the Mejellé, and under that article the owner of

the land would be entitled at any time to demand the removal of the structure and a purchaser from the owner at a forced sale has clearly the same rights as the owner.

The case however is not that of a license to build. It is the ordinary case of an unregistered sale, and it is clearly settled by authority that a purchaser under such circumstances cannot resist a claim by the registered owner for the removal of any buildings he may have erected on the site so purchased. *Haji Ali v. Elia* (1900) 5 C.L.R., 68. Such a person cannot have built under the belief that he had a right to the land, and consequently the protection of Art. 35 of the Land Code does not apply to him.

To sum up:—

If Defendant had no right to the land, and did not believe that he had a right to the land, then he was either a licensee or a trespasser.

If he was a licensee, it was the case of a loan of land to build a mandra, and the license could be revoked by the owner.

If he was a trespasser the Court would order the removal of the mandra.

If Defendant built under a belief that he was entitled to the land, as he was not registered as owner such a belief will not avail him.

If he had any right to the land, it was as unregistered owner by prescription. He has not sought by action or cross-action to assert such a right. Therefore the Court cannot entertain a claim to any such right.

Nor is it worth while in this case to give him an opportunity of asserting such a right, inasmuch as it appears by the evidence that the Mandra in dispute is only worth ten shillings.

The appeal must accordingly be allowed with costs.

Appeal allowed.