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

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ACHILLEA HYPERMACHOS AND HELENE ACHILLEA, AS NATURAL GUARDIANS OF THEIR MINOR CHILDREN MICHAEL AND AUGUSTA, *Plaintiffs*,

v.

THONOU DIMITRI AND OTHERS, AS HEIRS OF THE DECEASED ARPANAKI DIMITRI, *Defendants*.

ACKNOWELDGMENT OF DEBT—DELIVERY—ACKNOWLEDGMENT ENFORCEABLE ON DEATH—WILL—INVALIDITY—WILLS AND SUCCESSION LAW, 1895—TESTAMENTARY RIGHTS OF CHRISTIAN SUBJECTS OF PORTE—ACKNOWLEDGMENT OF DEBT IN CUSTOMARY FORM—RIGHT OF HEIRS TO FALSIFY—DOCUMENT OF FICTITIOUS CHARACTER—DEFI DAWA—MEJELLE, ARTS. 854, 1584, 1589, 1601, 1610, 1611 AND 1631.

A., desiring to benefit the infant children of B. and C. after his death, drew up an acknowledgment of debt, said to be in customary form, acknowledging an obligation to pay the sum of £100 to B. and C. for the benefit of the children in return for cash received.

It was agreed between A., B. and C. that the document should not be enforceable till after the death of A.

A. gave the document to B. and went with him to the office of D. where, by arrangement, A. and B. deposited the document in the hands of D. to be held by him till the death of A. After the death of A., B. and C. sued the heirs of A. upon the acknowledgment.

HELD. 1. Per TYSER, C.J., confirming the judgment of the District Court, (*dissentiente* BERTRAM, J.): That there had been no effective delivery of the document so as to bring the case within the provisions of Arts. 1610 and 1611 of the Mejellé.

Per BERTRAM, J.: That there was a sufficient delivery to support the action.

2. Per BERTRAM, J.: That the document being according to its real nature a will, was invalid, as not being in compliance with the provisions of the Wills and Succession Law, 1895.

Fictitious conventions, though they may be of binding obligation on the parties, are of no effect as against those prejudicially affected by them.

Art. 1611 of the Mejellé does not preclude the heirs in such a case from showing the fictitious nature of the document in question.

The article applies only to cases in which a man actually binds himself, and not to cases in which a man merely makes a pretence of binding himself with the object of fixing a fictitious obligation upon his heirs.

Louka Haji Andoni Pieri v. *Eleni Haji Yanni* (1893) 2 C.L.R., 153, and *Parapano* v. *Happaz* (1894) 3 C.L.R., 69, considered and commented on.

SEMBLE: The interpretations given by the Court in *Louka Haji Andoni Pieri* v. *Eleni Haji Yanni* to Arts. 1589, 1601, 1610 and 1611 of the Mejellé may be subject to reconsideration.

The question whether a document is an adknowledgment of debt " in customary form " is a question of fact, which, if material, should be raised at the settlement of the issues.

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

The action was brought upon an acknowledgment of debt for £100 purporting to be given by the deceased Arpanaki Demetriou to the Plaintiffs, as natural guardians of their infant children Michael and Augusta. The debt was stated to be due in respect of cash received.

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It appeared from the evidence of the Plaintiffs that the apparent character of the document was fictitious. It was in fact delivered as a gift, on the condition that it should not be enforced till after the death of the donor. The original intention of the deceased had been to transfer his property into the name of the female Defendant. He was persuaded by his advocate, Mr. Kyriakides, to relinquish this idea, and to enter into the obligation of this document instead. To secure the enforcement of the condition on which it was given, it was deposited in the hands of Mr. Kyriakides.

The principal passages in the evidence relating to the delivery and deposit of the document were as follows:—

By the Plaintiff Achillea Hypermachos:

Cross-examined: " Deceased made this as a gift to my children. This promissory note did not come into my possession till after his death . . . I did not claim on it during his lifetime, and after his death I asked Mr. Kyriakides to claim on it . . . I took the promissory note to Mr. Kyriakides when it was made, and asked him to keep it till after the death of Arpanakis. There were present when it was drawn up myself, my wife, deceased and Loizou. Then it was signed before the Certifying Officer, and I and deceased went to Kyriakides' house and we gave the promissory note to him to keep it till after the death of the maker. Re-examined (by Mr. Kyriakides). I had the promissory note when we came to you."

The District Court held that the delivery of the document to the Plaintiffs was not sufficiently proved, and gave judgment for the Defendants.

The Plaintiffs appealed.

Kyriakides for the Appellants. The evidence for the delivery is adequate. As to the effect of the document I say that it is payable out of the disposable portion of the estate on the authority of the case of *Louka Haji Andoni Pieri* v. *Eleni Haji Yanni* (1893) 2 C.L.R., 153.

Lanites for the Respondent. There was no delivery. If there was, the document is in substance a testamentary disposition and is invalid under the Wills and Succession Law, 1895.

Kyriakides in reply. The requirement of the canon law, which governed Christian testamentary dispositions before the law of 1895, were as rigid as the provisions of the law itself. Yet in the case referred to the document was not held to be invalid absolutely, but only subject to the principles of the law of inheritance.

In the course of the argument it was admitted that the document was in " customary form " except that no date was fixed for payment of the alleged debt. The effect of this variance was not discussed in the judgment, but the Court intimated that the question whether or not a document is a document in customary form within Art. 1610 of the Mejellé is a question of fact which, if material, should be raised at the settlement of the issues.

The Court dismissed the appeal.

Judgment. CHIEF JUSTICE: In this case the deceased gave the acknowledgment to Mr. Kyriakides and did not give it to the Plaintiff. The Plaintiff says " the promissory note did not come into my possession until after his death."

If at any time after the sened was made it was given to him, it was given in order that he might take it to Mr. Kyriakides in pursuance of the plan adopted on Mr. Kyriakides' advice.

The object of the deceased in giving the sened to Mr. Kyriakides and not to the Plaintiff was to put it out of the power of the Plaintiff to sue in his lifetime. The Plaintiff says that the deceased wanted to transfer his property to the wife of the Plaintiff. Mr. Kyriakides dissuaded him and the sened was drawn up and handed to Mr. Kyriakides so that the deceased should not be deprived of his property.

If the sened had been given to the Plaintiff the deceased might have been sued on it and just as effectually deprived of his property, as he might have been if the property had been transferred to the wife of the Plaintiff.

Art. 1610 of the Mejellé does not apply unless an acknowledgment has been given to the person seeking to enforce it or to some one on his behalf so that he can enforce the performance of the obligation contained in the acknowledgment.

Here Mr. Kyriakides was to hold the sened so as to ensure that it should not be enforced against the deceased. This is merely an acknowledgment without a gift of the sened.

The Plaintiff admits that the acknowledgment is not true therefore he cannot recover the amount. (Mejellé, Art. 1589.)

Whatever may be the effect of Art. 1610, in my opinion when the sened has not been given to the person who is to benefit by it the article does not apply.

There would appear to be some doubt whether the meaning of Art. 1610 is that the person who gives the sened cannot in any way dispute the debt or whether the article is not really merely a matter of procedure or regulation affecting the rights of the party in the suit.

We have consulted the Mufti and Cadi and their opinions seem to agree that although when Art. 1610 applies the Defendant in an action by the beneficiary cannot deny the debt, it would still be open to him to bring a " defi dawa " under Art. 1589 to prove that he had stated what was not true in the sened. (Mejellé, Art. 1631.)

If that is so, it would appear to be merely a matter of procedure.

It is not however necessary to consider the question now nor is it necessary to consider the decision in this Court in the case of *Louka Haji Andoni Pieri* v. *Eleni Haji Yanni* and the cases referred to in that decision, because here the facts differ by reason of the acknowledgment not having been given to the Plaintiff.

Those cases will moreover so far as regards persons who are not Mohammedans have to be reconsidered in the light of legislation contained in Law 20 of 1895.

No man has power to dispose of property after his death except in so far as power is given to him by the law.

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Independently of that law, having regard to the views of the Mufti and Cadi and the other provisions of the law contained in the Mejellé, Art. 1610 requires further consideration in any case in which its provisions are applicable.

A gift to take future effect is not good. Mejellé, Art. 854.

An admission of debt due and payable on death is bad. Mejellé, Art. 1584.

It would be absurd for a man to say after I shall be dead I am indebted to you.

An admission given during lifetime of a debt due now and payable at the death of the promisor, will it bind the heir?

An admission giving during lifetime of a debt due and payable now with a collateral agreement not to enforce it until after the death of the acknowledgor is that enforceable?

These are questions which it is not necessary to consider now.

But it can hardly be satisfactory to regard them as taking effect like a will, when the law provides that a will must be in a specified form, or when if Arts. 1610 and 1611 have the effect in the later cases given to them the heirs would be bound to pay the whole amount.

The appeal is dismissed and the judgment of the Court below affirmed with costs.

BERTRAM, J.: While I concur in the result of the judgment of the learned Chief Justice I regret that I am not able to share his view of the facts in this case. As I read the evidence, while the document did not come permanently into the possession of the donee until after the death of the donor—yet during the lifetime of the donor, it seems to me that there was a valid and effectual delivery—formal in character and temporary in duration, but none the less complete. As I read it, donor and donee went together to the office of Mr. Kyriakides, and at the time the document was in the hands of the donee. It must therefore have been delivered to him. Arrived at the office they deposited the document in the hands of Mr. Kyriakides for the purpose of securing the condition on which it had been given. It seems to be that there is evidence that before this deposit took place there was a sufficient delivery to support the action.

Under these circumstances—the delivery being taken as proved—I am under the necessity of considering the argument addressed to us by Mr. Kyriakides as to the effect of this document. Mr. Kyriakides did not contend that it was binding on the heirs of the deceased under Art. 1611 of the Mejellé absolutely, but that on the authority of *Pieri* v. *Haji Yanni* (1893) 2 C.L.R., 153, it must be treated as a testamentary disposition and hold good up to the amount of the disposable portion of the estate.

Now *Pieri* v. *Haji Yanni* was a decision which purported to be given under the Moslem law of inheritance. It was given on the assumption which then prevailed in Cyprus that the rights of Christian subjects of the Sultan were regulated by that law, both as regards testamentary and intestate succession. Proceeding on that assumption the Court first considered the true meaning of Art. 1601 of the Mejellé. They came to the conclusion that

according to that article a fictitious acknowledgment of a non-existent debt made in mortal sickness must rank as a bequest, and must be subject to the provisions of the law of inheritance limiting the disposable portion of the estate. Thence, reasoning by analogy they declared that a similar acknowledgment of debt made in health, upon the condition that it should not be enforced until after the death of the giver (though made in such a form as to be binding upon the heirs under Art. 1611) was nevertheless also to be treated as a bequest and as subject to the same limitation.

Now all this reasoning was based upon a state of affairs that has since passed away. Whatever may have been the case at the date of *Pieri* v. *Haji Yanni* the testamentary rights of Christian subjects of the Porte in Cyprus are not now governed by the Moslem law of inheritance but by the Wills and Succession Law, 1895. That law is a law of an extremely composite character. Its provisions limiting the disposable portion of the estate are in some respect analogous to the principles of the Moslem law, and if these were the only provisions of the law which had to be considered, it is possible that it might be necessary to hold that the doctrine of *Pieri* v. *Haji Yanni* was still applicable, and to declare the acknowledgment in this case to be valid up to the amount of the disposable portion. But there are other provisions of a much more stringent character that have to be considered.

Sec. 22 declares that no will shall be valid unless it is made in accordance with that section. The requirements of the section are amongst other things that a will shall be attested by three witnesses according to particular form.

Sec. 2 defines "will" as meaning "the legal declaration in writing of the intentions of the testator with respect to the disposal of his property after his death." The definition no doubt says "*the* legal declaration" and not "*a* legal declaration." But too much weight must not be given to the word "the." Sec. 27 indicates that there is nothing to prevent a man making more wills than one, disposing of different portions of his estate, and implies that all such wills, if not repugnant, may take effect together. Any written disposition of property of a testamentary character would therefore seem to be a will, within the meaning of the definition.

It seems to me that if the real nature of this document is to be looked at, it is impossible to say that it is not a "will" within the meaning of the above definition. If it is a will, it is equally impossible to say that it is valid within Sec. 22.

Nor is there any reason why the real nature of the document should not be looked at. This document is what is known in French law, as a "*simulation*"—that is to say—"*une convention apparente, dont les effects sont modifiés ou supprimés par une autre convention, contemporaine de la première et destinée à rester secrète,*" see *Planiol, Traité de Droit Civil*, Vol. I, 1186. The general rule with regard to such fictitious conventions in both French and English law is that though they may ordinarily be of binding obligation between the parties they are nullities so far as they concern those whose interests may be prejudicially affected by them, and that as against such persons the real nature of the transaction is alone regarded. Even assuming that the interpretation which previous decisions of this Court have given to Arts. 1610

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and 1611 of the Mejellé is correct, I do not think that Art. 1611 of the Mejellé is in conflict with this principle. At first sight it seems to put a man's heirs, for the purpose of the binding character of these documents on precisely the same footing as the man himself. But I believe that the case contemplated by the article is that in which a man actually binds himself by such a document. In such a case it is not unreasonable that his heirs should inherit his obligation. I do not believe that it applies to a case in which a man merely makes a pretence of binding himself, with the object of fixing a fictitious obligation upon his heirs. In such a case this Court has held itself entitled to look at the real nature of the transaction. This was done in the case of *Pieri* v. *Haji Yanni* itself and in the earlier case of *Haralambo* v. *Haralambo* (1891) 2 C.L.R., 21. I do not think therefore that there is anything in Arts. 1610 and 1611 of the Mejellé, nor in the interpretation which this Court has given to them, to prevent us from looking beyond the form into the true nature of the document, and if we do so, I think it is clear that the document is a will, and an invalid one.

In the consideration of the validity of this document we are not left without assistance by the English authorities. As I have said the Law of 1895 is of a very composite character and its sections regulating the attestation of wills are taken (with certain modifications) from the English Wills Act of 1835.

The effect of that act on transactions of a testamentary character, not made in the form of a valid will was considered in the case of *Warriner* v. *Rogers* (1873) L.R., 16 Eq., 340. In that case a lady handed to the Plaintiff a locked box to be opened after her death, herself keeping the key. On her death the box was opened and found to contain amongst other things a paper purporting to make a gift of certain property to the Plaintiff. The paper was held to be ineffectual. "To a man of common sense," said Bacon, V.C., in delivering judgment, "nothing can be clearer than that whatever was intended by this memorandum, it was not to take effect until after the death of the person who wrote and signed it . . . The danger is great, if such an attempt were to succeed; because then the result of such transaction as this would be, that the solemn disposition of property, which the law requires to be made in the shape of a will would be entirely lost sight of, because this would be as good a disposition, or perhaps better, than any will which could be made." It seems to me that the words quoted apply almost exactly to the facts of the present case.

It only remains to notice an argument addressed to us on this point by Mr. Kyriakides. He urged that the stringent provision of the law with regard to attestation ought not to be held to invalidate the document altogether. At the time of the decision of *Pieri* v. *Haji Yanni*, so he contended, the validity of Christian wills was determined by the law of Church—that is to say, the Roman law. The provisions of this law with respect to attestation are even more stringent than those of the law of 1895. They require no less than seven attesting witnesses. Yet the failure of the document in *Pieri* v. *Haji Yanni* to comply with these provisions was not held to invalidate it. On the contrary the Court gave effect to it as a bequest. This argument is however a misapprehension. This Court in considering *Pieri* v. *Haji Yanni*

took no account whatever of Roman testamentary law. The only testamentary law it considered was the Moslem sacred law. The principle upon which it proceeded was that laid down in *Polydoro* v. *Haji Yeorghi* (1887) 1 C.L.R., 37, in which the Court declared, " the provisions of the law as to wills are . . . contained . . . in the sacred law, and we know of no modern law conferring on any subjects of the Porte, whether Christian or Moslem any larger powers of testamentary disposition." Any argument therefore based upon the Roman law is quite irrelevant to the decision of *Pieri* v. *Haji Yanni*.

The law of 1895 is so clear and specific that I rest my judgment on that ground alone. It is consequently not necessary to discuss further the case of *Pieri* v. *Haji Yanni*. At the same time it may not be inapprorpriate to suggest that the judgment in that case contains much that may one day be the subject of reconsideration.

In the first place the fundamental assumption which underlies the case—that in the matter of wills and successions the Christians of the Ottoman Empire were subject to the Mohammedan sacred law—has long been negatived by the judgment of the Privy Council in *Parapano* v. *Happaz* (1894) 3 C.L.R., 69. That case, it is true, dealt in terms only with intestate succession, but in this matter there was no real distinction between intestate and testamentary succession. From the time of the fall of Constantinople both were always recognised as being " religious matters " within the competence of the ecclesiastical tribunals. (See *Sidarouss Des Patriarcats*, pp. 270, 273, 276; Mohammed Farid Bey, History of the Ottoman Empire, p. 61, cited Sidarouss, p. 67, and *cf.* the Vezirial Circulars of 4 Rejeb, 1285, 23 Sheval, 1291, the Circular of the Minister of Justice, 1295, and the Vezirial Order of 23 Jemazi-ul-Akhir, 1308.) It is clearly the opinion of the Privy Council, as declared in the judgment of *Parapano* v. *Happaz*, if I correctly interpret that judgment, that, whatever may have been the actual practice, the Christians of Cyprus had the same legal privileges in " religious matters " as the other Christians of the Ottoman Empire, and that in matters of this kind they were entitled to have their rights determined not by Moslem but by Christian law.

In the second place, it may be a question whether this fundamental misconception (if it was a misconception) under which *Pieri* v. *Haji Yanni* was decided may not be held to affect the authority of the interpretations which in that judgment the Court incidentally gave to Art. 1589, 1601, 1610 and 1611 of the Mejellé. So far as we have been able to ascertain these interpretations are not in harmony with what is ordinarily accepted to be the meaning of these sections in the Ottoman Courts.

In the third place it is worthy of note that the decision of the Court in that case was come to after considering two previous authorities which were apparently in conflict. It may be a matter for further consideration whether the authority which in the result was disregarded (*Dimitri Solomo* v. *Marikou Elia*, see 2 C.L.R., p. 161), ought not to have been followed, and whether that decision was not based upon a more correct view of the law than the decision in *Pieri* v. *Haji Yanni* itself.

For the reasons which I have explained I concur in the judgment of the Chief Justice that the appeal must be dismissed with costs.

Appeal dismissed.