

THE PRINCIPAL DIFFERENCES BETWEEN SWISS PRACTICE IN INTERPRETING THE CIVIL CODE

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In its task of interpreting and applying the Civil Code imported from Switzerland, Turkish practice has not followed slavishly the Swiss Federal Court or Swiss legal doctrine. Instead, in a number of instances, the Turkish Court of Cassation has disregarded both. A number of examples can be cited which bear out this contention.

1. According to the Civil Code, each of several owners in common (*copropriétaire*) of land has a right of preemption, by operation of law, which permits him to take the place of a purchaser who has bought the share of another co-owner. The relevant article of the Code makes no provision for the case where several co-owners exercise this right simultaneously. According to Swiss authors (see, e.g. the commentary by Wieland) each owner is entitled to a part of the share which has been sold in proportion to his own share. The Turkish Court of Cassation (United Sections), in a closely reasoned decision dated 11 June 1947, dismissed this opinion and adopted the view that each co-owner is entitled to an equal portion of the share which has been sold.

2. The right to begin divorce proceedings is regarded as a highly personal right which can only be exercised by the aggrieved party himself and not by a legal representative, such as the guardian of a lunatic. Swiss Courts and Swiss writers are agreed on this. The Turkish Court of Cassation, in conformity with deeply rooted popular feelings, admits that the guardian may submit a petition

for divorce on behalf of his ward against the latter's spouse, on the grounds of adultery or cruelty.

3. It is accepted by the prevailing practice and by authors in Switzerland that transactions entered into by a person who lacks capacity (minor, lunatic) are totally void and fail to produce any legal effect, except in the cases provided by law. The united sections of the Turkish Court of Cassation have decided on 9 March 1955 that this principle of nullity as expressed in article 15 of the Turkish Civil Code (Article 18 of the Swiss Civil Code) must be applied restrictively. In the opinion of the Court the purpose of declaring such transactions to be void is to protect the persons who lacks capacity. If, however, the transaction benefits such a person, the other contracting party is not allowed to rely on the plea that it is void upon the pretext that he lacks capacity. This teleological interpretation will enable the Court to hold that a worker who has taken employment of a kind in which he or she should not have engaged (e.g. owing to pregnancy) is nevertheless entitled to national insurance benefits.

4. Article 512 of the Code of obligations (cp. article 522 of the Swiss Code of Obligations) provides that an agreement creating a life rent must comply with the formalities required of a succession pact, even if it is not intended to make the beneficiary a heir. According to article 492 of the Turkish Civil Code (cp. article 512 of the Swiss Civil Code), a succession pact must be made in the same way as public will, i.e. it must be made in the presence of two witnesses before a notary, a justice of the peace or any other person who is competent for this purpose (article 479 of the Turkish Civil Code ; article 499 of the Swiss Civil Code). It must be pointed out that, notwithstanding this provision, only notaries and justices of the peace are available to receive public wills, seeing that no law has conferred this competence upon any other person. Thus the keeper of the land register has no power to receive a public will. It is irrelevant that the will disposes of land and that all transactions affecting land must be concluded before the keeper of the land register. However, in several instances, agreements creating a life rent were only concluded before the keeper of the land register. The question was whether these agreements were void on the ground that they were not

in proper form. In Switzerland it has been held that such agreements are invalid, but the Turkish Court of Cassation has decided in favour of their validity on the ground that the keeper of the land register is an official who is competent for the purposes of article 479 of the Turkish Civil Code (article 499 of the Swiss Civil Code). This somewhat excessively ingenious interpretation is justified, having regard to the fact that a considerable number of agreements for life rent had been concluded before the keeper of the land register. These agreements would have been void, unless the Court had adopted its present interpretation.

5. According to article 132 of the Turkish Civil Code (cf. article 140 of the Swiss Civil Code) a spouse may petition for a divorce on the ground of wilful desertion or if the other spouse refuses to return to the matrimonial home without good reasons. In Switzerland desertion must have taken place for at least two years; in Turkey it must have lasted for at least three months. Upon the application of the aggrieved party, the judge summons the absent spouse, if necessary by public notice, to return to the matrimonial home within a definite period, which is six months in Switzerland and one month in Turkey. In Turkey this summons must be taken out by way of ordinary proceedings before the justice of the peace who has no jurisdiction to entertain proceedings in divorce. A judgment must be obtained in the course of normal contentious proceedings to the effect that the respondent spouse has failed to comply with the order to return to the matrimonial home without having shown good reasons. Only then can divorce proceedings proper be begun before the court of first instance. This court will grant a decree on the basis of the judgment of the justice of the peace. In Switzerland, on the other hand, there is only one single course of proceedings for divorce on the ground of wilful desertion, and no preliminary judgment is required.

6. Article 169 (3) of the Turkish Civil Code (cf. article 177 (3) of the Swiss Civil Code) provides that a married woman cannot validly enter into obligations towards third parties for the benefit of her husband unless a justice of the peace (in Switzerland the guardianship authority) gives his consent. The question whether this consent is also required if the wife intends to grant a

mortgage or a pledge. According to the practice of Swiss courts, which is approved by the majority of writers, the wife only requires this consent for the purpose of entering into an obligation, but not if she wishes to grant a proprietary interest or if she wishes to dispose of property (see e.g. the decision of the Swiss Federal Tribunal in the *Recueil Officiel*, vol. 49, II, pp. 433, 339). The Turkish Court of Cassation, in a decision rendered on 5 November 1952 by the United Civil Sections, has held, on the other hand, that the consent of the justice of the peace is necessary if the wife wishes to grant a mortgage for the benefit of her husband.

7. The greater part of the arable land in Turkey is not registered in the land register. The Civil Code requires, however, that all transactions involving the transfer of land must be made in the form of an *acte authentique*. Alternatively, according to article 26 of the Law concerning the Land Register, such transactions may be concluded before the keeper of the land register. It is argued on the basis of Swiss law that land which is not registered in the land register cannot be validly transferred according to this method. However, an urgent need exists in Turkey to allow the transfer of such land, seeing that the creation of a cadastre and of a land register will not be completed for a long time, despite the considerable efforts which are made in this direction. Adhering to the spirit of the Code, the Court of Cassation did not hesitate, at first, to declare invalid all informal sales of unregistered land. As a result, a vendor was in a position to recover land which he had sold years before, and the purchaser was left to ask for the return of the purchase price. This state of affairs became gradually worse, especially from 1940 onwards, when the economic consequences of the war led to an unprecedented increase in the price of agricultural land. The Court, in the desire to protect the purchaser, refused the vendor the right to recover the land, unless he had previously paid or offered to pay to the purchaser the value of the land, calculated at the time when the action was brought. In another case, where the purchaser had built a house on the land which he had bought, the purchaser succeeded in his demand that he be granted ownership of the land against payment of the difference between the value of the land as improved by the building, and the original purchase price. In the

end, the United Section of the Court of Cassation in a decision of 9 October 1946 recognized as valid the transfer of the possession of non-registered land and rejected the claim of the vendor to recover it, on the ground that such land was to be treated as movable property, in which case transfer of possession was sufficient to create a good title. This decision, which disregards the practice based upon the Swiss Civil Code, must be welcomed as salutary.

8. In Turkey, civil or official marriage was introduced by the new Civil Code. A special law requires the engaged couple to undergo a medical examination as to whether they suffer from syphilis. However, the peasant population which was used to the practically informal Mohammedan marriage ceremony, continued to marry in the old form. The consequences were as follows : children born of such a union were illegitimate ; if their father died they did not succeed to his estate. The Court did not hesitate to apply article 249 of the Turkish Civil Code (cf. article 260 of the Swiss Civil Code) which provides that a child of parents who were engaged to be married and who were unable to marry owing to the death or loss of capacity to marry of one of them may be declared legitimate by the court upon the application of the other party or of the child himself.

It must be noted that the legislature has since taken steps to improve this situation. By law No. 2576 of 1934, No. 4727 of 1945 and No. 5224 of 1950, children born of a union between a man and a woman who have set up a matrimonial home, live together as husband and wife and are not precluded by law from marrying each other are declared to be legitimate.

9. The Court of Cassation admits oral evidence as sufficient to prove the conclusion of a marriage if no extract from the marriage register or any other document is available. Since the registers of births, deaths and marriages are still far from satisfactory in Turkey, this practice of the court opens the way for parties who live together as husband and wife without having gone through a civil form of marriage to claim that they were married in civil form. However, since the legitimacy laws set out above (8) also make it possible to convert an irregular union into a civil marriage, the parties prefer the

latter administrative procedure, which is less expensive and more speedy, to an action in the courts for a declaration that their marriage is valid.
