[HALLINAN, C.J., AND ZEKIA, J.]

(November 15, 1952)

CATERINA SOCRATOUS OF PANO PLATRES,

Appellant,

v.

THE ATTORNEY-GENERAL OF CYPRUS,

Respondent.

(*Civil Appeal No.* 3909.)

Ottoman categories of land—Hali and Arazi Mirié—Prescription—Cultivation by cutting natural timber—Estoppel—Tax collected in error but no detriment.

In a plan of 1920 prepared for a general valuation of the village area of Platres, plaintiff-appellant appears as the owner of plot 6. Between 1922 and 1938 the appellant was in error assessed and taxed for the northern portion of plot 11 (land in dispute) in addition to plot 6. In 1938 the appellant applied to be registered for most of the land in dispute ; the mistake was discovered and tax was correspondingly reduced. In 1946 she applied for registration of the land in dispute and, on being refused, brought these proceedings.

Held : (1) Following the decision of *Savvas Haji Kyriacou* v. *The Principal Forest Officer*, 3 C.L.R., 87, the land must be either *hali* or *arazi mirié*. The burden of proving that the land was *arazi mirié* was on the plaintiff and she did not discharge that burden. The land was therefore *hali*.

(2) To prove a prescriptive right to land which has been *hali* the appellant had to establish either cultivation for the prescriptive period before 1904, or, thereafter, such cultivation together with the consent of the Commissioner of the District. She did not obtain such consent and the cutting of natural timber for the prescriptive period before 1904 was not such cultivation as could confer a prescriptive title. On these facts she acquired no prescriptive rights. (Secus the land had been *arazi mirié*.)

(3) The acceptance of tax from the appellant did not estop the respondent from denying the appellant's title. There can be no estoppel *in pais* without detriment. The case of *Haji Constanti and others* v. *The Principal Forest Officer*, 3 C.L.R., 151, distinguished.

Appeal dismissed.

Appeal by the plaintiff from the judgment of the District Court of Limassol (Action No. 471/47) in favour of the defendant.

G. Clerides for the appellant.

Sir Panayiotis Cacoyiannis for the respondent.

The facts of the case are fully set out in the judgment of the Court which was delivered by :

HALLINAN, C.J. : The land, the subject-matter of this appeal, is situated about a mile from the centre of the old village of Pano Platres and adjoins the forest reserve.

There are certain undisputed facts in the case which are to be found in documents produced by the respondent from Government records. In 1902, a survey of the immovable property of Pano Platres was made by the late Salim Effendi and a plan was prepared by him together with a schedule containing certain particulars of the properties surveyed. This schedule was certified and signed by the village representatives of Pano Platres on the 29th November, 1902, and shows that the plaintiff was then the owner of plot 148 on the plan, the area being one donum approximately. No objection was taken to the admission of the survey of 1902 either here or below.

In 1906, on the application of the plaintiff, Registration No. 798 was effected in her name by prescription. This registration refers to plot No. 148 on Salim Effendi's plan. The boundaries given in that registration are two sides *hali* and two sides Government forest.

In 1920 there was a general valuation of this village area and a plan was prepared in which the appellant's land covered by the original registration No. 798 was assigned the number 6 and the area of *hali* surrounding it was given the numbers 11 and 11A. In the schedule drawn up pursuant to this certificate which is signed by the village representative Michael Papa Neofytou, the appellant is recorded as the owner of plot No. 6 ; plots No. 11 and 11A are described as *hali* land. A certificate was signed by the Mukhtar, Ioannis Demetriou, and the Aza Papa Neofytou. This certificate states :—

> " We certify that plot 11 was left uncultivated since immemorial time. The whole land is cultivable. It is not registered in the books of the L.R.O."

By some error which has not been explained, the appellant was assessed and taxed in 1922 in respect of the northern portion of plot 11 which surrounds plot 6 and which is now the land in dispute. In 1933 the daughter of the appellant applied and was registered " by prescription through dowry through the plaintiff " for a piece of land which was part of the previous registration No. 798. In 1938 the plaintiff applied to be registered in respect of most of the land now in dispute. After a local enquiry her application was in effect refused and the portion of plot 6

which she had not alienated to her daughter was registered as No. 2045 on the 9th March, 1939. The Assessment Register was corrected so that thereafter she only paid tax on the land in respect of which she was registered. She had been paying between 1922 and 1938 a tax of about 10*s*. a year. The appellant appears to have acquiesced in the decision of the Land Registry in 1938 until, in September, 1946, she applied to be registered in respect of the land now in dispute. This application was refused, and she brought these proceedings.

The Court below found that the land in dispute was *hali* land and that it had never been cultivated by the plaintiff apart from a small cultivated plot in the disputed area which the Government is prepared to give her. Her claim was therefore dismissed.

One of the issues about which there has been much argument in this case concerns the category in which the land in dispute should be placed according to the Ottoman Land Code. It clearly does not fall into the category of *mulk* or *arazi metrouké*. Following the reasoning of the Court in the case of *Savvas Haji Kyriacou* v. *The Principal Forest Officer* (3 C.L.R., 87) the land must be either of the category *arazi mirié* or *arazi mevat* (that is to say *hali* land). In the light of the definition contained in articles 6 and 103 of the Land Code and the exposition of the subject in the case of Savvas Haji Kyriacou, one might say that *hali* land is unoccupied land not left for the use of the public which is a considerable distance from the nearest inhabited place. *Arazi mirié* is land in respect of which a private individual can obtain a usufruct. *Hali* land could become *arazi mirié* if a private individual, with the permission of "the official" (that is to say the Land Registry Official) cultivated the land for a period of ten years without dispute and obtained a title deed. From the report of the Savvas Haji Kyriacou case, it appears that the Ottoman Government prior to the English occupation had issued a notice that *hali* land might be broken up and cultivated. This was interpreted as a general authority which rendered the consent of the Official unnecessary, so that a private individual might open up *hali* and by prescription occupy it as *arazi mirié*. By Notice 7038 of the 23rd February, 1904, in the *Cyprus Gazette* of the 26th February, 1904, the notice of the Ottoman Government was cancelled so that thereafter a private person could not convert *hali* into *arazi mirié* and obtain a right to its use without the consent of the Commissioner of the District. After 1904 therefore a private person could not obtain any right over *hali* land by mere prescription. Apart from the evidence concerning the assessment of the appellant in respect of the land in dispute between the years 1922 and 1938 (which we shall discuss

later in this judgment) there is no evidence that the consent of any official was obtained by the appellant. The appellant to succeed had to prove that the land in dispute had been opened from *hali* and become *arazi mirié* before 1904, or that the land was not *hali* land but was *arazi mirié* in 1858 when the Ottoman Land Code came into operation.

The appellant has relied on two facts to support her claim that the land in dispute was *arazi mirié*: first, that it was too near inhabited places to be *hali*, and secondly that her own and other plots in the possession of private persons adjoin the land in dispute. The short answer to the point concerning its proximity to the village is that the Court below found on sufficient evidence that the land in dispute was a " considerable distance " from the old church and that from its situation the land might be *hali*. As to the other point, little can be deduced from the fact that lands near those in dispute were in private possession because they might have been originally *hali* lands converted into *arazi mirié* by prescription together with the general permission of the Ottoman Government. If one is to accept the enquiry of 1902 and the schedule and certificate signed by the Village Representative and the Mukhtar, the land in dispute was *hali*. The appellant's own title deed of 1906 also shows the boundaries of her land as two sides *hali* and two sides Government forest.

There is nothing in the position of the land in dispute in relation to the lands adjoining it from which the Court might infer that this land is *arazi mirié*. The burden of proving that it is *arazi mirié* therefore remains on the appellant, and in our opinion the trial Court was right in holding on the evidence that she had not discharged this burden, and the finding of the trial Court that the land in dispute is *hali* should not be disturbed.

Since then this case must be decided on the assumption that the land in dispute is *hali*, and since the appellant has no title deed to the land, she has to prove that she cultivated this land for the prescriptive period of ten years and obtain either the consent of the Official or had that consent under the general authority given by the Ottoman Government up to 1904. Apart from the question of estoppel, she did not obtain the consent of the Official after 1904 but she can rely on the general permission of the Ottoman Government prior to that date. The question then that falls to be decided is whether the Court below was justified on the evidence in finding that she had not cultivated the lands in dispute in such a way as to give rise to a prescriptive right.

It is clear that she cannot rely merely on the fact that she cultivated the land in respect of which she is registered.

In Article 1273 of the Medjellé which is part of a chapter concerning the cultivation of *mevat* (*hali*) it is stated :—

" He who has cultivated a part of land and has left the other parts uncultivated becomes owner of the cultivated part but not of the uncultivated."

Apart from the evidence that the appellant cut and sold timber on the land in dispute there is no reliable evidence that she otherwise cultivated the land in dispute except for a small cultivated plot which the Government is prepared to give her.

As for the other evidence of cultivation, I consider that the Court was right in refusing to accept the oral evidence of the Mukhtar, Ioannis Demetriou, and the Village Representative, Papa Neofytou, having regard to the certificate they signed in 1920 (Exhibit 10) where they aver that the land in dispute had been left uncultivated since " immemorial times ". Two other witnesses for the appellant, Aristides Ioannides and Efstathios Aristidou, in 1947 signed a certificate, Exhibit 14. In this they state that, apart from a mandra for goats (which for many years had been abandoned) and the cutting of timber, they were unable to say more than that the appellant 8 or 10 years ago had cultivated a very small portion of the land in dispute. The other evidence as to cultivation (apart from cutting trees) to which appellant's counsel referred us was that of Ioannis Athenis. It is clear from his evidence that the cultivation he referred to was on land in respect of which the appellant and her daughter are registered. There was, however, considerable evidence led by the appellant that she had cut or permitted to be cut pine trees on the land in dispute, which she either used as fuel or sold. On this matter there is the evidence of Ioannis Athenis, of Costas Demetriou Pafitis, and the certificate of Aristides Ioannides and Efstathios Aristidou given in 1947 (Exhibit 14.) The respondent did not rebut this evidence which, we think, must be accepted.

The question then arises whether the cutting of this timber is such a cultivation of *hali* land as is sufficient to give rise to a prescriptive right. If timber is naturally growing on *arazi mirié*, the cutting of this timber for fuel or sale over the prescriptive period would constitute such cultivation of the land as to give the party cutting the timber a right to be given a title deed under Article 78 of the Land Code. The authority for this proposition is contained in the Commentary on Article 78 of Halis Eshref. If however the land is *hali*, the mere cutting of timber would not by itself constitute cultivation so as to give rise to a prescriptive right. The words " cultivation of land " when used in respect of *hali* land are defined by Article 1275 of the Medjellé, and the mere cutting of naturally growing timber is clearly not within that definition.

Since then, in our opinion, the trial Court was right in holding that the appellant failed to prove that she has cultivated and occupied the land in dispute so as to give her a prescriptive title, she can only succeed if the respondent, by virtue of the assessment in 1922 and the subsequent collection of taxes from the appellant in respect of the disputed land, can be held estopped from denying her her title.

From the time of Salim Effendi's survey in 1902 up to her application to be registered in respect of the land in dispute in 1938, the appellant never laid claim to this land. Even in 1933 when she was giving some land to her daughter as dowry she gave it from out of the portion in respect of which she was the registered owner. Indeed it is doubtful if she would ever have made the application in 1938 had it not been for the mistaken assessment in 1922.

Estoppel can only be established if the party pleading estoppel has acted to his detriment as a result of a representation made by the other party. It cannot be said that in this case the appellant acted to her detriment as a result of the assessment. She has apparently derived some appreciable profit from cutting the trees on the land in dispute, and she has only paid a tax of 10*s*. a year.

On the facts we do not consider that the appellant as a result of the assessment of 1922 ever really believed that she was entitled to the land in dispute, and she has not been induced by that assessment to act to her detriment in such a manner as to establish estoppel.

Counsel for the appellant has referred us to the case of *Nicola Haji Constanti and others* v. *The Principal Forest Officer* (3 C.L.R., 151). In that case, in the year 1869, certain land was registered by the Land Registry Official of the day as *merra* or pasture of the village of Zakaki ; in 1893 Government included it within the State forests. The Court held that the land was village *merra* and should be excluded from the State forests. The head-note states :—

> " The Government is estopped from saying that this is not a pasture land assigned as such to the inhabitants of Zakaki ".

The word " estopped " is not used in the judgment although certain expressions such as " it is not open to Government now to turn round and say " and " the State . . . . cannot now . . . be heard to say . . . ." are the sort of phrases used in connection with estoppel. Nevertheless if the judgment is read carefully we do not think the basis of the decision is estoppel ; certainly not estoppel by representation or conduct. Indeed it is difficult to see how any Court could have applied the doctrine of estoppel *in pais*, because the villagers had suffered no detriment—on the contrary it must be assumed that the pasturage they enjoyed was

worth more than the 4*s.* annual tax. What the Court appears to have held is that the method of granting *merra* from *arazi mirié* was not prescribed by law and that in the circumstances of the case the actions of Government and its servants amounted to a grant. This finding is, we think, sufficiently clear in the following passage at pp. 156–157:—

> "It has been said that the registration in the *mallieh* books is not a registration of title; and this, of course, is so as regards an individual possession of land, the registration of which must be in the *Tapu* books. But we can find nothing in the law or the regulations as to the registration of *metrouké*; and it seems to us that on principle these would not be registered in the *Tapu* registers, as they are not held by *Tapu*. The entry in the *mallieh* books for so many years appears to us to afford good evidence of an acknowledgment on the part of the Government that this land has been assigned to the village of Zakaki as a *merra*".

and again at pages 157–158:—

> "We do not see why the State cannot grant *arazi mirié* as a *merra* on any terms it pleases, or why it cannot, under circumstances such as the present, be taken to have assented to this particular land .... being assigned to the inhabitants of the village ....".

What the State had done might constitute something analogous to estoppel by deed—it should not be allowed to derogate from its grant; but this is quite a different doctrine to that of estoppel *in pais* (by conduct or representation) which causes another person to act to his detriment.

In the present appeal it would be quite impossible for the Court to hold that what Government had done in taxing the appellant between 1922 and 1938 amounted to a grant or assignment of the land in dispute. The Ottoman Land Code prescribes how a private person can obtain a usufruct in *arazi mirié* or can open up *hali* land. The action of Government officials on the revenue side could not constitute a grant in law for since 1904 the permission of the Commissioner of the District was necessary. Nor can the appellant rely on estoppel *in pais* for she did not suffer detriment.

Since the appellant has not proved that she held the land as arazi mirié and has failed on the issues of prescription and estoppel, this appeal must be dismissed with costs.