[TYSER, C.J. AND PORTER, ACTING J.]

TYSER, C.J. & PORTER, ACTING J. 1916 January 15

THE DELEGATES OF EVQAF

v.

THE MUNICIPALITY OF NICOSIA.

VAQF—RIGHTS OF DELEGATES OF EVQAF—RIGHTS OF GOVERNMENT—ANNEX TO THE CONVENTION—ORDER OF 30TH NOVEMBER, 1915—LAW OF 27 RAMAZAN, 1294—MUNICIPAL COUNCILS LAW, 1885, SEC. 1.

The Plaintiffs claimed that they had a right to administer the water and channels of the Arab Ahmed and Siliktar aqueducts. By the Annex to the Convention of 4th June, 1878, dated 1st July, 1878, the Plaintiffs were to superintend the administration of the property belonging to religious establishments in Cyprus.

HELD: *That the Plaintiffs are only entitled to administer Evqaf property in so far as religious establishments are beneficiaries.*

HELD *further: That Sec. 1 of Law 8 of 1885 conferred no property in existing water channels on Defendants.*

HELD *further: That Mazbuta Vaqfs not attached to religious establishments are to be administered by the Government.*

Russell, K.A., and Jemal Effendi for the Plaintiffs.

P. Constantinides, Artemis and *Chrysafinis* for the Defendant Municipality.

This was an appeal and cross-appeal from a judgment of the District Court of Nicosia. The Plaintiffs in the action claimed the right to control and administer the Arab Ahmed and Siliktar aqueducts and the water brought by these aqueducts to Nicosia.

The Plaintiffs and Appellants were the Delegates of Evqaf appointed under the Annex to the Convention of the 4th June, 1878, dated the 1st July, 1878.

The Defendants and Respondents were the Municipal Council of Nicosia.

In the course of the argument it was pointed out that the Annex of the 4th June, 1878, was annulled by the War Cyprus Annexation Order in Council, 1914, and the Plaintiffs were re-appointed under an Order in Council dated 30th November, 1915, under which appointment their powers, rights and liabilities were the same as those conferred on them by the Annex to the Convention.

It was agreed at the hearing of the appeal that the question to be tried was, who was entitled to administer the aqueducts and water.

The Plaintiffs claimed that, as Delegates of Evqaf, they had all the right of the Ministry of Evqaf, and were entitled to administer all vaqfs in Cyprus previously under the supervision or administration of that Ministry.

The Plaintiffs also claimed that the aqueducts and water were vaqf property within the term of the Annex because the Arab Ahmed

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aqueduct was attached to or belonged to the Mosques of Ay. Sofia and Omerie, and the Siliktar aqueduct to the Yeni Jami.

They contended that not only were the Delegates of Evqaf entitled to the water for the use of the mosque, but also to make revenue for the mosque by selling the water. They further contended that every vaqf is of a sacred nature and therefore within the Annex.

The Defendants claimed that they had the right to administer the aqueducts and water under the powers contained in the Law of 27 Ramazan, 1294; they also relied on Sec. 1 of Law 8 of 1885.

The Defendants also claimed a prescriptive right. They produced correspondence showing that they had been entrusted with the administration of the water by the Government. They further claimed that if the original aqueducts were vaqf there were many additions made by the Municipality which were not vaqf.

The following facts were found by the Court:—

The aqueducts as existing up to a recent date were Mazbuta vaqfs.

There was no Vaqfie for the Arab Ahmed aqueduct.

The Vaqfie given in evidence as the Vaqfie for the Siliktar aqueduct was a Vaqfie for a portion of the water taken from that aqueduct, and there was no Vaqfie for the aqueduct generally.

It was found as a fact that the Defendants had not acquired any prescriptive right. It was further found on evidence of user, there being no Vaqfie:

1. That the water and channels were made vaqf on the terms that water should be supplied from the Arab Ahmed aqueduct to the Mosques of Ay. Sofia and Omerie and the inhabitants of the town, and from the Siliktar aqueduct to the Yeni Jami and the inhabitants of the town of Nicosia.
2. The terms of the vaqf were that the water should be used and enjoyed and not for the purpose of raising income.

The Court in giving judgment said :—

As regards the rights of the Plaintiffs we are of opinion that they are limited to those stated in the Annex to the Convention between England and Turkey, to which the Delegates of Evqaf owe their existence.

It was contended for the Plaintiffs that the Delegates of Evqaf are the Successors of the Ministry of Evqaf and entitled to administer all vaqfs in Cyprus previously under the supervision or administration of that Ministry.

The origin of the Ministry of Evqaf in Turkey and its growth and powers may be gathered from the following statement taken from a

treatise written in 1328 by Ismail Haqqi Effendi, the Secretary of the Ministry of Evqaf and Professor of Law in the University of Constantinople.

" Before the capture of Constantinople there were vaqfs administered " by their Mutevellis and the Qadis acted as Nazirs. After Constan- " tinople was taken many vaqfs were made by Fatih Sultan Mehmed, " Sultan Selim II, and Sultan Bayezid. They gave the Nazaret to " Grand Viziers, and Sultans appointed Mutevellis. Sultan Bayezid " gave the Nazaret to the Sheih-ul-Islam.

" The Sultans after these and other Viziers gave the idare to the " Court Chamberlains (Kourena) and after that time the founders " of Evqaf appointed their children as Mutevellis and gave the Nazaret " to the big officers of State, and these officers appointed an Auditor " (Mufettish) to audit the vaqf accounts.

" This went on for a number of years and then misconduct was " noticed.

" In 1252 all the vaqfs were united and a Ministry of Evqaf consti- " tuted, and a little later the Haremein vaqf was given to the Ministry.

" In 1260 the Evqaf administration improved and the Nazirs of " Evqaf were included in the Imperial Council. At that time the " administration was divided into two parts—Mazbuta and Ghairi- " Mazbuta. The Sultan himself was Mutevelli of Mazbuta and the " Evqaf Nazir acted as his vekil.

" Other vaqfs were added to the category of Mazbuta which were " dedicated by others than the Sultan. These were vaqfs of which " the khairat ceased to exist, and those of which the khairat existed " but the conditions of the vaqfie had not been observed, and also " vaqfs known to be vaqfs, but of which the conditions of vaqf were " not known."

The intention of the Annex to the Convention was to preserve, for the Moslems of Cyprus, their Mosques, Schools and other religious establishments, and, as a necessary means to this end, all vaqfs attached to such religious establishments.

When the Ministry of Evqaf, being a Government Department, ceased to have authority in Cyprus, the administration of all matters entrusted to that Ministry devolved on the British Government, to whom the administration of the Island was delegated by the Turkish Government except so far as special provision was made under the Convention and Annex.

The only exception is Emwal Emlak and Arazi attached to sacred institutions, that is to say, property, possessions and land attached

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to sacred institutions. The Delegates of Evqaf were given the right to administer those properties only. They did not have conferred on them any other authority which previously to the Occupation was enjoyed by the Ministry of Evqaf.

It was further argued for the Plaintiffs that every vaqf is of a sacred nature and therefore within the terms of the Annex.

The motive of dedication is the seeking to approach God and worship him by the gift of property for philanthropic purposes (Omer Hilmi, Clause 52) but it does not follow that the property made vaqf is attached to a religious institution, we find that this contention is bad.

If the High Contracting Parties had meant all Evqaf, they would have said so in the Annex to the Convention.

If it is argued that the Annex to the Convention must be construed to mean all Evqaf, because the administration and supervision of all Evqaf since the date of the Annex has been in the hands of the Delegates of Evqaf, the answer is that tacitly or expressly the Government may have delegated to the Delegates of Evqaf the supervision of all other vaqfs, but of this vaqf no such delegation has been made. What has been done in this matter would not justify us in giving an interpretation to the Annex which is not in accord with its express terms.

The term " administration " or " Idare " means, as regards Mazbuta Evqaf, the tevliet and nazaret; as regards Mulhaka evqafs the nazaret only.

We will next consider the rights of the Defendants, that is to say, the special rights which they claim to have under the Law 27 Ramazan, 1294, and other express enactments.

The Law of 1294 only imposed the duty of supervising the water supply of the town and of enforcing the proper performance of their duties by the persons in charge of it. It did not confer on the Municipality any rights beyond that. Moreover the Law 27 Ramazan, 1294, so far as it is not altered, is incorporated or re-enacted by the Ordinance 2 of 1880.

The Ordinance 2 of 1880 is repealed by the Ordinance 6 of 1882, Sec. 108. Subsequently under the Reprint of Statutes Law 1905, the Law 8 of 1885, to regulate the powers and duties of Municipalities, was published in the new edition of the Laws.

By Sec. 3 of the Reprint of Statutes Law it was unnecessary to re-enact Sec. 108 of Ordinance 6 of 1882.

The enactments in the Law 2 of 1880 including that part of it, which brings into or keeps in force the Law 27 Ramazan, 1294, are repealed, although it is not so stated in the new edition.

By Sec. 6 of the Reprint of Statutes Law it is enacted as follows:—

"Upon the passing of a resolution of the Legislative Council "authorising him so to do, the High Commissioner may, by pro- "clamation, approve of the edition prepared under this Law, and "order that it shall come into force from such date as he thinks fit. "From the date named in such proclamation the new edition shall "be deemed to be and shall be without any question whatever in "all Courts of Justice the sole and only proper book of the Ordinances "and Laws enacted by the Legislature of Cyprus since the commence- "ment of the British Occupation and in force at the date referred to "in Sub-section (1) of Sec. 2."

That is to say on such date as the High Commissioner might fix by notification in the *Cyprus Gazette*.

A proclamation under that section was duly issued on the 30th August, 1906, bringing those laws into force on the 1st January, 1907.

The Courts are bound to regard the new edition as the sole law on the subject enacted by the Cyprus Legislature.

The Turkish law is repealed and the Municipality has no power other than those given by this law.

By Sec. 1 of 8 of 1885 of the new edition of the laws the Municipality are to provide, or cause to be provided, a good and sufficient supply of water for the use of persons dwelling within the Municipal area, and to keep, or cause to be kept, cleansed and in good repair all public fountains, drains and aqueducts, and to preserve the same from contamination.

This law does not transfer any property in any water to the Municipality. Moreover, without express mention, it could not be held to deprive the Crown of a right vested in it, therefore it does not confer on the town any property over the water dedicated to Mosques or any other khairat. It only imposes on the Municipality the duty of seeing that the aqueducts and water are kept in order.

The Court reviewed the evidence at length and continued: From all the evidence the conclusion we draw as to the terms of the dedication is, (1) that the water and channels were made vaqf on the terms that they should be used and enjoyed and therefore it could not be leased, except in case of necessity (Omer Hilmi, 394), and then only with the approval of the Government (O.H., 166); (2) that it was not permitted to give teskeres for the water; (3) that the terms of the vaqf

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as to the user were, that the water was to be supplied to the Mosque of Ay. Sofia and Omerie in the one case, and the Yeni Jami in the other and to the people of the town of Nicosia; that if there was a scarcity of water the people in the different quarters of the town had to take the water in turn.

The property dedicated was therefore of the class of the dedications called Muessesati-Khairie and not of the class Musteghillat.

There are two beneficiaries from the point of view of this action —(1) Mosques, (2) the inhabitants of Nicosia.

So far as the Mosques are beneficiaries the water and channel is attached to the Mosques.

So far as the people are beneficiaries it is not attached to the Mosques. It is as if a person by one dedication made vaqf 2 houses:—one for the use of the preacher in the Mosque and the other for the poor of the town in which the Mosque was, or for his poor relations, in which case it would be clear that the house dedicated to the poor relations would not be attached to the Mosque.

It follows from these findings that the Plaintiffs have such rights over the water and channels as are given to a partner in a water course in common by Art. 1269 of the Mejellé.

As the conditions of the Vaqfie are not known the water and aqueducts would be Mazbuta vaqf according to the passage cited above from Ismail Haqqi Bey, and the administration of the water and aqueducts, so far as it is not given to the Delegates of Evqaf, has devolved on the Government.

In so far as the inhabitants of Nicosia are beneficiaries any right which the Ministry of Evqaf had at the time of the British Occupation vested in the Government.

The wells which have been added are made by the Municipality by leave of the Government for the purposes for which the original waters were designed; they are under the same conditions as the original waters.

Now as the Plaintiffs are part owners they would be entitled to what they claim against the Defendants, unless the Defendants can show that they are entitled to manage the channels. It appears clear from the correspondence that the Municipality are working under the authorisation of the Government, and the Plaintiffs cannot take the management completely out of their hands.

We have considered the question as to whether the Defendants have exceeded the rights which the Government could confer on them as part owners of the channel, but that question was never

raised at the trial, we do not think we should consider it now, but that our judgment should be confined to the agreed matter in dispute, viz., who is entitled to administer the water and aqueducts.

We do not think that there is anything in the contention that the Defendants have acquired a prescriptive right; the Mosques have never ceased to enjoy the user of the water.

Our judgment is that the appeal should be dismissed and that the judgment of the Court below so far as it dismisses the claim of the Plaintiffs to the exclusive right to the aqueducts and channels and so far as it claims an injunction be affirmed, but as the grounds of the judgment are different and neither party has succeeded in establishing an exclusive right to either the water or channels, that there should be no costs here or in the Court below.

Appeal dismissed.

N.B.—There was a slight difference between the version of the Annex deposited in the Sher' Court by the Turkish Government and the English version. The Court treated these differences as immaterial.

The Turkish version was as follows:—

" And an official shall be appointed by the Ministry of Evqaf who " with an official to be appointed by the English Government shall " administer the emwal, emlak and arazi belonging to (or attached to ماك) sacred Mosques, etc."

The English version says " *superintend* . . . the administration."

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

GEORGHI HAJI NICOLA AND ANOTHER
v.
CHRISTODOULOS FIEROS.

LAND TRANSFER AMENDMENT LAW, 1890—MORTGAGE OF PREMISES CONTAINING MILL—SUBSEQUENT LEASE BY MORTGAGOR—MACHINERY FOR MILL PLACED ON PREMISES AFTER MORTGAGE—SALE OF MORTGAGED PROPERTY LAW, 1890—LAW CONCERNING THE SALE OF IMMOVEABLE PROPERTY FOR DEBT, 15 SHEVAL, 1288, ART. 13.

C.S. was the registered owner of certain mulk property including a building used as a mill and containing some machinery for the purposes of the mill. In 1909 *he mortgaged the whole of the property to the Defendant under the Land Transfer Amendment Law,* 1890. *In* 1912 *he entered into a partnership with the first Plaintiff and C.H.N. to work a mill in the said building and purported to lease the building to the partnership firm for a term of* 20 *years. After the formation of the partnership, C.S., in accordance with the partnership agreement, purchased and put in new machin-*