BELCHER, C.J., SERTSIOS, J., FUAD, J. 1928.

March 27.

[BELCHER, C.J., SERTSIOS, J., FUAD, J.]

BISHOP OF PAPHOS

v.

NAZIM BEY KIPRIZLI & OTHERS.

TRESPASS ON LAND—ECCLESIASTICAL PROPERTY LAW (No. 1 OF 1893), SECTION 2 AND SECTION 3 (1)—LAND CODE, ARTICLE 122—MULK—ARAZI MIRIE—IDJARETEIN VAQF—MEVQUFE (VAQF) LAND—EFFECT OF THE DISPUTED PROPERTY BEING ON LIST OF LANDS OF THE PAPHOS SEE DEPOSITED WITH LAND REGISTRY OFFICE IN 1893.

This is an appeal by defendants from the judgment of the District Court of Paphos.

Paschalis and *Chrysafinis* for appellants (defendants).

Triantafyllides and *Loizo Philippou* for respondent (plaintiff).

The facts appear sufficiently from the judgments.

Judgment. THE CHIEF JUSTICE: The plaintiff brought this action in the District Court of Paphos against the defendant Nazim Bey personally and also against him and others as heirs of Hattije Hanim of Paphos, and the part of the judgment then given, which is not appealed from, was that the defendants, as such heirs, be restrained from interfering with a field known as "Ayios Georgios" or "Old Church field."

The action appears from the judgment of the learned President (now Mr. Justice Lucie-Smith) to have been based upon the provisions of Law 1 of 1893, Section 3 (1). That law, as is set out in its preamble, was intended to secure to the ecclesiastical corporations in Cyprus the continued possession of such immovable property as they might then be in actual possession of, pending some permanent settlement. From the fact that the law has been repeatedly renewed and is in force at the present time, it may be taken that the permanent settlement contemplated has not been made.

The law is a short one, of the preamble and six sections, of which the important parts for the purposes of this case are Section 2, which provided that nothing in the law shall apply "to any land of the category known as 'Mulk'" and Section 3 (1) which states in effect that in an action by an ecclesiastical corporation for interference with cultivated lands in the possession of the corporation, proof of title shall not be required but that the action may be maintained on proof of 10 years possession, even against a registered owner.

The learned President found that in fact the plaintiff had proved uninterrupted possession of "the field in dispute" from 1869 to 1916 and the area of the field is stated in the judgment to be 16 donums, 1 evlek.

The first ground of appeal submitted to us was that the proved possession cannot avail the respondent seeing that the land in question is not attached to a monastery and registered as such in the Imperial Archives; and we are referred to Article 122 of the Land Code. That article, however, relates solely to the different ways in which the ownership of land by a monastery is to be recorded, *i.e.*, either by virtue of original charter, and so as Vaqf Sahih outside the purview of the Land Code, or by ordinary title under the Code. Comparing what is said in the judgment of this Court in the Kykko Monastery case, C.L.R., Vol. I at p. 116 with note 1 to Article 122 in R. C. Tute's "Ottoman Land Laws" it is evident that the interpretation of Article 122 is not free from doubt, but the right of action claimed here was purely a possessory one not purporting to depend on title; and as it appears to have been admitted that the plaintiff is an ecclesiastical corporation, the existence or not of any *ab antiquo* charter in the monastery or registered title in the Bishop is immaterial.

The law of 1893 was passed subsequently to the Kykko case, and the preamble to it is couched in such clear terms as to leave no doubt in my mind that it means just what it says, that it was the enjoyment of lands "actually in possession" of the monastery to which it aimed at affording temporary protection, whether or not such lands could then lawfully be held by a monastery otherwise than by a record by charter, a question which may well have been one (if it was not the only one) of those referred to earlier in the preamble as being then pending. It would be futile to pass a provisional law if cases under it could not be decided without finding an answer to one of the very questions whose contemplated postponement, implying an unsettled interval, was the object of the passing of the law. The matter seems indeed to have been concluded more than a generation ago, by the judgment of this Court in the Armenian Monastery case, 3 C.L.R., p. 256; it appears to me now, as it did to our learned predecessors who heard the case on appeal in 1895, "too clear for argument."

Then it is argued, and the appellant's case must rest on this, that the field in question is "land of the category known as mulk" within the meaning of Section 2 of law of 1893 and, therefore, the provisions of Section 3 of that law cannot apply. The argument proceeds, as I understand it, somewhat as follows:—The land is part of property

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of the defendants which so far as they are concerned is registered as Idjaretein Vaqf (Mulhaka); that it could not have become Vaqf at all without an original mulk-nameh; that, therefore, it must once have been mulk, and, therefore, it is now mulk, or at least its dedication as Vaqf placed it in the same position as regards the State and as regards claims by adverse possession as mulk land, whereas the object of Section 3 of Law 1 of 1893 is to confine the operation of that law to land which has the incidents of arazi mirié; and Idjaretein Vaqf has not those incidents. It is pointed out that not only is such a thing as cultivated mulk land unknown in Cyprus, but that what the framers of the law must have meant to exclude from its operation was land for which the monasteries could admittedly already get registered titles; that is, not only mulk in the strict sense but Vaqf lands which must at one stage have been mulk.

We must first decide whether Section 2 was intended to make the proof that the land is not mulk (in whatever sense that word is used), incumbent on the plaintiff, or, on the other hand, to permit proof that it *is* mulk to be raised as a defence by the defendants. The latter must, in my view, be the correct interpretation of the section. If, as we have seen, the plaintiff's cause of action under Section 3 depends on possession, it can make no difference to either party what sort of title may at one time have issued, or might later issue to the plaintiff. But, as will be noted hereafter, the category of the registered owner's holding makes a great deal of difference when viewed as a defence to possessory claims under the ordinary law; and since this special law No. 1 of 1893 deals wholly with possessory rights, the reference in Section 2 to " mulk " must be to mulk of the defendant. His own holding being matter which is peculiarly within the knowledge of the defendant, it is for him, if he can, to raise the nature of that holding as a defence.

Has the defendant established that the land claimed by plaintiff is, so far as his (defendant's) holding is concerned, of the category known as mulk? Nominally not; he admits that his original holding, and the registration based on it which he relies on, is as Idjaretein Vaqf. But, he says, look at the real object of Section 2. Surely it is to confine the law to cases where the monasteries need protection, that is to arazi mirié and those forms of vaqf which still leave the ultimate ownership in the Government. An owner, against whom a monastery claim, ought, he says, to be in no worse position than if the claimant were a private

individual. If land is mulk, a private individual must occupy it adversely for 15 years before he gets a prescriptive right; if arazi mirié, for 10 only, and 10 is the period for which the monastery must show possession by Section 3. And, argues the defendant, if that is the real object, then a fortiori it cannot be intended to give the monastery greater rights than the private individual as against an owner of Idjaretein Vaqf, where the long period of 36 years is required by the general law, if, by the exception, you place monastery and individual on the same footing as regards mulk, where the lesser term of 15 years suffices. In effect, he says, arazi mirié is the only land the law is meant to apply to, and the existence of vaqf as a category was overlooked by the framers of the law, or else they thought that it was sufficiently included under the term " mulk," seeing that land must, as a preliminary to dedication, become mulk. That is the defendant's argument; he says the holding he has shown is one which must be regarded as " mulk " for purposes of the law. But before that argument can have effect the actual title adduced by defendant in respect of this land must be examined as the mode of discovery to real category. He produced in Court below a Certificate of Registration, No. 15980, as Idjaretein Vaqf, of land therein described as " The chiftlik of Potima with its known appurtenances and with its distinguished and known boundaries, as marked by L.R.O. clerk, M. Safvet Effendi, on the 28th July, 1918 (by order of the Registrar General) on plan made by M. Salim Effendi and dated the 3rd February, 1903." If the field in question is really included in that chiftlik, not as a mere matter of circumscription but as having been actually granted by the Sultan to the defendant's predecessors, then, and then only, it will be necessary to decide whether the reasoning above summarised is sound and the land accordingly to be treated is of the category of mulk for purposes of Law 1 of 1893. There is in evidence (Ext. M.S., II.) a copy of the original list of the fields, with their areas, constituting Potima chiftlik, and at the foot of Salim Effendi's plan is a comparative table showing the chiftlik fields as then known to the villagers in relation to their old names and areas in the chiftlik record. On the plan the field in dispute is shown, lying between fields 12 and 15; it is not numbered on the plan but has a note on it " Site and field of ruined church " and in his evidence the surveyor said, on cross-examination by the plaintiff's advocate " I did not mention that locality in the list at foot of plan. I could not satisfy myself as to which item ' church and field ' belonged, so I left it blank. I measured it up half with item 15 and half with item 12."

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For the plaintiff, Hassan Izzet, another L.R.O. clerk at Paphos, produced a list of its properties which the See of Paphos deposited with the Land Registry in the year 1893. On that list item 29 is " Ay. Georghi land with boundaries: channel-Drynali-Road and Niksha land " and he stated that on 8th June, 1925, he went to Potima chiftlik and found the disputed field with boundaries as described for item 29; in a new survey of Cyprus made in 1920 the field is recorded in the name of the See of Paphos. It appears also from the evidence of this witness that titles are not issued in respect of properties belonging to the See as shown in their deposited list.

As a matter of physical fact, the field, as now shown in the latest survey, is entirely surrounded by lands which, it is not now disputed, form part of the Potima chiftlik. The plaintiff's witnesses Efthymios Avraam and Sophocles Haralambou show that the disputed field once extended to a point where it was at least nearer to, or as Izzet Effendi's exhibit H.I. 2 shows, actually not completely enclosed within the chiftlik boundary. Izzet Effendi gave evidence that in the case of other chiftliks, there are properties included in the boundaries but belonging to strangers.

Both the plaintiff and the defendant obtained such recording of the disputed field as theirs, as the nature of things would permit in each case, the plaintiff by deposited list in 1893 and the defendant by deposited plan and consequent title in 1903.

We have to decide whether, upon the evidence, the disputed land was properly included or to be regarded inferentially as included in the chiftlik's title in 1903. On the one hand it had been for many years in the possession of the plaintiff and it was shown by name on their codex; and on the other it was never in the possession of the defendants before that date and it was not shown by name in the original list of properties belonging to there chiftlik.

In these circumstances there was no sufficient justification for Salim Effendi dealing with the plan and title as he did (without notice to possible claimants) in 1903, that is by showing the land as an unnumbered plot on the plan and yet including its area, divided up between two undisputed fields of the chiftlik, in the figure shown on a title which purported to be that for the fields of Idjaretein Vaqf as narrated in the original description of the chiftlik and list of the fields composing it. If the field was not Idjaretein Vaqf before, Salim Effendi's action in cutting, in the way he did, the Gordian knot of his inability to make the fields square with the list, can hardly be regarded as equivalent to a dedication. An erroneous description in

a certificate cannot alter the category of land, which depends on quite other considerations. And before he did so, there was no evidence that the defendants held this land at all, under any category, or indeed that anyone else did so except the plaintiffs.

The only title which the defendants have shown to this land is, therefore, one which was based on an unfounded assumption by a surveyor as to the legal position, supported neither by the pre-existing records nor by the facts of occupation. It is a plan certified to in error by the L.R.O and even were the title which issued thereon in its nature unquestionably mulk, its lack of foundation and consequent liability to disappear altogether on rectification of the register would prevent it being set up as an answer to the plaintiff's claim.

It is not necessary, therefore, to consider the argument that the land is of the category known as mulk although it is registered as Idjaretein. I have been much impressed by that argument, while recognising the difficulty that faces it of getting over the plain words of Section 2; but in this case, at all events, the facts deprive it of the basis on which alone it could be rested.

The appeal should, therefore, in my opinion, be dismissed, and the judgment of the District Court affirmed, with costs.

SERTSIOS, J. I concur.

FUAD, J. I dissent. In 1891, before the Ecclesiastical Properties Law was passed, the only law which dealt with the rights of monasteries and ecclesiastical corporations with regard to tenure of land was Article 122 of the Land Code, which is to the following effect:—

> " Land (arazi) that has from time immemorial been annexed to a monastery and the annexation of which has been registered in the Imperial Archives cannot be held by tapou and cannot be bought or sold; but land, which, having originally been held by tapou, has, while so held, passed by one means or another into the hands of monks and been held without tapou as being annexed to a monastery shall be treated like other state land (arazi mirié) and shall as before be made to be held by tapou."

I agree generally with the interpretation given to this article by the Supreme Court in *Sofronios Egoumenos of Kykko* v. *Principal Forest Officer*, 1 C.L.R., p. 111, that the law did not recognise the annexation of any state land to a monastery or a church, as church property, unless it was held from time immemorial and its annexation

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was recorded in the Imperial Archives, and that land which came into their possession by one means or another later was to be held by tapou by the individual in possession and be treated like other state land—that is, it did not become church property, it could not be dedicated, and the right to possession remained vested in the individual concerned. It could only be disposed of by the permission of the proper authorities under Article 36 of the Land Code, and would either remain vested in him or his heirs or revert to the state. The owner of arazi mirié being the State, the right to possession is treated as a personal matter. The law did not consider the possibility of any right in or over it save a right of possession, which could only be assigned with the permission of the officer of the State, and would pass by inheritance, and which would always revert to the State on failure of heirs and under other given circumstances.

This reversionary right of the State is very zealously safeguarded throughout the law, and a number of restrictions is placed on the use which could be made of the land by the person in actual and lawful possession. It is interesting to note that it could not be dedicated even for the benefit of a Moslem religious institution, unless the rights of the State in and over it were bought out and out and it was converted into mulk by express permission of the Sultan. Therefore, unless the land was turned into mulk, a claimant could have nothing more than a right of possession, the ownership remaining in the State: *Houloussi* v. *Apostolides*, 1 C.L.R., p. 20, *Emphiedjis* v. *Law*, 1 C.L.R., p. 122. In other words, with the exception of lands possessed *ab antiquo* by the churches and registered as so possessed in the Imperial Archives, no land of the category of arazi mirié could be possessed by them like ordinary individuals, because being corporations they would never die, and the State would lose its reversionary rights, which are fully protected by the law.

When this was found to be the state of the law, the Ecclesiastical Properties Law of 1891 was passed for two years and was followed by Law 1 of 1893, which is still in force by virtue of Law 14 of 1926. The preamble runs as follows:—

> " Whereas questions have arisen as to the rights of ecclesiastical corporations with regard to the tenure of land in the Island of Cyprus; and whereas it is expedient that, pending the settlement of such questions, ecclesiastical corporations in Cyprus should not be disturbed in the enjoyment of any immovable property of which they are now actually in possession, Be it enacted . . .

S. 2.—Nothing in this law contained shall be deemed to apply to any land of the category known as mulk.

S. 3 (1)—In any action brought by an ecclesiastical corporation in respect of any interference with or trespass upon any cultivated lands in the possession of the corporation, it shall not be necessary for the plaintiff to produce evidence of his title to such cultivated land, but evidence of 10 years' possession alone shall be sufficient to enable the corporation to maintain an action against any person interfering with the lands, even if he is the registered owner in the books of the Land Registry Office.

(2) The privileges conferred by this section shall not apply to any lands of which any such corporation has taken possession after the 22nd May, 1891.

Even apart from the terms of Section 2 it is quite clear that the only questions which arose with regard to tenure of lands by the churches was with regard to arazi mirié, *i.e.*, all lands which were covered by Article 122 of the Land Code —lands for which, no matter how long their possession, they could get no title to, therefore, only lands the ownership of which was in the State, which the Land Code wanted to protect. Because as the decision of the Supreme Court, which no doubt led to the passing of the law, and the laws in force in the land clearly admitted the right of the churches to get registration and title to lands of the category of mulk, in which class lands held in ijaretein were clearly included, they could and did get a valid title to ijaretein lands and there could have been no question with regard to them. It is a right they possessed under the Civil Law and Evcaf laws in force in the Island; and there was no reason, object, or sense, in making *temporary* provisions for their rights over lands for which the existing laws apply provided and gave them permanent rights, and incidentally in so doing undermining all the principles of the Mohammedan laws with regard to prescription of ijaretein (36 years), and giving privileges over and above anything an ordinary individual or a Moslem corporation or institution could possibly have over properties dedicated to religious purposes—that is giving by 10 years' possession rights to them which others require 36 years to acquire and over properties which receive greater protection in the eyes of the law than any freehold property. Because ijaretein lands could be bought and sold by anybody or a corporation, the reversionary right of the State is already wholly extinguished (*see Emphiedji* v. *Law*, and Evcaf laws of Omer Hilmi, Article 192); the State is not concerned with what happened to them.

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The legal adviser to the Government is also of the same opinion (*see* Draft Law for Ecclesiastical Properties, *Cyprus Gazette*, No. 1902, p. 157, dated 10th February, 1928, Objects and Reasons—to enable churches to become a body corporate so that immovable property of any category may be registered in the name of such corporate body; at present only mulk property and not arazi mirié can be registered in the name of a church see or monastery). Here again only two categories are mentioned (1) mulk generally, lands for which they could get registration, (2) arazi mirié for which they could get no registration; and by this draft law Article 122 of the Land Code is sought to be repealed. Therefore, what is meant by " mulk " in all these laws is quite clear. Land of the category of mulk is land which by purchase of the right of ownership and by express permission of the Sultan became the property of the individual, to be dealt with like any other freehold property, and over which the State lost its reversionary rights, and which could be bought and sold, and land to which Article 122 of the Land Code did not apply.

Take the Land Code. There are four classes of mulk land. The first class comprises houses in town or village and complements of houses not exceeding half a donum in extent. This class is surely not the " category of land known as mulk " and sought to be excepted from the operation of a law dealing with *cultivated* lands which monasteries may possess.

I leave the second class out for a moment.

The 3rd class *Ushrie* land left in the possession of original Moslem inhabitants of conquered territories to be held as their own property. There is no such land in Cyprus. It is found only in Arabia and Mesopotamia and in other parts of the Ottoman territories which were inhabited by Moslems at the time of the conquest. The exception could not, therefore, refer to this class either.

Class 4—Harajie, land left in the possession of the Christian inhabitants of territory occupied or annexed peacefully or by treaty. Cyprus not being one of the territories so occupied, no such land could exist here, and as a matter of fact does not. Consequently the exception could not refer to it.

Therefore, it could only possibly refer to class 2, land which was originally arazi mirié and made mulk to be possessed in one of the different ways authorised by the Sheri law—making it vaqf being clearly and admittedly one of such ways. There is no land in Cyprus which has been made mulk and remained as such without being

dedicated to some religious object. There is no category of *cultivated* mulk land pure and simple, and so if the reference in Section 2 of Law 1 of 1893 is to be interpreted as being limited to land which was made and remained mulk, it would be useless and absurd, and there would have been no reason to except from the application of the law a category of land which did not exist when the law was enacted.

There is something else which I should explain to make my decision clearer. One might be misled by Article 4 of the Land Code. Well-known commentators point out that land which was originally arazi mirié and was turned into *mulk* and then made what is known as a true vaqf is not *arazi* any longer, and, as the Land Code explains, is dealt with under the Civil Code and Evcaf laws, and the mention of it under " mevqoufé land " is for the purpose of distinguishing it from arazi mevcoufé tahsisat, State land which was never made mulk and the reversionary right to which is still in the State, and which is treated like arazi mirié. It is for the purpose only of showing the distinction and to prevent any possible misunderstanding which might arise from the use of the term " mevcoufé " that mention is at all made in this article.

As we also see in defendant's titles his land is not described under category as *arazi mevcoufe sahiha*, but simply as *ijaretein*, because so far as the State is concerned there is no difference between such lands and a house made vaqf ijaretein, both being described simply as *ijaretein*. The evidence shows that there was an old record with " well-known and distinguished boundaries " which Salim checked and on which he prepared a plan. With regard to this bit of land he says he could not get it identified and, therefore, did not know to which portion of the lands of the chiftlik it should be attached, but clearly stated that it was within the boundaries mentioned in the old records. His plan was checked later and the outer boundaries (and this is all we are concerned with) were found correct and certified by the Registrar General. Again, at the request of the plaintiff an official was sent and he made a local enquiry in the usual way, and stated before the Court as the witness of the plaintiff, that this land was within the boundaries of the chiftlik which they knew.

The action is based on Law 1 of 1893. I read the judgment of the Court below. It also found that the land was within the title-deed of the defendant, but it gave judgment for the plaintiff on the ground of over 10 years' possession —the only thing he claimed by the action on the strength of Law 1 of 1893.

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If we find Law 1 of 1893 does not cover ijaretein land then the judgment cannot stand. The learned advocate for the plaintiff, in the course of his valuable argument before us, said in answer to the Chief Justice, " I admit we either stand or fall on Law 1 of 1893." The question of the land being outside the boundaries having never been really contested or raised before the Court below, and not being in issue, defendant was not given a chance of adducing other evidence or documents and records, which he might have had in his possession. The law and the decision of the Supreme Court say, " in questions of land one must look at the boundaries; there is no other way of ascertaining what is within or without a title-deed " ; and decisions show that protection is always given to a person holding a title, which on the face of it is shown to include the land in dispute. And, what is more, if any proof was necessary, the onus was on the plaintiff to prove that the land in question was arazi mirié and outside the title covering an ijaretein chiftlik before he could claim to enjoy *privileges* (the very word used in sub-section 2 of Law 1 of 1893) conferred upon him by Law 1 of 1893, and to bring land within that class to which the law is applicable.

Apart from the fact that the defendant was always absent from Cyprus and, therefore, no prescription would run against her, even if out of the title-deed, there is no evidence to show its category and that it is arazi mirié because it is not, and it might be vaqf, like thousands of other cases; the form of action would be different, and no remedy could be given to plaintiff at all, because he should have in such a case asked for cancellation of the title-deed in the name of defendants, which clearly now includes the land in question, and ask for registration of it in his own name.

The appeal, therefore, ought to have been allowed.

Appeal dismissed.