SUPPLEMENT No. 4

TO

THE CYPRUS GAZETTE No. 2731 OF 16TH JUNE, 1939.

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[THOMAS AND FUAD, JJ.]

1937
April 10.

FATMA BEYAZ ALI AS GUARDIAN OR NEXT OF KIN OF MINOR MEHMED, *Plaintiff (Respondent)*,

v.

THE ESTATE OF THE DECEASED HASSAN HAJI HUSSEIN, *Defendants (Appellants)*.

(Sheri Appeal No. 26).

FATMA BEYAZ ALI *v.* HASSAN HAJI HUSSEIN.

SUCCESSION IN SHERI LAW—ACKNOWLEDGMENT OF CHILD—CASE OF ADMITTED ILLEGITIMACY.

The Respondent brought an action in the Sheri Court of Nicosia asking for a declaration that her minor son is an heir of the deceased Hassan Haji Hussein, with whom, according to her evidence and that of her witnesses, she cohabited for four years upon condition that a nikiah should be made. Though a nikiah was in fact contracted between herself and the deceased, it was proved beyond any doubt, and admitted by the mother herself, that the minor Mehmed was born during the period when there was no nikiah. The Sheri Judge found that the deceased acknowledged Mehmed to be his son, and that, where a father makes such an acknowlegdment without mentioning the fact that the child is the result of illicit intercourse, this is conclusive proof in Sheri Law of the parentage of the child. He accordingly held that the minor was an heir of the deceased. From this decision of the Sheri Judge the defendants appealed.

HELD: *That acknowledgment by a man of an admittedly illegitimate child born of a woman with whom he cohabited but was not married, does not render such child his heir.*

M. Zekia with *M. Fadil* for the Appellants:

To establish pedigree there must be very substantial and reliable evidence. Oral evidence unsupported by documentary evidence has little weight. If the evidence is unreliable this Court is not bound by the lower Court's findings of fact. Where there is admittedly no marriage acknowledgment has no effect.

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M. Behaeddin for the Respondent:

Proposal and acceptance constitute *nikiah* in Sheri Law. A promise of marriage by the father during cohabitation followed by an acknowledgment of the child is a valid marriage according to Sheri Law.

The judgment of the Court was delivered by Mr. Justice Thomas.

Judgment: THOMAS, J.: In this action the respondent claimed a declaration that he is an heir of Hassan Haji Hussein. Judgment was given in his favour by the Judge of the Sheri Tribunal of Nicosia-Kyrenia against the defendants as heirs of the estate, and from that judgment the present appeal is brought. The action was brought in the minor's name by his mother Fatma, who, after being married for three months to Hussein of Dhiorios, was divorced by her husband on 5th March, 1922. Shortly after this there were conjugal relations between Fatma and Mustafa Hassan which lasted some four years when Mustafa Hassan married and died soon after. On 1st February, 1923, the plaintiff Mehmed was born. The case put forward by the plaintiff was that Mustafa Hassan lived four years with Fatma upon condition that a *nikiah* should be made; that Mehmed was born during the years they lived together as husband and wife, and that Mustafa had acknowledged Mehmed to be his son. The hearing of this case before the Sheri Court ended on 13th June, 1935, and after what would be in the case of ordinary civil proceedings an unreasonable delay of eight months the Sheri Judge, Burhanettin Bey, gave judgment on 20th February, 1936. He found that after a promise by Mustafa to make a *nikiah* with Fatma they lived together as husband and wife, and that Mehmed was born during this time. He also found that Mustafa acknowledged Mehmed to be his son, and that, where a father makes such an acknowledgment without mentioning the fact that the child is the result of illicit intercourse, as in the present case, this is conclusive proof in Sheri Law of the parentage of the child. He accordingly held that Mehmed was in accordance with Sheri Law the son of Mustafa, and so an heir of the defendant estate.

The point thus raised in this appeal is whether it is a principle of the Sheri Law that, where as a result of illicit cohabitation a child is born, and the man acknowledges the child to be his without mentioning that the child is the result of fornication, such acknowledgment makes the child an heir.

With regard to the nature of the relationship between Mustafa and Fatma it was stated by plaintiff's counsel at issues that Mustafa promised to make a *nikiah* and marry Fatma in accordance with the Sheri; that they lived together on condition that a *nikiah* should be made. Fatma on her evidence says Mustafa promised to marry her,

and that, when she became pregnant, Mustafa said: " I shall marry you " one day." She said further: " Although without *nikiah* I used to " have relations with him; and Mehmed was born during the period we " had relations without *nikiah*." Plaintiff's own witnesses Hussein Zihni and Abdulkadir say Fatma was Mustafa's concubine, and that Mehmed was born without *nikiah*. This evidence given by the plaintiff Fatma and her witnesses establishes conclusively that the relationship between Mustafa and Fatma was an unlawful union. In accordance with Sheri Law any child born of such a connection is illegitimate. Can a father by acknowledging an illegitimate child to be his son make that son his heir ? The authorities establish in a manner entirely free from doubt that such an acknowledgment does not make the son an heir. This question has been the subject of a great deal of litigation in India.

Cases regarding the legitimacy of children have frequently arisen where the marriage cannot be proved. " In these cases Mohammedan " Law presumes a legal marriage from continued cohabitation and the " acknowledged position of the parties as husband and wife, provided " there is no insurmountable obstacle to such a presumption and pro- " vided the relationship existing between the parties was not a ' mere " casual concubinage,' but was permanent in its character, justifying " the inference that they were lawfully married." (This is the opinion of Ameer Ali, one of the greatest and most learned judges who have ever sat upon the bench in India. See his Mohammedan Law (5th Edition), Vol. 2, p. 213.) The same eminent authority dealing with the decision of Mahmood, J., in *Muhammad Allahdad Khan v. Muhammad Ismail Khan* says : " The learned judge held that, although, according " to Mohammedan Law, *ikrar* or acknowledgment in general stands " upon much the same footing as an admission as defined in the Evidence " Act, acknowledgments of parentage and other matters of personal " status stand upon a higher footing than matters of evidence, and " form part of the substantive Mohammedan Law. So far as inheritance " through males is concerned, the existence of consanguinity and legi- " timate descent is an indispensable condition precedent to the right " of succession, and such legitimate descent depends upon the existence " of a valid marriage between the parties. Where legitimacy cannot " be established by direct proof of such a marriage, acknowledgment is " recognized by the Mohammedan Law as a means whereby the marriage " of the parents or legitimate descent may be established as a matter " of substantive law. Such acknowledgment always proceeds upon " the hypothesis of lawful union between the parents and the legitimate " descent of the acknowledged person from the acknowledgor, and there " is nothing in Mohammedan Law similar to adoption as recognized

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" by the Roman and Hindu Systems, admitting of an affiliation which " has no reference to consanguinity or legitimate descent. A child " whose illegitimacy is proved beyond doubt, by reason of the marriage " of its parents being either disproved or found to be unlawful, cannot " be legitimized by an acknowledgment. Acknowledgment has only " the effect of legitimation where either the fact of marriage or its " exact time, with reference to the legitimacy of a child's birth, is a " matter of uncertainty." (Ameer Ali, p. 222.) In delivering the judgment of the Privy Council in *Habibur Rahman Chowdhury v. Altaf Ali Chowdhury* (48 Indian Appeals 114) Lord Dunedin referred with approval to the " very learned judgment of Mahmood, J.," and cited the following passage from the judgment of Lord Atkinson in an earlier case before the Privy Council(1) which their Lordships declared was a clear and conclusive view of the principle in question. " If this be so, " the rule of Mohammedan Law applicable to the case is well established. " No statement made by one man that another (proved to be illegitimate) " is his son can make that other legitimate, but where no proof of " that kind has been given such a statement or acknowledgment is " substantive evidence that the person so acknowledged is the legitimate " son of the person who makes the statement provided his legitimacy " be possible." The question of law raised in the present appeal has long ago been put to rest by decisions of the Privy Council. The Sheri Judge's statement of the law that the father made his illegitimate son his heir by an acknowledgment was clearly wrong, and for the reasons given above we think this appeal should be allowed and the decision of the Court below set aside.

Appeal allowed and the decision of the Court below set aside.

(1) *Sadik Husain Khan v. Hashim Ali Khan.*

1939
Jan. 17.

[FUAD AND GRIFFITH WILLIAMS, JJ.]

ZEKIYE TAHIR AND ANOTHER, *Plaintiffs (Respondents),*

v.

YUSUF MEHMED, *Defendant (Appellant).*

(Sheri Appeal No. 30).

CYPRUS COURTS OF JUSTICE ORDER, 1927, CLAUSE 17 (c)—SHERI TRIBUNAL'S JURISDICTION IN MATTERS OF MAINTENANCE IN RELATION TO MARRIAGE—CIRCUMSTANCES IN WHICH THE FATHER OF A MARRIED SON IS LIABLE TO MAINTAIN HIS SON'S FAMILY—EXTENT OF SUCH LIABILITY.

One Hassan Oktay, who is the husband of plaintiff No. 1, father of plaintiff No. 2, and son of defendant, left Cyprus some time before the institution of the action without making any provision or leaving any means for the maintenance of the plaintiffs.