SUPPLEMENT No. 4

TO

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[BELCHER, C.J., LUCIE-SMITH AND FUAD, JJ.]

1929
July 2.

FATMA ISMAIL AND ANOTHER, AS HEIRS OF DECEASED MEYREM KARA MUSTAFA, OF NICOSIA,

Plaintiffs-Appellants,

v.

THE ATTORNEY-GENERAL OF THE COLONY OF CYPRUS, *Defendant-Respondent.*

FATMA ISMAIL & ANOTHER *v.* THE ATTORNEY-GENERAL.

(Civil Appeal No. 3269).

JURISDICTION OF THE SHERI COURTS AS REGARDS INHERITANCE AND SUCCESSION IN CASES CONCERNING PERSONS OF THE MUSSULMAN FAITH—AUTHORITY OF THEIR JUDGMENTS IN SUCH CASES—CIRCUMSTANCES IN WHICH A PREVIOUS DECISION OF THE SUPREME COURT MAY BE OVERRULED.

Meyrem Kara Mustafa died leaving a house, which, soon after her death, was, upon a Mukhtar's certificate, registered by the L.R.O. in the name of her son, who was absent from Cyprus at that time. Some time later the plaintiffs obtained an Ilam from the Sheri Court in their favour and applied to the L.R.O. for registration of the house in their own names, but were refused by the L.R.O. Thereupon the plaintiffs brought an action in the District Court of Nicosia (Action No. 666/26) against the Crown claiming cancellation of the existing registration and registration in their own names. The District Court dismissed their action on the grounds: (1) That the Ilam was not binding on the Crown because the evidence on which the Sheri Court acted was insufficient, and because of the decision in Mustafa Kidiri Salih v. The King's Advocate, 11 *C.L.R., p.* 64; (2) *That the plaintiffs failed to prove their case before the District Court, which was the Court to decide a question of heirship where the Crown's right was in issue. The plaintiffs appealed from this decision of the District Court.*

HELD: (1) *That the jurisdiction of the Sheri Courts, in cases of inheritance and succession concerning persons of the Mussulman faith, is exclusive;*

(2) *That the authority of their judgments in such cases is binding;*

(3) *That in exceptional cases the Supreme Court may overrule a previous decision of its own.*

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Fadil Eff. for the plaintiffs.

Mr. Pavlides for the Crown.

The arguments of Counsel appear sufficiently from the Judgment.

The judgment of the Court was delivered by the Chief Justice.

Judgment: BELCHER, C.J.: Meyrem Kara Mustafa died in 1918 registered as proprietor of a house. Soon after her death the L.R.O. upon a Mukhtar's certificate registered as owner as Meyrem's heir her son Mustafa Mehmed who was then absent from Cyprus. Plaintiffs-Appellants in 1925 obtained from the Sheri Court an Ilam that they, and not Mustafa Mehmed, were the heirs of Meyrem. Whether material or not, it may be mentioned that the ground given by the Sheri Court for its decision was that Mustafa predeceased Meyrem and that plaintiffs were next in succession. Plaintiffs then applied for registration to the L.R.O. who refused it, and they then sued the Attorney-General in the District Court of Nicosia, their claim being for cancellation of the existing registration and registration in their own names. The issues settled by the District Court were:

1. Did the Ilam bind the Crown ?
2. Are the plaintiffs the heirs of Meyrem ?
3. Are they entitled to registration ?

The Court dealt with those issues as follows:—

It decided that the Ilam was not binding on the Crown because the evidence on which the Sheri Court acted was insufficient. And also because of a decision of the Supreme Court in *Mustafa Kidiri Salih v. K. A.*, C.L.R., XI, part II, p. 64, that an Ilam does not bind the Crown. On the second issue also the District Court found against the plaintiffs, the ground being that they failed to prove their heirship before the District Court, which was the tribunal to decide a question of heirship where the Crown's right as Beitul-mal was in issue. Issue 3 naturally depended on issue 2 and the Court did not, therefore, deal with it. The plaintiffs' claim was dismissed and they appealed to this Court.

Before us Fadil Eff. argued that the Ilam itself was the only evidence which could properly be adduced before the District Court in proof of heirship and that it was not within the competence of that Court to find that the Ilam was not regularly issued.

Mr. Pavlides for the Crown submitted that the Ilam was not conclusive and that plaintiffs ought to have proved their case *de novo* before the District Court according to the rules of evidence in force in that

Court, which had jurisdiction to pronounce on this question of heirship, the jurisdiction in religious matters which the Sheri Courts have not, being exclusive. He relied on the case in C.L.R., XI, p. 64.

There is thus only one point for decision and it is a law point which is of considerable interest, and the first thing we have to determine is whether it is really met by the decision in the case referred to.

I have looked at the Chief Justice's note in that case, which was decided on 30th November, 1922 (Appeal No. 2228). The report, however, is fuller than the note; and although the decision as reported is simply " Judgment upholding the judgment of the District Court and " dismissing the appeal " we think it must be taken that the Supreme Court adopted the reasons of the District Court. I have accordingly referred to the District Court file of the case. From that it appears that the action was for a mandamus directing the Registrar-General to issue a title deed in plaintiffs' names for a Mülk house. The issue as settled by the District Court Judge was: are the plaintiffs the lawful heirs of the deceased ? One of the plaintiffs deposed to their relationship, and stated that they had proved their claim to heirship before the Sheri Court. The Cadi, he said, issued an Ilam, which they took in to the L.R.O. and asked for registration upon it. On cross-examination she contradicted herself on the question of relationship.

The Acting King's Advocate at this stage claimed that there were no heirs and that the Ilam was valueless as proof, it lying on plaintiffs to prove their title in the District Court. Behaeddin Eff. submitted that the Sheri Court was the competent Court to decide the question of heirship of a deceased Moslem, and that such a decision having been obtained there was no right in any other Court or in the Crown to decide in a contrary sense and that the L.R.O. consequently had no right to refuse to recognize the Ilam. The Crown, he said, had been notified of the Sheri Court proceedings and a Treasury Official was present in that Court when decision given. The Crown, Behaeddin Eff. argued, was, therefore, a represented party. The Acting King's Advocate submitted that the Sheri Court could only decide between Moslems and not bind the Crown, even if the Treasury Official had purported to submit to the jurisdiction. The Court (Vergette, P.D.C.), in giving judgment dismissing the claim said: " The Ilam cannot bind the Crown; it is only " binding between Moslems. Here the Crown is a claimant to the " property and it would be absurd if other claimants could go to the " Sheri Court and obtain an Ilam defeating that claim."

In the present case there are two points of difference from the other, but I do not think either affects the real identity of underlying principle. The first is that it is not the deceased (whose heirs plaintiffs claim to be)

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who is now in the register, but a person who they affirm was erroneously registered as heir.

It is, however, not to be questioned that if a person has been registered in error the official is bound to correct the error once it is duly established. The second is that the Crown here makes no direct claim to the land as being Mahlul. But it claims the right to frustrate the effect of an Ilam by refusing registration and that for all practical purposes is equivalent to seizing the property as Mahlul.

The question then being: did that case decide that the Crown is at liberty to disregard an Ilam which it may consider affects its own rights ? and if it did so decide, is this Court bound to follow it ? the first part of it there is no escape from answering in the affirmative. The case did so decide, and the *ratio decidendi* was that the Crown cannot be a party to a suit between Moslems and it is only such a suit that can form the subject of a Sheri decision. Not the slightest difficulty occurs in applying that decision to a case where the facts are so nearly on all fours as they are in the present: but should we follow it ? that is the second part of the question, supposing we have the alternative of declining to do so.

Have we this alternative ? Undoubtedly the rule of English Law as to the binding nature of the decisions of appellate tribunals which in the absence of any clear rule of Ottoman Law on the subject we may properly follow, is that such a Court should in general follow the previous decisions of the same Court. But in exceptional cases they are not bound to do so (*Vernon v. Watson*, 1891, 1 Q.B., 400). We may now examine the law as it stood before that case was decided, and apart from that decision. By Clause 25 of the Cyprus Courts of Justice Order, 1882, which was in force when the subject matter of this case arose, in all actions relating to immoveable property the rights of the parties shall be regulated by Ottoman Law as modified or altered by Cyprus Statute Law, and this provision is now included in the short but comprehensive wording of Clause 27 of the 1927 Order which replaces Clauses 23–25 of the former one. To find the substantive law relating to heirship of Mulk property in the case of Moslems we must go to the " Law as to title deeds for pure Mulk to be issued by the Defter Khané," 28 Rejeb, 1291 (10 Sept., 1874). The property in question in the present case is a Mulk house. Section 13 of that Law is as follows (R. C. Tute's translation, p. 146):

" On the death of the owner of Mulk property the Local Administra-
" tive Council shall be obliged to proceed in accordance with the Register
" of Successions (Defter Kassam) or, if there is not one, to act in

" accordance with the official report (mazbata) signed and sealed by the " Sheria authorities based on the certificate of the Imam and Mukhtars " of the Quarter showing the number of the heirs. After the matter " has been registered in its special register to be kept in accordance " with Article 11 and after it has been approved by being sealed at the " foot of the page, succession duty of five piastres per 1,000, paper fee " of three piastres and clerk's fee of one piaster will be taken by the " Treasurer and provisional certificates will be given to the heirs."

By section 15, the Mulk property of persons who die without leaving heirs and intestate shall be sold by auction to the highest bidder like Vacant State Land (Mahlul) and the purchase money paid to the Defter Khané after being entered in the Book of Receipts. It may be accepted I think without discussion that whatever the precise functions of the Local Administrative Council (Mejliss Idaré) and of the Defter Khané under the Law of 28 Rejeb, they are now vested, so far as they survive, in the Land Registry Office. The important thing for the present purpose is that there is nowhere in that law any suggestion that the registering officer had any option to refuse registration if the Sheri authorities had sealed a certificate of heirship. This follows on what was done as regards Arazi. In Note 5 to Article 54 of Tute's translation of the Land Code it is said: " It is the business of the Sheria " Court to set forth in the inheritance certificate the names of the heirs " and their respective shares in both the Mulk and Mirié properties " left by the deceased, when the deceased was a Moslem. This docu- " ment cannot be questioned by a Civil Court. If error is suspected " it must be referred to the Sheria Court for amendment at the instance " of the party interested." *A fortiori* there was no legal possibility of intervention, arbitrary or otherwise, by any executive officer.

It is not necessary to ask what were the substantive provisions of the Ottoman Law of inheritance applicable in this particular case; whatever they are, the question is clearly one which under the Ottoman Legal system only one Court or series of Courts could in case of dispute determine, and that was the Sheria Tribunals. Was any alteration made by the 1882 Order in Council? By section 20, the jurisdiction of the Mussulman Religious tribunals known as the Mekhemé-i- Sherié shall be restricted to the cognizance of religious matters concerning persons of the Mussulman faith. " Religious matters " is an unfortunately loose phrase but how it has been interpreted (as regards the matter of this case) during the past fifty years is made plain by section 17 of the 1927 Order which defined it to include " (*d*) Inheritance " and succession " and by the history of the functioning of the Sheri Courts. Whatever line of jurisdiction could be fixed the subject of

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inheritance must always have fallen well within it. This needs no elaboration.

A point to observe is that it is not " cases between Moslems " but cases concerning persons of the Mussulman faith " which the Sheri Courts are to decide.

Now the Crown's rights in land which becomes Mahlul have their very foundation and origin in the law of inheritance and succession, and they cannot arise until in the particular case the question, are there individual heirs, has been decided. As soon, there is only one Court to decide that question: for, by section 21 of the 1882 Order, the Sheri Courts' jurisdiction, so far as it extends at all, is exclusive and this principle is maintained by section 26 of the 1927 Order.

The decision we have to consider is one whose necessary effect is to negative the conclusion to which a consideration of the law would have led us, and to enable the Crown either to compel the Moslem claimant in heirship cases (every one of which potentially involves a question of Mahlul) to resort to a Court other than the Sheri Court, or by executive act to do away with one effect of the Sheri Court decision in such cases, which comes to the same thing. That is, it places the Crown above and beyond the law applicable to the ordinary citizen.

The decision is a comparatively recent one: it stands by itself, without any line of cases bending in its direction and without there being any subsequent case in which it was followed: the decision is not supported by reasons other than the adoption of the *ratio decidendi* of a District Court judgment which when examined shows that it was based on a misquotation of the text in an Order in Council. I feel the greatest reluctance in overruling any prior decision of this Court because one of its chief functions is to build up a fabric of interpretation on whose permanence the public can rely; but the fabric must be sound as well as permanent.

Mere convenience is no criterion. It is not an argument worthy of consideration that the Sheri Court procedure, with its legal fictions and peculiar rules of evidence, is not one suitable for dealing with claims which may affect the rights of the Crown: the answer is that—apart from the decision in *Kidir Salih v. the King's Advocate*—the law is that that tribunal is the only one provided: we are here to administer the existing law and not to alter it. For the reasons given above I think we should definitely overrule the decision in question and that in the present case the appeal should be allowed and judgment entered for the plaintiffs, for the declaration they seek, with costs.

Appeal allowed and judgment entered for the plaintiffs.