[BOVILL, C.J. AND SMITH, J.]

BOVILL, C.J. & SMITH, J. 1890. July 8.

SOPHRONIOS EGOUMENOS OF KYKKO MONASTERY *Plaintiff*,

v.

THE PRINCIPAL FOREST OFFICER *Defendant.*

CLAIM TO OWNERSHIP OF SOIL BY A MONASTERY—USER FOR PASTORAL PURPOSES—FOREST DELIMITATION ORDINANCE, 1881—TITLES REGISTRATION LAW, 1885—IMMOVEABLE PROPERTY LIMITATION LAW, 1886—ARTICLE 122 OF OTTOMAN LAND CODE.

The annexation of State lands to a monastery, as monastery property, will not be recognized by the law, unless such annexation is recorded in the Imperial archives. A mere user of such lands for pastoral purposes would not give a title to them, nor prevent their being included within the limits of a State forest under the Forest Delimitation Ordinance of 1881.

APPEAL from the District Court of Nicosia.

The plaintiff, on behalf of the Monks of the Monastery of Kykko, claimed to restrain the Forest Delimitation Commission from including within the limits of a State forest a large area of land, on the ground that the said land was the merah of the Monastery, and had ab antiquo belonged to the Monastery, that the said ab antiquo ownership was evidenced by title deeds, firmans, ilams and judgments, and also by ab antiquo possession.

The plaintiff further claimed that the defendant should be restrained from entering on the said merah to prevent the Monastery servants from cutting wood or pasturing their sheep therein. The defendant admitted that part of the land claimed had been delimited as a State forest, but denied the alleged ab antiquo possession, and right of pasture of the Monastery, or that any merah the property of the Monastery had been interfered with by the said delimitation. Upon the trial it was admitted that all the land claimed had been delimited as part of a State forest, and the plaintiff proved that the priests and servants of the Monastery had been accustomed to pasture their flocks over the whole tract of land claimed, and to take wood and fuel therefrom.

The effect of the documents put in evidence by the plaintiff, appears from the judgment.

The District Court dismissed the plaintiff's action.

The plaintiff appealed.

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Pascal Constantinides, for appellant: That the Monastery has a merah appears from the firmans, ilams, kochans and judgments that were put in evidence before the District Court. If kochans are only temporary and should have been sent to Constantinople, that is a matter which concerns the Land Registry Office only, not the plaintiff. Plaintiff proved that for fifty years past the Monastery had exercised an exclusive right of pasturage over the land claimed. The Titles Registration Law, 1885, shews that the plaintiff can prove the title of the Monastery by oral evidence. The Immoveable Property Registration Law, 1886, gives a right to the managers of religious foundations to bring an action, even without a title or registration, against persons adversely occupying the immoveable property of such foundations.

Collyer, *Q.A.*, for the respondent: This is a claim to the absolute property in about a hundred square miles of land, which the Government believes to be ill founded. As regards the documentary evidence, it is insufficient. The plaintiff ought to produce evidence of registration at Constantinople, and failing this, the Monastery has no legal title. With respect to the oral evidence, it has been already decided by the Supreme Court (Christoforos Egoumenos of Machera *v.* the Principal Forest Officer, not reported) that the exercise of exclusive rights of pasturing does not give a title to land. As to Clause III. of the Titles Registration Law, 1885, the gist of this clause is, that monastery or church property shewn to be ab antiquo in the occupation of any Ecclesiastical Corporation should be registered in the Defter Hakani at Nicosia. Nothing in the law gives a right of pasturage apart from ownership of the land. A separate right can be only obtained by a grant.

1891. *Jan.* 15.

Judgment: This is an appeal from the decision of the District Court of Nicosia disposing of a claim made on behalf of the Monastery of Kykko to the ownership and rights over a very large tract of land, said to be about hundred square miles, which has within the last few years been delimited as State forest.

[After dealing with certain difficulties which arise owing to the form in which the action was brought, and the manner in which certain documentary evidence had been introduced into the case, matters which are not material to this report, the judgment proceeded as follows:]

The questions for our decision may be stated in fairly simple words. They are (1) are the lands lying within the boundaries stated in the writ of summons within an area which has been delimited as State forest under the Woods and Forest Delimitation Ordinance? and (2) has the Monastery (as a corporate body) a right to the possession

of these lands as merah ? We state the question in this form because it appears to us that unless the lands claimed are mulk, the claimant can have nothing more than a right of possession, the ownership (though it be only a nuda proprietas) remaining in the State. The plaintiff then objects to the delimitation of this land as State forest, because it is the property of the corporate body of Kykko Monastery as merah. We do not think it is necessary for us to consider whether the acquisition of a right to possess State lands as merah, (whether such rights were obtained by grant or by exercise of customary rights) would render it impossible to treat the same lands as State forest, as defined by the Woods and Forest Delimitation Ordinance, 1881; that consideration would only become necessary on the corporate body establishing a legal right or title to the land as merah.

As to the first of the questions which we have stated, it appears to us that there is no dispute that the whole of the land claimed is part of an area delimited as State forest.

It remains then to be considered whether the Monastery has the right to possess the lands claimed by them as merah.

The claim of the Monastery is based on the following evidence :

1. On two Firmans dated in 1200.
2. On an Ilam dated in 1271.
3. On an Ilam dated in 1289.
4. On a Daavi Court Judgment dated in 1289.
5. On two kochans dated in 1291.
6. On evidence of ancient usage.

We do not consider that any of this evidence is of any value for supporting an objection to the delimitation, as State forest, of the tract of land which the Monastery claim the right to possess, excepting, perhaps, the two kochans dated in 1291, and it will be convenient that we should here state our reasons for this opinion.

As to the two Firmans, they, like most other firmans relied on as titles to land, are documents setting forth that certain persons are interfering with the lawful rights of others, and directing that an enquiry is to be made and that right is to be done.

These particular firmans state that complaint is made to H.I.M. the Sultan by the inhabitants of the village of Kykko that their ab antiquo pasture rights are being interfered with, and H.I.M. directs that enquiry is to be made into the matter, that if the petitioners really possess an ab antiquo right of grazing over the lands in dispute,

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and if there has been a wrongful interference with their rights, that such interference is to be stopped. There is nothing in the firmans to show what lands are therein referred to, and we have no evidence on that subject, and no information as to whether the Cadi to whom the firmans were addressed, ever made the enquiry directed, or, if he did, what decision he came to upon doing so. These firmans are not in themselves evidence of title, though they may have resulted in producing some decision, the record of which might be evidence of title. No such record has been put in evidence.

As to the Ilam of 1291. This is a judicial decision on a dispute between the Monastery and an inhabitant of Ambeliko, wherein the Monastery claimed as their merah a piece of land, which apparently was situate somewhere about the northern extremity of the tract of land of which the Monastery now claims possession. There is no evidence before us to enable us to determine whether the boundaries of the piece of land mentioned in the Ilam are such as to make it coincident with any part of the tract with which we are now concerned. This document moreover, being the record of a decision between the plaintiff and a stranger, is really not evidence in the present litigation.

The reasons which render the Ilam of 1291 of no value as evidence in support of the plaintiff's objection in this proceeding, apply with even greater force to the Ilam of 1289 and the judgment of the Daavi Court of that year. The Ilam of 1289 does not indicate the position of the land, over which the Monastery were at that time claiming rights of pasture, with sufficient precision to justify any conclusion as to whether it was inside or outside the boundaries of the land now under consideration. The only evidence directly bearing on the subject is that of the Assistant to the Principal Forest Officer, who states that the boundaries of that piece of land were shewn to him, and that as pointed out to him, they were such as placed the land outside that delimited as forest.

With regard to the Daavi Court judgment, we have no means whatever on the evidence before us of ascertaining where the piece of land to which that judgment related was situate, and the judgment is a judgment obtained by a certain Epiphanios, as representative of the Monastery of Kykko, against a stranger to these proceedings, and was on the face of it obtained by the consent of that stranger, on the plaintiff fully indemnifying him. And this judgment distinctly shows that the Government at that time treated the property to which it relates as State lands over which the Monastery had no rights.

In all the cases we have considered the Monastery claimed rights of pasturage which they alleged were being interfered with; and if we could accept any or all of these documents as evidence that judicial decisions have been come to confirming these pasture rights to the Monastery as against the State, and if we could ascertain that the land, over which such rights were held to exist, was coincident with that over which similar rights are now claimed, or over any part of it, we do not see that that would assist the plaintiff in his objection to the delimitation of the tract of land as State forest. The customary right of pasturing would not have constituted the persons entitled to it owners of the land, nor would the Forest Delimitation Commission, by including this tract in the limits of a State forest, necessarily deprive the persons entitled to such customary rights of pasture from exercising them. Clause 3 of the Woods and Forests Delimitation Ordinance, 1881, specially protects the owners of such right.

We come now to the kochans. These are on the face of them kochans such as are directed to be issued temporarily to furnish evidence of the right of possession until the more formal permanent document known as a tapou sened could be prepared and forwarded from Constantinople. [*See* Article 21 of the Tapou Regulation of 8 Djemazuel Achir, 1275, at page 171 of Vol. I., Leg. Ott., and Article 9 of the further Tapou Regulation of 15 Chaban, 1276, at page 197 of same volume, which latter article prescribes the form of temporary kochan, which we have before us, in substitution for that prescribed by the earlier Tapou Regulation.]

They purport to evidence the right of Egoumenos Sophronios Papa Philakti to possess certain tracts of land, three hundred, and five hundred donums in extent, respectively, as merah, and the boundaries stated on them would indicate that they relate to lands within the area delimited as forest. It has been suggested to us that these documents are for various reasons of no validity and confer no title on any one. We do not, however, think it at all necessary for the purposes of this action to consider whether these kochans confer any rights on any one save the community or body known as the Monastery of Kykko, and the first thing to be considered is, whether by virtue of these documents (purporting as they do to confer a right of possession on Egoumenos Sophronios), the Monastery of Kykko (of which we may assume that Sophronios was Egoumenos) has any lawful claim to possess the property to which they relate.

Whatever title any person may claim under these documents, he must in claiming it, be taken to acknowledge

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that it is a title granted by the State to exercise some right over land which is the property of the State itself. The Ottoman Law on lands nowhere recognises more than a right of possession as possible to exist in State lands, the ownership being always in the State; and that the documents before us are intended to be issued as evidence of right to possess State land, is manifested by their form, and by their reservation of a rent payable to the State. It is impossible to suppose that these documents were issued under any authority, save the tapou regulations; the lands to which they apply must be taken to be State lands, and the rights which they confer must be assumed to be such as it is possible to find existing in State lands, and no greater.

The only article of the law which deals with the rights of monasteries is Article 122, which is to the following effect, viz.: "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 as regards land which having been originally held by tapou, has, whilst it was so held, passed by any means whatsoever into the hands of monks, and has been held without tapou as being annexed to a monastery, shall be treated like other State (mirié) land, and shall as before be made to be held by tapou."

As we understand this article, it means that the law will not recognise the annexation of any State land to a monastery, as monastery property, unless its annexation is recorded in the Imperial archives; and that where the right to possession of State lands has been granted to individuals, and any owner of it has purported to dedicate it to pious uses, the dedication is in the eye of the law inoperative, and the right to possession remains vested in the person who so purported to dedicate it, and descends to his heirs on his death. Such right could not be handed over by him to any grantee, without the permission of the competent authority (Article 36), and must either remain vested in him or his heirs or revert to the State.

We have given our utmost care and attention to seeing that we are accurately informed of the meaning of Article 122, and the translation of it which we have set out is, we believe, such as to state in accurate English, the precise meaning of what is enacted by the original Turkish. We are unable to attach any reasonable meaning to that article save that which we have already stated, or to see for what object the latter part of that article was enacted, unless it was to lay down the principles we have stated.

It has been suggested to us that Article 122, when it speaks of making State land, which is held without tapou as annexed to a monastery, to be held by tapou, may mean that a tapou or title to possess it (*see* Article 3), is to be granted to the monastic body, but we are of opinion that Article 122 does not admit of such a construction.

The right to possession of State lands is throughout the law treated of as a personal right, and as we have in effect already stated, the law speaks always of the State as the owner of the land, and does not recognise the possibility of the existence of any right in or over it, save a right of possession, which may be assigned by permission of the proper representative of the State and may pass by inheritance, but which becomes revested in the State on failure of heirs.

The reversionary rights of the State are safeguarded throughout the law. We find clauses forbidding the erection of buildings which, if erected, may permanently deprive the State, not only of its title but of its right of reversion, and whereas buildings necessary for farming operations may be erected on the leave of the proper representative of the State, the construction of houses to form a quarter may only be made on permission granted by Imperial decree.

So, too, the burial of corpses is forbidden, presumably because, if allowed, the ground would become a sacred place, and in the same way the law contains special enactments as to the planting of trees and vines, and while it allows such operations, carefully preserves the reversionary rights of the State. We may also mention that State land cannot in the eye of the law be made the subject of a dedication for the benefit of any Moslem religious institution, and the means by which such lands are dedicated is, by their first being granted by the Sultan as a mulk property, on which the grantee dedicates them to the religious institution.

It would be very remarkable if the words of Article 122 had been intended to recognise a right as belonging to Christian religious institutions, which is not recognised in the case of establishments belonging to the Moslem religion, and having regard to the considerations we have referred to, we feel it impossible to hold that it does.

Our understanding of the meaning of this Article 122 is then, that State lands cannot be regarded as annexed to monasteries unless their annexation is recorded in the Imperial archives, and we are strengthened in our conviction that this is the reasonable meaning of this article by the Emirnamé which has been put before us.

This Emirnamé states that doubts have arisen as to whether the provisions of Article 122 of the Land Law are to be strictly enforced, and tapou seneds granted in the names of priests for lands, not registered as belonging to a monastery or church, that the question has been submitted to the Sublime Porte, and that it has been decided that it shall not be lawful for priests to attach to a church lands possessed by them without tapou, and not registered in the Defter Hakani, as belonging to a church or monastery, and it directs that lands can be given and tapou seneds granted to priests as to other individuals, and the law shall be applicable to their lands in case of death.

This Emirnamé quotes a Vizierial Order; it is an official communication of that Vizierial Order, and in our opinion is an authoritative communication of the construction placed on Article 122 of the Land Law by the highest authorities of the Ottoman Empire. The construction there adopted appears to be entirely the same as that which we have come to, and we must hold that the statement of the law we have given, is a correct statement of the law as it existed in Cyprus at the time of the British occupation.

Since the British occupation of Cyprus the only legislation on the subject of possession of lands by monasteries, is contained in "The Titles Registration Law of 1885," and we propose to state as shortly as possible what we understand to be the effect of this law on the subject under consideration.

Section 11 says that all immoveable property shewn by evidence to belong ab antiquo to any church or monastery shall be registered at Nicosia.

This section is manifestly intended to deal with land the ab antiquo property of monasteries, and cannot have any application to the kochans we are now considering, as these do not purport to be documents of title to property annexed ab antiquo to the monastery. For the present therefore we may pass over the consideration of this section.

Section 12 enacts that immoveable property, other than that belonging ab antiquo to a church or monastery, "which shall have passed by any lawful means into the possession of any church or monastery, shall be registered in the name of some person as trustee for such church or monastery." The remainder of this section contains provisions as to the method of appointment of trustees, and the devolution of the property upon their death, and Clause 13 provides for the payment of "fees to be taken in respect of the transfer of any arazié mirié property by inheritance or by registration under Clause 12."

It is manifest from the language of this Clause 13 that it was assumed when this law was passed, that arazié mirié could by some lawful means pass into the possession of a church or monastery, but as we have already said, in dealing with Article 122 of the Land Law, there was at that time not only no lawful means by which such a thing could take place, but the law contained an express prohibition of State lands being annexed to a monastery.

If then, when this law was passed, it was intended to alter the pre-existing law, and empower ecclesiastical bodies to acquire a right to the possession of State lands, it would have been necessary to supersede the pre-existing law by an enactment conferring on ecclesiastical bodies the power to possess State lands; and, either by express words, or by implication, repealing all pre-existing law to a contrary effect, and it is difficult to imagine that anything but the clearest words would have been used to effect such an entire reversal of the policy of the law, and such a very radical change in its principles.

Taking the words of Clause 12 by themselves, they do not suggest that any repeal of the existing law was intended, or that any new powers or privileges were to be conferred on ecclesiastical bodies other than they possessed at that time; they purport only to provide for the registration of a certain class of church property, and we would particularly observe that that class of property is referred to, as "property which may lawfully come into the possession of a church or monastery."

We are entirely unable to see that such an enactment can apply to property which the law at the time actually prohibited from being annexed to a monastery, or from being possessed by anyone as property annexed to a monastery; and if there were not a direct reference in Clause 13 of the law to "the transfer of *Arazié Mirié* under Clause 12," we do not see how it would be possible to suggest that this law was designed to sanction the annexation of State lands to monasteries. Although these words may have given rise to such a suggestion, we do not feel that we can attribute to them the force of making lawful that which was previously prohibited by law.

The meaning of the enactments contained in this law as to church property is extremely obscure. We have given our closest attention to it, and are of opinion that Clause 12 and the subsequent clauses connected with it, were enacted under the erroneous impression that ecclesiastical bodies could possess State lands, but that the means of recording their title to such possession were inadequate and needed amendment. We do not wish to

say here that the provisions of Clause 12 are entirely inoperative, because there may be property to which they may apply; but so far as regards State land they can, in our opinion, and notwithstanding the direct reference to State lands which is contained in Clause 13, have no application.

If we are to hold that Clauses 12 and 13 have effected any change in the policy and principles of the law, we must do so on the ground that the provisions of Clause 13 have no meaning, but that if the law were altered, they might have a meaning, that it is, therefore, evident that the legislative authority would have altered the law if it had been in possession of an accurate understanding of it, and that it is, therefore, our duty to construe the law in such a way, as to give it the effect which the legislative authority erroneously supposed it to have, but we do not see how we could do this in the present case without assuming legislative functions.

We do not think, therefore, that any of the documentary evidence supports the contention that any part of the tract which has been delimited as forest is annexed to the monastery.

We observe that the Turkish Law and the Turkish authorities speak with scrupulous accuracy of lands being "possessed" by priests, and being "annexed to" a monastery. We have heard it said many times in the course of these proceedings that lands have been, or may be, or are "possessed" by a monastery.

To give any sense to such language it is necessary to understand the word monastery in the sense of the monastic body "fraternity, community," or "corporation," in which sense the word is no doubt frequently loosely used in our own language; and we have little doubt it may be so used in other languages, but while we do not think that the fraternity or corporation would be correctly described in legal language by the term "monastery;" *i.e.*, we do not think that the term "monastery" would be an accurate denomination of the monastic fraternity, we find the only Article of the Turkish Law which clearly deals with church lands, adopting that view, and distinguishing in the clearest manner the power to individuals to possess lands, and the possibility of lands being annexed to a building or institution.

The same nicety of language has not been preserved in Cyprus ordinances and laws, which speak of immoveable property "belonging to" a monastery, and of land "passing into the possession of" a church or monastery. We are not called upon to decide here what is the meaning of these expressions, but we may observe in passing, that they

appear to us to be of a loose and inexact nature, and well calculated to give rise to erroneous understandings of the law. *So loose is the language* employed, that we find in a law of 1886, called the Immoveable Property Limitation Law, an enactment that "managers of religious foundations shall have the right even without a title or registration, to bring an action against persons adversely occupying" any immoveable property belonging to a religious foundation. It appears to us to be quite manifest that the word title must be used in the sense of "documentary evidence of title," and that if not, the clause is ridiculous, and enacts that where a religious foundation has no legal right to the possession of a property, the manager thereof may bring an action against a person who has without any right taken possession of it.

We have nothing left to consider save the effect of the evidence of the witnesses; this, at the best, amounts to nothing more than that the priests and servants of the monastery have been accustomed to pasture their flocks over the whole tract of land with which we are concerned in this action. We do not think it necessary to consider the real effect of this evidence, or whether it establishes or fails to establish that which it is intended to prove, as it appears to us to have no bearing on the matter before us. If the priests and servants of the monastery have, as alleged in evidence, exercised rights of pasture over this tract of land and thereby acquired a customary right of pasture over it, that does not, for reasons we have already explained, prohibit it being delimited as State forest. By the exercise of customary rights a person does not necessarily acquire the ownership of the soil, nor any such exclusive right of possession, as to negative the possibility of the land being State forest.

Our conclusion being that the monastic body known as the Monastery of Kykko have no valid objection to the delimitation as State forest of the land which they claim as their property, this action, as an action instituted on behalf of that monastic body, must be dismissed, and the plaintiff as representative of the monastery having failed to make out his case, must be ordered to pay the costs of the appeal. It will however be seen that we have not decided that the plaintiff may not have personal rights under the kochans of 1291.

Those kochans may confer rights on the plaintiff which may have descended to his heirs, and which might be of such a nature as would render the delimitation of this land as State forest open to objection, and it is possible that the plaintiff, by his objection to the delimitation of the land as State forest, may have so kept those rights alive, as to

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justify his heirs in objecting to that delimitation. These are all questions on which both parties should be heard, and which we might prevent any further consideration of by dismissing this action.

It appears to us that if the rights we have referred to are kept alive, they may possibly become the subject of a judicial decision, if the claim in this action can be amended.

This is a matter on which we wish to give no opinion. Moreover if the Government is willing to respect the right of merah which is purported to be granted to the plaintiff by the kochans of 1291, the plaintiff may not, (even if he has a legal right to do so), desire to object to the delimitation of the land as State forest.

We think for all these reasons that we should direct that our judgment shall not be drawn up, until further application is made to us, so that both parties may consider how their rights are affected and what course they will pursue.

Appeal dismissed.

BOVILL, C.J. & SMITH, J. 1890. *Dec.* 23.

[BOVILL, C.J. AND SMITH, J.]

SOTIRAKI EMPHIEDJI, AS AGENT FOR THE ARCHBISHOP OF CYPRUS *Plaintiff*,

v.

A. F. G. LAW, PRINCIPAL FOREST OFFICER *Defendant.*

[It is thought desirable to report this case, the facts of which differ in some respects from the case above reported though the decision proceeded on the same grounds.]

APPEAL from the District Court of Famagusta.

The plaintiff sued, as the duly appointed agent for His Beatitude the Archbishop of Cyprus, and the claim was to restrain the defendant, who had acted as President of the Forest Delimitation Commission, from interfering with about 850 donums of land, and for damages for including the same within the boundaries of a State forest. These lands were claimed as appurtenant to the Monastery of Ayia Napa of which the Archbishop was the acknowledged head, and, consequently, the person having the lawful right to possess the same. Part of the lands had been cultivated for many years by persons paying rent to the agent of the Archbishop, but the greater part had been used as pasture land by the same and other persons, who also paid a rent, and the lands claimed in the writ were entered in the Mallieh Essass Books of 1288, and the Government has since then been taking verghi tax in respect