[ZEKIA, J. and ZANNETIDES, J.]

MINAS SYLVESTROU AND OTHERS,
Appellants (Plaintiffs),

v.

THE HIGH COUNCIL OF EVCAF,
Respondents (Defendants).

(Civil Appeal No. 4270).

Immovable Property—Adverse possession—Inconsistent with payment of rent—Estoppel.

Vakf Properties—Categories of—Land Code, Article 4—The Immovable Property (Vakf Idjaretein and Arazi Mevkoufé Takhsisat, Conversion) Law, Cap. 232 (Law No. 14 of 1944)—Arazi Mevkoufé Takhsisat—Three categories of—Creation and Characteristics of—State imposts (menafi-emiriyé)—Dedication of—Land Code, Article 4—Cap. 232 (supra), section 4.

Vakf Idjaretein and Arazi Mevkoufé Takhsisat "privately possessed"—Conversion of, into Mulk and Arazi Mirié, respectively—Cap. 232 (supra), sections 2 and 3—The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231 (Law No. 26 of 1945), section 3 (2) and (3).

Evcaf Sahiha—Idjaré Vahidé.

Vakf properties held, administered and enjoyed as such on the 1st September 1946 in accordance with the provisions of the Cyprus Evcaf (Mohammedan Religious Property Administration) Order and Law, 1928 and 1934, shall continue to be so held, administered and enjoyed—The Immovable Property (Tenure, etc., etc.) Law, Cap. 231 (supra) section 3 (4).

Arable land—Not necessarily of arazi mirié category—Arable land originally Mulk—Harajiyé—Oshriyé—Dedication of, as Vakf without consent of any High Authority—Arable land of arazi mirié category—It could be converted into Mulk—Temliknamé firman necessary—And then dedicated as Vakf—State Land (Arazi Mirié) could be dedicated directly as Vakf—Imperial sanction necessary.

Vakf—Dedication—Vakfiyé deed—Vakf may be created without such deed.

Practice—Appeals—Appellate Courts should not disturb decisions of lower courts unless satisfied that those decisions are wrong.

In January 1954 the appellants instituted an action against the respondents claiming ownership of certain agricultural lands by virtue of uninterrupted, undisputed and adverse possession for the prescriptive period and over. The respondents-defendants denied the "adverse possession", contending that the appellants-plaintiffs and their predecessors

were merely tenants paying rent in kind, viz. 1/8th of a kilo of wheat and 1/8th of a kilo of barley for each donum of land per annum. They also counterclaimed for a declaration that the lands in dispute were Vakf properties and for an order directing registration thereof in their name. The respondents -defendants at first alleged that the lands were Arazi Mevkoufé Takhsisat, 2nd category or class, but later, by an amendment of their defence, asserted that the properties in question were of Idjaré Vahidé category dedicated by Mustafa Pasha, the conqueror of Cyprus, under a Vakfiyé (deed of dedication) dated 14 Rebi Ul Evel 987 Hajira (i.e. 1580 A.D.) None of the lands in dispute was registered in the books of the Land Registry. For revenue purposes, however, some time between 1916 and 1919, these properties were given plot numbers in the field books of the Land Registry, compiled at the time, each such number showing a particular area. For the purposes of tax collection the name of the occupant for the time being of each plot was also shown and, as a matter of practice, the Government tax collectors used to call and collect immovable property tax (formerly known as Vergi Kimat) from such occupants. The holders of the lands were always paying to the Government the tax just referred to, as well as rent in kind to the Evkaf Authorities as stated hereabove. It appears that the Evkaf Authorities were only interested in the collection of those annual rents from the occupants without raising any objection to the change of persons holding and cultivating these lands, such change being effected either by private transfer of the relevant rights or by taking possession of the lands in question by way of inheritance or otherwise. The aforesaid rents appear to be the same in amount and kind since 1874 without any change.

It would seem, now, convenient to refer to certain statutory provisions affecting Vakf properties and their categories, as well as the various other categories of lands under the Ottoman Land Code.

Section 2 (1) and section 3 of the Immovable Property (Vakf Idjaretein and Arazi Mevkoufé Takhsisat, Conversion) Law, Cap. 232 (Law No. 14 of 1944) provide:

Section 2 (1). "All immovable property hitherto known as "Vakf Idjaretein" and privately possessed as such at the date of the coming into operation of this Law shall thereafter be held and enjoyed as property of the category known as "mulk", subject to the provisions of any Law for the time being in force relating to property of such category".

Section 3. "All immovable property hitherto known as "Arazi Mevkoufé Takhsisat" and privately possessed as such at the date of the coming into operation of this Law shall thereafter be held and enjoyed as property of the category known as "arazi mirié", subject to the provisions

of any Law for the time being in force relating to property of such category ".

Section 3 of The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, (which is Law No. 25 of 1945, put into operation on the 1st September 1946) provides:

Section 3. (1). " The categories of immovable property hitherto known under the Ottoman Land Code as " Mulk ", "Arazi Memlouké," " Arazi Mirié," "Arazi Metrouké " or " Arazi Mevat " shall be abolished and thereafter all immovable property whatsoever shall be owned, held and enjoyed subject to and in accordance with the provisions of this Law or any other law in force for the time being.

(2) All immovable property hitherto known as " Mulk " or " Arazi Memlouké " and privately owned as such at the date of the coming into operation of this Law shall continue to be owned, held and enjoyed as private property.

(3) All immovable property known as " Arazi Mirié " and privately possessed as such at the date of the coming into operation of this Law shall be owned, held and enjoyed as private property.

(4) All immovable property which at the date of the coming into operation of this Law is held, administered and enjoyed as Vakf property in accordance with the provisions of the Cyprus Evcaf (Mohammedan Religious Property Administration) Order and Law, 1928 and 1934, shall continue to be so held, administered and enjoyed as if this Law had not been passed subject only to the provisions of sections 35, 36 and 37 of this Law ".

The trial Court held that: (1) the properties in dispute were of the Idjaré Vahidé category and not, as alleged by the plaintiffs (appellants) of the Takhsisat 1st class; therefore the Immovable Property (Vakf Idjaretein etc. Conversion) Law Cap. 232 section 3 (*supra*) did not avail the plaintiffs; (2) the long undisturbed possession of those lands by the plaintiffs (appellants) did not help them, either, to acqire the right of ownership claimed, in view of the fact that the possession could not be said to be an "adverse" one since the plaintiffs (appellants) by paying rent were merely the tenants of the defendants (respondents), (3) consequently, the latter are entitled to the registration of the lands in their name as counterclaimed. (Cfr.: section 3 (4) of the Immovable Property (Tenure, etc.) Law, Cap. 231 (*supra*).

From this judgment the plaintiffs appealed, on the following grounds which shortly stated are:

1. The trial Court was wrong in finding that the lands in question were Vakf or Idjaré Vahidé category.

2. The Court having no evidence before it as to the nature of the annual payment in kind made to the respondents ought to have concluded that the lands in question were Arazi Mevkoufé Takhsisat first category and as such by virtue of section 3 of the Immovable Property (Vakf Idjaretein and Arazi Mevkoufé Takhsisat Conversion) Law, Cap. 232 (Law No. 14 of 1944), (*supra*) all interests of Evcaf over the lands in question ceased to exist and the lands were converted to Arazi Mirié which land, by virtue of section 3 (3) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, (Law No. 26 of 1945), (*supra*) became the private property of the plaintiffs as from the 1st September 1946, the date when the last mentioned Law came into operation.

3. The Court in the absence of a Vakfiyé and other documentary evidence enabling it to decide the category of Vakf to which the property belonged ought to apply the principle "what is of time immemorial should be kept in its ancient state" and should have ordered the retention of the immovable property in question in the hands of the plaintiffs subject to the right of Evcaf to collect the annual amount of wheat and barley as described.

Held, affirming the judgment of the Lower Court,-

(1) There is no doubt whatsoever that the lands in dispute are Vakf lands. The crucial point in this case is to ascertain to which of the various categories of Vakf those lands belong. For this purpose Article 4 of the Land Code should be looked at, inasmuch as it deals with all classes of Mevkoufé Lands i.e. Vakf properties, in conjunction with Article 2 which describes the categories of Mulk land. (*Note*: Articles 2 and 4 are set out in the judgment of the Court).

(2) If the lands in question were originally Mulk (as they might well be, although arable or agricultural ones) of Arazi Oshriyé category (tithe-paying lands), they could be dedicated by their owner as Salih Vakf (valid Vakf) without seeking the consent of any high authority. This is one of the possibilities in this case. The second possibility is that the lands in dispute were originally State lands and their possessors after having obtained a "Temliknamé" turned them into Mulk and then dedicated them as Vakf. It must be noted that this was a prevailing practice at the times the Ottoman Sultans were indulging in conquests.

The third possibility is that the lands in dispute were originally State lands and although their category was not altered the State imposts (menafi-emiriyé) were by imperial sanction dedicated as Takhsisat Vakf. This is Takhsisat first category.

The fourth possibility is that the State retained its rights on the imposts (tithe and other taxes) but consented to the dedication of the possessory rights as Mevkoufé Takhsisat. That is Takhsisat second category.

The fifth possibility is that the State kept the " rekabé ", the ownership in fee simple, to itself only and parted with all the ancillary rights, that is the possessory as well as " Menafi-emiriyé " tax rights, both of which have been dedicated as Takhsisat. The State in such a case retains a reversioner's rights and the property having retained its nature as Arazi Mirié can be used only as such. This is Takhsisat third category. The lands in dispute could only come within one of the five classes of Vakfs just stated. A sixth possibility in the circumstances of the case is ruled out. The Vakf lands in question do not possess the attributes of " Idjareteinli Vakf " and therefore this category is left out.

(3) However, for the disposal of the present appeal we do not think it is necessary for this Court to fix definitely the category the Vakf lands in dispute belong to, provided it can be established that the lands in dispute are or are not of the first category of Takhsisat Mevkoufé. If they are Arazi Mevkoufé Takhsisat, first category, which are privately possessed, such lands by virtue of section 3 of the Immovable Property (Vakf Idjaretein etc. Conversion) Law, Cap. 232 (*supra*) would have become Arazi Mirié and as such by virtue of section 3 (3) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, (*supra*) the private property of the present appellants. If, however, the property in question is found to be of some category of Vakf other than the first type Takhsisat then as far as the appellants are concerned the result would be the same because whether the properties are Evcaf Sahiha properties, that is, those described in the first and second possibilities or are Takhsisat second and third category (fourth and fifth possibility) the plaintiffs have nothing to gain and are bound to fail because the rights of Evcaf over such properties remain unaffected and even expressly protected by section 3 (4) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231 (*supra*).

(4) The characteristics of the Takhsisat first category are to be ascertained in the light of Article 4 of the Land Code by finding whether the State imposts (menafi-emiriyé) alone have been dedicated to Vakf. Those imposts on arazi mirié land were eight in number (v. *post* in the judgment). But on the evidence it does not appear that any such dedication has ever been effected. The amount of wheat and barley paid by the appellants from time immemorial to the Evcaf Authorities was merely rent in kind and not one of the various State imposts on arazi mirié land. This view is supported by the judgment of this Court in *Collet and Sadik Effendi* v. *Kyrillos, Metropolitan of Kition* 6 C.L.R. 8. Therefore. the finding of the trial Court in this case that the amount of cereals collected annually from the appellants were in the nature of rent, is well supported by evidence.

(5) It has been argued that the appellants-plaintiffs by

private agreements bought these lands and also held them as properties inherited and that the Vakf Authorities did not object to it. The Evcaf Authorities did not object to the change of tenant so long as the new holder paid the rent. All these private transactions which were devoid of any legal effect as far as transfer of property is concerned, do not, in our mind, carry the case of the appellants any further.

As Tyser, J., remarked in the case of *Collet and another v. Kyrillos, Metropolitan of Kition*, (*supra*) at p. 11: "The evidence is quite consistent with a transfer of ordinary tenancy from father to son or to a stranger with the consent of the Evcaf Board". The fact that the Evcaf Authorities consented to collect rents from a new tenant who stepped into the shoes of his father or purported to buy the rights of another tenant makes no difference. The new holders by paying rents to Evcaf and signing counterfoil of receipts as tenants expressly and/or by conduct have become tenants. The rents being annually paid can reasonably be inferred as being annual leases, tacitly renewed from year to year. This is quite consistent with Idjare Vahide Vakfs. It is not necessary that such leases should be in writing and annual leases are permissible in all Idjaré Vakfs. While on this topic I refer to Article 58 of the Evcaf Laws by Omer Hilmi which makes it clear that the property dedicated should be immovable property and the definition of Idjaré Vahidé is given in Article 38 which reads:

> "Idjaré Vahidelé Evcaf" is the name given to Mussaqafat and Mustaghilat vaqfs which are let by the Muteveli of the dedication, in the same way as properties are let by their owners, for a term, long or short, such as a month or a year".

Here the term "Mustaghilat" comprises arable land capable of beneficial possession (income bearing). See sect. 14 of the English version of Evcaf Law by Tyser, J.).

(6) On the other hand if the properties in question were of Arazi Mevkoufé Takhsisat privately possessed, covered by the Immovable Property (Vakf Idjaretein etc. Conversion) Law, Cap. 232 (*supra*), in other words, Arazi Mirié Takhsisat first category, tithe and other duties and impost collected in respect of such properties together with Immovable Property tax, which is admittedly paid by the plaintiffs-appellants direct to the Government, would have been paid again to the Government for the account of Evcaf as this was the practice for many years up to the year 1944; but from the evidence it is clear that apart from the Immovable Property Tax (known as Vergi Kimat) payable at any rate to the Government nothing was paid to the Government for the account of Evcaf. The Immovable Property (Vakf Idjaretein etc. Conversion) Law, Cap. 232, (*supra*) by section 4 provided for the annual payment of £2,230 to Evcaf Office as compensation

for loss of revenue from Arazi Mirié Takhsisat first category to that office. The amount of £ 2,230 was not ascertained at random but after calculating the state imposts collected by Government on behalf of the Evcaf from this category of lands. It is clear from the evidence that the lands in dispute were not taken into account as such and no compensation was paid in respect thereof under the Immovable Property Conversion Law.

This fact is another indication that the lands in dispute were not considered by the Government as being of the first category of Takhsisat and it explains the readiness of the Land Registry to proceed with the registration of such properties in the name of Evcaf if there had been no objection on the part of the holders.

(7) The immovable property tax (Vergi Kimat) which is paid directly to the Government Revenue by the occupants of the lands cannot be considered as an indication that the Vakf properties in question are of the first category Takhsisat because such tax is payable to the Government also in cases of other Vakf properties, save Mulhaka and non-Meshruda Vakfs, which are dedicated as a rule to the Mosques and Tekkes.

(8) The words "privately possessed" occurring in section 3 of the Immovable Property (Vakf Idjaretein etc.) Cap. 232, (*supra*) qualify the Vakf lands affected by the said Law and leave unaffected the remaining ones, namely, Takhsisat 2nd and 3rd category. The possession referred to is no doubt used in the legal sense of the word which is quite distinct from the kind of possession a tenant has over the land under his lease.

(9) There was in our view sufficient evidence before the trial Court to find that the lands in dispute were of the Idjaré Vahidé category or Arazi Mevkoufé Takhsisat second or third category. In *Collet and another v. Kyrillos, Metropolitan of Kition* referred to above, it is stated that there was evidence that not only the annual rents but also the tithe was payable to the Evcaf. In p. 12 of that case Tyser, J. stated:

"It appears, from the book of accounts produced, that the Delegates of Evcaf receive not only a rent but also the tithes". If that is so the lands in dispute could only be of Idjaré Vahidé and/or Takhsisat third category. Whether the lands in question are of Idjaré Vahidé category or of Takhsisat second and third category is not of any significance as far as the appellants are concerned; once their legal rights are those enjoyed by tenants the nature of the title of the respondents, their landlord, would make no difference to them. Furthermore, by section 3 (4) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, (*supra*)

the Evcaf Authorities are entitled to administer the Evcaf Lands of any category according to the relevant law.

(10) The argument advanced on behalf of the appellants, that the lands in dispute could not be Idjaré Vahidé category because, *inter alia*, they are arable lands and, therefore, of Arazi Mirié category, is wrong. There is no doubt that in modern times the great part of cultivable land belong to Arazi Mirié category but it is clear from Article 2 of the Land Code as well as from its historical background that considerable extent of arable lands were of Mulk category. When a country was conquered by Ottoman Sultans the recognised practice was to divide the arable land into three and to distribute the first part among the conquerors and/or leave it in the hands of the Moslem inhabitants of the country ; to allow the second part to remain in the hands of the non-Moslems and to turn the third part into state land (Arazi Mirié).

The first category was known as " Oshriyé ", that is, tithe-paying land. The second category was known as " Harajiyé " that is tribute-paying land.

Apart from cultivable land there was the built-up area, towns and villages, and such built-up area comprised the house etc., together with small pieces of land forming yard or curtilage of such houses and building sites. These were also considered as Mulk property.

Now the ownership in the case of bits of land attached to buildings and of the arable lands coming under the first and second category just mentioned vested absolutely in the owner of such property and were collectively known as Mulk lands.

In the case of Mulk lands "rekabé", literally meaning the neck, the ownership in fee simple (nue propriété) as well as the possessory rights vested entirely in such owners with the following difference only: that in the case of buildings and the adjacent land there was no liability to pay any state impost. In the case of the first class of arable land, however, tithe out of the produce of the land was payable to the State and in the case of the second class tribute in kind was paid annually.

The dedication in respect of these two kinds of land i.e. tithe and tribute-paying land could be made without the permit or firman of the sultan, and having in mind that the non-Moslem people, although legally entitled to would not create Vakfs, the possibility remains that a Moslem owner of the first class Mulk arable land could without seeking the Imperial consent or the firman of the Sultan dedicate as Vakf such land. In such case, however, the tithe continues to be payable to the State.

Therefore, it is inaccurate to assume that arable land cannot be dedicated unless it was first converted into Mulk by a

valid way. There is no doubt, however, that if the land in question was originally State land, that is Arazi Mirié, you could not create Vakf either of the kind known as Sahih or Gairi Sahih (Takhsisat) unless in the first case you obtain a " Temlikname " firman turning the Mirié land into Mulk land and in the second the Imperial consent.

(11) Once it has been established that from time immemorial the plaintiffs and their predecessors effected annual payments in the nature of rents, that, in our mind, constitutes an estoppel on their part from challenging or from disputing the title of the respondents as the owner of the properties in question.

We quote the following from page 288 of Hill and Redman's Law of Landlord and Tenant, 12th Edition:

" *Estoppel by payment of rent.* Payment of rent is recognition of the title on the person to whom it is paid and operates as an estoppel against the tenant if he disputes such title ; save that where the tenant did not originally receive possession from such payee, or where his title has expired, the tenant may show that the payment has been made by mistake, and that the real title is in someone else ".

The appellants failed to show that the payments were made by mistake or that the real title is in someone else.

(12) The document produced by the respondents purporting to be the deed of dedication covering the disputed lands, although admitted by the trial Court as evidence, was found not to relate to properties in question. Undoubtedly it is extremely difficult to identify land property described in an ancient document like the one under consideration (nearly 400 years old) with lands in their present condition, nevertheless the onus to show that the properties referred to in the document were those in dispute was on the respondents and in the absence of satisfactorily identifying evidence we do not think that the Court was wrong in its finding in this respect.

Whether there was a deed of dedication in respect of the properties in dispute which was lost or the subject matter involved could not be identified with the lands in dispute or whether there was no deed at all, the case for the respondents does not necessarily fail. Vakf could be created without a deed (Vakfiyé) (*see Khanim and others* v. *Dianello and another*, 6 C.L.R. 52).

(13) Lord Goddard, C.J., in *Cherterton R.D.C. v. Ralph Thompson, LTD* (1947) 1 All E.R. 273, p. 274 expressed himself in the following words as to the way the powers of an appellate Court are exercised.

" I think it is rather a difficult case. One thing I have in mind, sitting in this Court, as in other Courts of Appeal, is that one ought not to interfere with the decision of the

Court below unless one is satisfied that its decision was wrong, and I am not satisfied that the decision of the Court of quarter sessions and the Court of petty sessions were wrong ".

Likewise the present case possesses unusual features and some difficult points to answer. However, we have not been persuaded that the trial Court was either wrong in law or that its decision was unsupported by evidence and we therefore dismiss the appeal with costs.

Appeal dismissed.

Cases referred to:

Collet and Sadik Effendi v. Kyrillos, Metropolitan of Kition, 6 C.L.R. 8.

Khanim and others v. Dianello and another, 6 C.L.R. 52.

Chesterton R.D.C. v. Ralph Thompson LTD (1947) 1 All E.R. 273.

Appeal.

Appeal by the plaintiffs against the judgment of the District Court of Larnaca (Vassiliades, P.D.C. and Limnatitis, D.J.) dated the 26th September 1958 (Action No.70/54) dismissing the plaintiffs' claim for a declaration that they had under their continuous, undisputed and adverse possession for over fifty years certain cultivable lands and for the cancellation of any registration in respect of those lands in the name of the defendants and the registration thereof in their names as set out in the list appended to the statement of claim.

Stelios Pavlides, Q.C. with
John Clerides, Q.C. for the appellants.
F. Korkut with *O. Orek*
and *N. F. Korkut* for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by:—

ZEKIA, J. : The facts of this case appear at length in the lucid judgment of the trial Court. The following is a brief account of such facts.

The subject matter in dispute consists of agricultural lands cultivated by the appellants (plaintiffs) and their predecessors for the last 50 years or so. The lands in dispute, divided into 40 pieces, are about 83 acres in extent. They are situated in the village of Tersefanou in the District of Larnaca. The plaintiffs, numbering 30, all coming from the same village, Tersefanou, claim the ownership of the said pieces of land on a common ground, namely, by virtue of undisturbed posses-

sion for the prescriptive period and over. Each plaintiff claims the plot or plots of land appearing against his name in the list attached to the statement of claim.

A declaration was sought by the appellants (plaintiffs) that they had the lands described in the statement of claim, under their undisputed, continuous and adverse possession for over 50 years ; in addition they claimed — (a) the cancellation of any registration in respect of the disputed lands found in the names of the respondents, and (b) the registration in the name of each plaintiff of the particular land set out in the list against his name.

The action was instituted on the 16th January, 1954 ; the respondents (defendants) by their statement of defence denied that the plaintiffs adversely possessed the properties in question and contended that they (the plaintiffs) were only tenants paying rents to the Evcaf Authorities.

The respondents (defendants) also counterclaimed (a) for a declaration that the properties in question were vakf properties, and (b) for an order directing the registration of the properties in question in their names.

The defendants in their original statement of defence apparently had, when asked to furnish the plaintiffs with particulars about the category of the vakf to which the properties in dispute belonged, stated that the disputed lands were of the 2nd class of Arazi Mevkoufé Takhsisat.

Later, however, the statement of defence was amended to read that the Vakf properties involved in the action were of Idjaré Vahidé category which were dedicated by Mustafa Pasha, the Conqueror of Cyprus, under a Vakfiyé (deed of dedication) dated 14 Rebi Ul Evel 987 Hajira (1580 A.D.).

The pieces of land in question are not registered in the books of the Land Registry. For revenue purposes, however, some time between 1916 and 1919 in the Field Books of the Land Registry, compiled at the time, these properties were given plot numbers, each number showing a particular area. For the purpose of collecting taxes for the Government, the occupant of each plot for the time being was also shown and the tax collectors used to call and collect immovable property tax (formerly known as Vergi Kimat) from such occupants.

The disputed pieces of land are notoriously known as "Vakoufia or Vakoufika", meaning vakf lands or vakf properties, paying "Idjaré", that is, rent to the Evcaf Authorities against official receipts issued by the Evcaf Office. The rents paid were in kind, 1/8th of a kilo of wheat and 1/8th of a kilo of barley for each donum per annum. The payment of such rents and collection went on regularly up to the year 1943 and with some irregularity continued up to the year 1949.

A considerable part of the lands in dispute was formerly held by the See of Kitium which paid the Evcaf Authorities rent in kind in respect of such properties in the same amount as we have just mentioned. Some of the plaintiffs bought the rights of the See of Kitium in these lands some time in 1950 but the purported sale was expressly made subject to the rights and claims over the properties of Evcaf.

It has to be added that an action was instituted by the Representatives of Evcaf against the See of Kitium in the year 1901 in respect of some of the properties now forming part of the subject matter of these proceedings regarding the amount of rent payable to the Evcaf, the respondents in this case. On appeal, the judgment in the said action was affirmed by this Court. (see : *Collet and Sadik Effendi* v. *Kyrillos, Metropolitan of Kition* 6 C.L.R.8).

Both parties in the present action referred to and partly relied on the judgment of the Supreme Court in the said case to which we shall have to revert later in our judgment.

It is not disputed that the lands in question were and are commonly known as Vakf lands. It cannot be disputed either that the holders of such lands paid an annual rent in kind to the Evcaf Authorities and they, the holders, paid also immovable property tax (Vergi Kimat) to the Government. The authorities of Evcaf, it appears, were only interested in the collection of the annual rents from the occupants of the lands in question without raising any objection to the change of persons holding and cultivating these lands either by privately transferring their rights to others or by taking possession of such lands by way of inheritance or otherwise. The rents paid appear to be the same in amount and kind since the year 1874 without any change.

An attempt on the part of the Evcaf Authorities to convert the rent into cash in 1944 was resisted to by the plaintiffs.

Now the main issue in the present case is to ascertain to which category of Vakf the properties in question belong and the nature of the tenure as far as the plaintiffs-appellants are concerned.

The trial Court having considered the case on the evidence available found that the long undisturbed possession on the part of the plaintiffs did not help the plaintiffs to acquire the ownership of the properties involved in this case in view of the fact that the possession was not an adverse one, because the plaintiffs by paying such rents were the tenants of the respondents and that the properties in dispute were of the category of Idjaré Vahidé and consequently the respondents were

entitled to registration in their names as owners as they counterclaimed.

From this judgment the plaintiffs appealed on the following grounds which shortly stated are:

1. The trial Court was wrong in finding that the lands in question were Vakf or Idjaré Vahidé category.

2. The Court having no evidence before it as to the nature of the annual payment in kind made to the respondents ought to have concluded that the lands in question were Arazi Mevkoufé Takhsisat first category and as such by virtue of section 3 of the Immovable Property (Vakf Idjaretein and Arazi Mevkoufé Takhsisat Conversion) Law, Cap. 232 (Law No. 14 of 1944), (*Supra*) all interests of Evcaf over the lands in question ceased to exist and the lands were converted to Arazi Mirié which land, by virtue of section 3 (3) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231. (Law No. 26 of 1945), (*supra*) became the private property of the plaintiffs as from the 1st September 1946, the date when the last mentioned Law came into operation.

3. The Court in the absence of a Vakfiyé and other documentary evidence enabling it to decide the category of Vakf to which the property belonged ought to apply the principle "what is of time immemorial should be kept in its ancient state" and should have ordered the retention of the immovable property in question in the hands of the plaintiffs subject to the right of Evcaf to collect the annual amount of wheat and barley as described.

The respondents put in evidence a bulky document purported to be a photostat copy of the original deed of dedication allegedly covering the plots of land in question but the Court having gone into the relevant part of the document produced found that the description of the properties given, as properties dedicated by Mustafa Pasha, the Conqueror of the Island, did not correspond to the properties in dispute in this action and accordingly did not act on it.

The respondents in the appeal disputed this finding of the trial Court and contended that the area of the land indicated in pages 80 and 81 of the said document related to the lands in dispute. The appellants objected to our taking into account this submission because there was no cross-appeal and if respondents could raise this point the appellants would wish to repeat their objection as to its admissibility which objection was taken at the trial also.

In the first place the crucial point in this case as we said earlier is to ascertain to which category of Vakf the lands in dispute belong and whether they belong to Takhsisat first

category or not. That they do belong to one or the other category of Vakf there can be no doubt. The categories of lands recognised by the Ottoman Empire, are those enumerated in Articles 1, 2, 3, 4, 5 and 6 of the Ottoman Land Code which contained the law in force in the Island up to the coming into operation of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, on the 1st Sept., 1946. Although certain parts of the Ottoman Land Code were amended prior to the passing of the said law such amendments do not affect the present case. We are interested in Article 4 of the Land Code inasmuch as it deals with all classes of Mevkoufé Lands i.e. Vakf properties. We give the English version of Article 4 rendered by Fisher, J. which reads:

" Mevqufé, dedicated, land is of two kinds:—

(1) That which having been true mulk originally was dedicated in accordance with the formalities prescribed by the Sacred Law. The legal ownership and all the rights of possession over this land belong to the Ministry of Evcaf. It is not regulated by civil law, but solely by the conditions laid down by the founder. This Code, therefore, does not apply to this kind of mevqufé land.

(2) Land which being separated from State land has been dedicated by the Sultans, or by others with the Imperial sanction. The dedication of this land consists in the fact that some of the State imposts, such as the tithe and other taxes on the land so separated have been appropriated by the Government for the benefit of some object. Mevqufé land of this kind is not true vaqf. Most of the mevqufé land in the Ottoman Empire is of this kind. The legal ownership of land which has been so dedicated (of the Takhsisat category) belongs as in the case of purely State land to the Treasury, and the provisions and enactments hereinafter contained apply to it in their entirety. Provided that, whereas in the case of purely State land the fees for transfer, succession and the price for acquiring vacant land are paid into the Public Treasury, for this kind of mevqufé land such fees shall be paid to the vaqf concerned.

The provisions hereinafter contained with regard to State Land are also applicable to mevqufé land, therefore whenever in this Code reference is made to mevqufé land this land which has been so dedicated is to be understood as being referred to.

But there is another kind of such dedicated land of which the legal ownership is vested in the Treasury (Beit-ul-Mal) and the tithes and taxes thereon belong to the State and of which only the right of possession has been appropriated for the benefit of some object, or the

legal ownership is vested in the Treasury and the tithes and taxes as well as the right of possession have been appropriated for the benefit of some object.

To such dedicated land the provisions of the civil law with regard to transfer and succession do not apply ; it is cultivated and occupied by the Evcaf Authorities directly or by letting it and the income is spent according to the directions of the dedicator.".

This article, however, is closely bound up with Article 2 which describes the categories of Mulk land. I quote article 2 from the English version rendered by the same author.

" ART. 2 — Mulk land is of four kinds.

(1) Sites (for houses) within towns or villages, and pieces of land of an extent not exceeding half a donum situated on the confines of towns and villages which can be considered as appurtenant to dwelling-houses.

(2) Land separated from State land and made mulk in a valid way to be possessed in the different ways of absolute ownership according to the Sacred Law.

(3) Tithe-paying land, which was distributed at the time of conquest among the victors, and given to them in full ownership.

(4) Tribute-paying land which (at the same period) was left and confirmed in the possession of the non-Moslem inhabitants. The tribute imposed on these lands is of two kinds:—

(a) " Kharaj-i-moukassemé " which is proportional and is levied to the amount of from one-tenth to onehalf of the crop, according to the yield of the soil.

(b) " Kharaj-i-mouvazzef " which is fixed and appropriated to the land.

The owner of Mulk land has the legal ownership.

It devolves by inheritance like movable property, and all the provisions of the law, such as those with regard to dedication pledge or mortgage, gift, pre-emption, are applicable to it.

Both tithe-paying land and tribute-paying land become State land when the owner dies without issue, and the land becomes vested in the Treasury (Beit-ul-Mal).

The provisions and enactments which are applicable to the four kinds of mulk land are stated in the books of the Sacred Law, and will not therefore be dealt with in this Code.".

From the outset I wish to point to an omission in the English version of article 4. The original in Turkish reads: "That which having been true mulk land originally was dedicated....." In the English version the word "land" is left out which, to my mind, ought not to have been omitted because the class of properties named mulk are definitely those referred to in article 2 which have been described as mulk land which comprises at least four kinds of mulk property, three of which are arable lands.

The cornerstone of the arguments of the able counsel for the appellants for his submission that the lands in dispute could not be of Idjaré Vahidé category is that (a) the lands in question are arable lands and therefore of Arazi Mirié category ; (b) that the alleged lease is not for a fixed term as ought to be in Idjaré Vahidé class.

There is no doubt that in modern times the great part of cultivable land belong to Arazi Mirié category but it is clear from Article 2 of the Land Code as well as from its historical background that considerable extent of arable lands were of Mulk category. When a country was conquered by Ottoman Sultans the recognised practice was to divide the arable land into three and to distribute the first part among the conquerors and/or leave it in the hands of the Moslem inhabitants of the country ; to allow the second part to remain in the hands of the non-Moslems and to turn the third part into State land (Arazi Mirié).

The first category was known as "Oshriyé", that is, tithe-paying land. The second category was known as " Harajiyé " that is tribute-paying land.

Apart from cultivable land there was the built-up area, towns and villages, and such built-up area comprised the house, etc., together with small pieces of land forming yard or curtilage of such houses and building sites. These were also considered as Mulk property.

Now the ownership in the case of bits of land attached to buildings and of the arable lands coming under the first and second category just mentioned vested absolutely in the owner of such property and were collectively known as Mulk lands.

In the case of Mulk lands " rekabé ", literally meaning the neck, the ownership in fee simple (nue propriété) as well as the possessory rights vested entirely in such owners with the following difference only ; that in the case of buildings and the adjacent land there was no liability to pay any state impost. In the case of the first class of arable land, however, tithe out of the produce of the land was payable to the State and in the case of the second class tribute in kind was paid annually.

The dedication in respect of these two kinds of land i.e. tithe and tribute-paying land could be made without the permit or firman of the Sultan, and having in mind that the non-Moslem people, although legally entitled to would not create Vakfs, the possibility remains that a Moslem owner of the first class Mulk arable land could without seeking the Imperial consent or the firman of the Sultan dedicate as Vakf such land. In such case, however, the tithe continues to be payable to the State.

Therefore, it is inaccurate to assume that arable land cannot be dedicated unless it was first converted into Mulk by a valid way. There is no doubt, however, that if the land in question was originally State land, that is Arazi Mirié, you could not create Vakf either of the kind known as Sahih or Gairi Sahih (Takhsisat) unless in the first case you obtain a "Temlikname" firman turning the Mirié land into Mulk land and in the second the Imperial consent.

It is clear from the above that if the lands in dispute in this case were of Arazi Oshriyé category (tithe-paying land), they could be dedicated by their owner as Sahih Vakf (a valid Vakf) without seeking the consent of any high authority.

This is one of the possibilities which I shall have to consider later in this judgment. The second possibility is that the lands in dispute were originally State lands and their possessors after having obtained a "Temlikname" turned them into Mulk and then dedicated them as Vakf. It must be noted that this was a prevailing practice at the times the Ottoman Sultans were indulging in conquests.

The third possibility is that the lands in dispute were originally State lands and although their category was not altered the State imposts (menafi-emiriyé) were by imperial sanction dedicated as Takhsisat Vakf. This is Takhsisat first category.

The fourth possibility is that the State retained its rights on the imposts (tithe and other taxes) but consented to the dedication of the possessory rights as Mevkoufé Takhsisat. That is Takhsisat second category.

The fifth possibility is that the State kept the " rekabé ", the ownership in fee simple, to itself only and parted with all the ancillary rights, that is the possessory as well as "Menafi-emiriyé " tax rights, both of which have been dedicated as Takhsisat. The State in such a case retains a reversioner's rights and the property having retained its nature as Arazi Mirié can be used only as such. This is Takhsisat third category. The lands in dispute could only come within one of the five classes of Vakfs just stated. A sixth possibility in the circumstances of the case is ruled out. The Vakf lands in question do not possess the attributes of " Idjaretein-li Vakf" and therefore this category is left out.

The next question is, in the light of the evidence, to which class the lands in dispute belong.

For the disposal of the present appeal we do not think it is necessary for this Court to fix definitely the category the Vakf lands in dispute belong to, provided it can be established that the lands in dispute are or are not of the first category of Takhsisat Mevcoufé. If they are Arazi Mevkoufé Takhsisat, first category, which are privately possessed, such lands by virtue of section 3 of the Immovable Property (Vakf Idjaretein etc. Conversion) Law, Cap. 232 would have become Arazi Mirié and as such by virtue of section 3 (3) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, the private property of the present appellants. If, however, the property in question is found to be of some category of Vakf other than the first type Takhsisat then as far as the appellants are concerned the result would be the same because whether the properties are Evcaf Sahiha properties, that is, those described in the first and second possibilities or are Takhsisat second and third category (fourth and fifth possibility) the plaintiffs have nothing to gain and are bound to fail because the rights of Evcaf over such properties remain unaffected and even expressly protected by section 3 (4) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, which reads:

> " all immovable property which at the date of the coming into operation of this Law is held, administered and enjoyed as Vakf property in accordance with the provisions of the Cyprus Evcaf (Mohammedan Religious Property Administration) Order and Law, 1928 and 1934, shall continue to be so held, administered and enjoyed as if this Law had not been passed subject only to the provisions of sections 35, 36 and 37 of this Law ".

The characteristics of Takhsisat first category are to be ascertained in the light of Article 4 of the Land Code by finding whether the State imposts (menafi-emiriyé) alone have been dedicated to the Vakf. It is of importance therefore to find out what were the State imposts on Arazi Mirié and whether any of these have been dedicated to Vakf.

Under the Turkish occupation the State imposts, i.e. tithe and taxes relating to Arazi Mirié collectively known as " Menafi-Mirié " were eight in number and under British Rule they continued to be so until 1914 and many years afterwards in some cases only the rates were increased. We give them hereunder:

1. It is the tithe which was taken out of the produce, 1/10th of the actual amount produced.

2. Owners of pasture lands, building sites, threshing floors of Arazi Mirié category not cultivated or planted

with trees had to pay in lieu of tithe an annual sum calculated on the value of 30 paras per thousand 3/4/1000.

3. Pasture fees.

4. Transfer fees and mortgage fees.

5. Succession fees.

6. When Mirié lands fall vacant (Mahloul) the proceeds of sale.

7. The fees charged on issue of certificate of registration when the Arazi Mirié was acquired by prescription was 30/1000 on its value.

8. The fees payable on the partition of the Arazi Mirié. These are the State imposts mentioned in Art. 4. (See p.39-40 of Professor Djemalettin on Land Code).

Can it be said that what the appellants (plaintiffs) have been paying from time immemorial to the Evcaf Authorities namely 1/8th of a kilo of wheat per donum and 1/8th of a kilo of barley per donum annually by way of rent irrespective of the amount actually produced, was one of the kinds of imposts enumerated above?

The amount of wheat and the amount of barley paid to the Evcaf Authorities annually was rent in kind. There is almost no room to doubt. The receipts produced by the respondents and the counterfoil of such receipts signed or marked by the appellants show clearly that the cereals paid were in the nature of rents and not taxes and it is not uncommon in this country to pay rent in kind in respect of arable lands held under lease.

What is more, in *Collet and Sadik Effendi v. Kyrillos Metropolitan of Kition*, 6 C.L.R., 8, referred to already, where a considerable part of the land in dispute in the present action was the subject matter of that action, it was held that the See of Kitium, the predecessor in title, so to speak, of some of the present appellants, were the tenants of the respondents in respect of such properties and it was further found that the landlords, respondents in this case, were entitled to collect rents at the rate of 1/8th of a kilo of wheat and 1/8th of a kilo of barley from the defendant See.

So, the finding of the trial Court in this case that the amount of cereals collected annually from the appellants (plaintiffs) were in the nature of rent is well supported by evidence. It has been argued that the appellants by private agreements bought these lands and also held them as properties inherited and that the Vakf Authorities did not object to it. The Evcaf Authorities did not object to the change of tenant so long as the new holder paid the rent.

All these private transactions which were devoid of any legal effect as far as transfer of property is concerned, do not, in our mind, carry the case of the appellants any further.

As Tyser, J., remarked in the case of *Collet and another v. Kyrillos, Metropolitan of Kition*, (*supra*) at p. 11 : "The evidence is quite consistent with a transfer of ordinary tenancy from father to son or to a stranger with the consent of the Evcaf Board ". The fact that the Evcaf Authorities consented to collect rents from a new tenant who stepped into the shoes of his father or purported to buy the rights of another tenant makes no difference. The new holders by paying rents to Evcaf and signing counterfoil of receipts as tenants expressly and/or by conduct have become tenants. The rents being annually paid can reasonably be inferred as being annual leases, tacitly renewed from year to year. This is quite consistent with Idjaré Vahidé Vakfs. It is not necessary that such leases should be in writing and annual leases are permissible in all Idjaré Vakfs. While on this topic I refer to Article 58 of the Evcaf Laws by Omer Hilmi which makes it clear that the property dedicated should be immovable property and the definition of Idjaré Vahidé is given in Article 38 which reads:

> " Idjaré Vahidelé Evcaf " is the name given to Mussaqafat and Mustaghilat vakfs which are let by the Muteveli of the dedication, in the same way as properties are let by their owners, for a term, long or short, such as a month or a year ".

Here the term "Mustaghilat" comprises arable land capable of beneficial possession (income bearing) (See sec. 14 of the English version of Evcaf Law by Tyser, J.).

If the properties in question were of Arazi Mevkoufé Takhsisat privately possessed, covered by the Immovable Property (Vakf Idjaretein, etc., Conversion Law Cap. 232 (*supra*), in other words, Arazi Mirié Takhsisat first category, tithe and other duties and impost collected in respect of such properties together with Immovable Property tax which is admittedly paid by the plaintiffs-appellants direct to the Government would have been paid again to the Government for the account of Evcaf as this was the practice for many years up to the year 1944 ; but from the evidence it is clear that apart from the Immovable Property Tax (known as Vergi Kimat) payable at any rate to the Government nothing was paid to the Government for the account of Evcaf. The Immovable Property (Vakf Idjaretein, etc., Conversion) Law, Cap. 232, by section 4 provided for the annual payment of £2,230 to Evcaf Office as compensation for loss of revenue from Arazi Mirié Takhsisat first category to that office. The amount of £2,230 was not ascertained at random but after calculating the state imposts collected by Government on behalf of the Evcaf from this category of lands. It is clear

from the evidence that the lands in dispute were not taken into account as such and no compensation was paid in respect thereof under the Immovable Property Conversion Law.

This fact is another indication that the lands in dispute were not considered by the Government as being of the first category of Takhsisat and it explains the readiness of the Land Registry to proceed with the registration of such properties in the name of Evcaf if there had been no objection on the part of the holders.

The immovable property tax (Vergi Kimat) which is paid directly to the Government Revenue by the occupants of the lands cannot be considered as an indication that the Vakf properties in question are of the first category Takhsisat because such tax is payable to the Government also in cases of other Vakf properties, save Mulhaka and non-Meshruda Vakfs, which are dedicated as a rule to the Mosques and Tekkés.

The words "privately possessed" occurring in section 3 of the Immovable Property (Vakf Idjaretein, etc.,) Cap. 232, (*supra*) qualify the Vakf lands affected by the said Law and leave unaffected the remaining ones, namely Takhsisat 2nd and 3rd category. The possession referred to is no doubt used in the legal sense of the word which is quite distinct from the kind of possession a tenant has over the land under his lease. The able counsel for the appellants endeavoured to demonstrate that the rents collected by the Evcaf Authorities were in the nature of a charge on the lands in question and such annual charge might have to be considered under section 10 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, relating to rights and easements over the lands of others; and if these annual payments in kind are considered in the light of such section Evcaf need not have any ownership or possessory rights over the lands in question. This is a novel point which in the light of the history and provisions of the Land Code, Medjellé, and the Evcaf Laws it is not possible to conceive.

In the absence of any law or authority it is difficult to accept the suggestion that the collection of annual rents by Evcaf could be considered as a privilege, advantage or right over the lands in dispute and that collection having continued for a period of over 30 years the Evcaf is entitled to collect it as an annual charge on the properties affected in accordance with section 10 of the Immovable Property Law, Cap. 231.

There was in our view sufficient evidence before the trial Court to find that the lands in dispute were of the Idjaré Vahidé category or Arazi Mevkoufé Takhsisat second or third category. In *Collet and another v. Kyrillos, Metropolitan of Kition* referred to above it is stated that there was evidence that not only the annual rents but also the tithe was payable to the Evcaf. In p. 12 of that case Tyser, J. stated:

" It appears, from the book of accounts produced, that the Delegates of Evcaf receive not only a rent but also the tithes ". If that is so the lands in dispute could only be of Idjaié Vahidé and/or Takhsisat third category. Whether the lands in question are of Idjaré Vahidé category or of Takhsisat second and third category is not of any significance as far as the appellants are concerned ; once their legal rights are those enjoyed by tenants the nature of the title of the respondents, their landlord, would make no difference to them. Furthermore, by section 3 (4) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, the Evcaf Authorities are entitled to administer the Evcaf Lands of any category according to the relevant law. Once it has been established that from time immemorial the plaintiffs and their predecessors effected annual payments in the nature of rents that, in our mind, constitutes an estoppel on their part from challenging or from disputing the title of the respondents as the owner of the properties in question.

We quote the following from page 288 of Hill and Redman's Law of Landlord and Tenant, 12th Edition :

> "*Estoppel by payment of rent.* Payment of rent is recognition of the title of the person to whom it is paid and operates as an estoppel against the tenant if he disputes such title ; save that where the tenant did not originally receive possession from such payee, or where his title has expired, the tenant may show that the payment has been made by mistake, and that the real title is in someone else ".

The appellants failed to show that the payments were made by mistake or that the real title is in someone else.

The document produced by the respondents purporting to be the deed of dedication covering the disputed lands although admitted by the trial Court as evidence was found not to relate to properties in question. Undoubtedly it is extremely difficult to identify land property described in an ancient document like the one under consideration (nearly 400 years old) with lands in their present condition, nevertheless the onus to show that the properties referred to in the document were those in dispute was on the respondents and in the absence of satisfactorily identifying evidence we do not think that the Court was wrong in its finding in this respect.

Whether there was a deed of dedication in respect of the properties in dispute which was lost or the subject matter involved could not be identified with the lands in dispute or there was no deed at all the case for the respondents does not necessarily fail. Vakf could be created without a deed (Vakfiyé) (See *Khanim and others v. Dianello and another*, 6 C.L.R. 52.)

Lord Goddard, C.J., in *Chesterton R.D.C. v. Ralph*

Thompson, Ltd. (1947) 1 All E.R., 273, p. 274 expressed himself in the following words as to the way the powers of an appellate Court are exercised.

> " I think it is rather a difficult case. One thing I have in mind, sitting in this Court, as in other Courts of appeal, is that one ought not to interfere with the decision of the Court below unless one is satisfied that its decision was wrong, and I am not satisfied that the decision of the Court of quarter sessions and the Court of petty sessions were wrong ".

Likewise the present case possesses unusual features and some difficult points to answer. However, we have not been persuaded that the trial Court was either wrong in law or that its decision was unsupported by evidence and we therefore dismiss the appeal with costs.

It is hoped that the outcome of this case will not prevent litigants coming to a reasonable understanding over the disputed lands.

Appeal dismissed with costs.