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

SMITH, C.J. & MIDDLETON, J. 1892. Dec. 19.

HADJI LOUKA LOIZO AND OTHERS *Plaintiffs*,

v.

THE PRINCIPAL FOREST OFFICER *Defendant*.

STATE FORESTS—DELIMITATION—GRANT OF LAND FOR CULTIVATION CONTAINING WITHIN ITS BOUNDARIES LAND NOT CULTIVABLE—CLAIM TO UNCULTIVABLE LAND AS MERA—AMENDMENT OF REGISTRATION BY GOVERNMENT—THE WOODS AND FORESTS DELIMITATION ORDINANCE, 1881—THE LAW CONCERNING THE CONFISCATION OF PUBLIC LANDS OF 1885—EMIRNAME 22 SEPHER 1290.

The right of possession of a tract of land stated to be 150 donums in extent, was granted to the plaintiffs "for the purposes of cultivation and for a tithe to be paid." Within the boundaries stated in the kochan given to the plaintiff were about 300 donums of cultivable land, and a considerably larger area of uncultivable land. At a recent registration of the lands of the village within which the tract of land is situate, the cultivable portion of it was registered on the plaintiffs' names, and the uncultivable portion excluded. This uncultivable portion, which fell within the definition of forest land contained in the "Woods and Forests Delimitation Ordinance, 1881," was subsequently delimited as State Forest.

HELD: That the reasonable construction of the grant to the plaintiffs was that it conferred upon them the right to possess so much of the tract of land as was susceptible of cultivation.

HELD ALSO: That the Government had the right to amend the registrations in the plaintiffs' names without taking legal proceedings against them.

APPEAL from the District Court of Kyrenia.

This action was brought under the provisions of Sections 8 and 9 of the Woods and Forests Delimitation Ordinance of 1881, to obtain an amendment of a delimitation made by a Delimitation Commission, whereby a considerable area of land which plaintiffs claimed as their property, and for which they had a kochan, had been included within the Government forest. The defendant admitted that the land claimed was within the boundaries in the plaintiffs' kochan, but contended that this kochan was issued by mistake, that by reason of the non-cultivation of the lands they had reverted to the Government, and that consequently, as

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they came within the definition of "forest land" under Section 1 of the Ordinance of 1881, they were rightly delimited. The plaintiffs only succeeded in proving cultivation of a small piece of the delimited lands some four or five years previously to its delimitation. The District Court gave judgment for the plaintiffs, holding that the Government should have brought an action to set aside the plaintiffs' kochan before delimiting the lands comprised within it, and further that the plaintiffs had fulfilled the conditions of the kochan as far as they could, by cultivating such of the land as was cultivable.

The defendant appealed.

Law, Q.A., for the appellant.

Pascal Constantinides for the respondents

The facts and arguments sufficiently appear from the udgment.

Dec. 27.

Judgment: This is an appeal from the judgment of the District Court of Kyrenia, directing that certain lands which have been delimited as forest, and which the plaintiffs claim to be the lawful possessors of, should be excluded from the delimitation.

By Section 1 of the Forest Delimitation Ordinance, 1881, the expresson "forest land" shall be taken to mean all uncultivated land bearing forest trees, whether standing in masses or scattered about, or which is covered with brushwood, etc., and under Section 2 all forest lands, except such as are the private property of any person or persons, are under the protection and control of the Government.

The Ordinance then goes on to provide for the delimitation of the forest lands.

Acting under the provisions of this Ordinance a Delimitation Commission delimited a considerable tract of uncultivated land at or near Koutsovento, on which there are forest trees scattered about, and included it within the State forest.

The plaintiffs object to this delimitation on the ground that the possession of this land was granted to them by the State in 1288, and they produce a kochan, the boundaries stated in which admittedly include the land which has been delimited; and the question for our decision is, what

is the effect to be given to the registration in the plaintiffs' name. It appears from a plan put in evidence, that the extent of land delimited, which is claimed by the plaintiffs, amounts to at least 400 donums, if our understanding of the plan is correct. It is contended by the Queen's Advocate, that this registration was effected by mistake, and that whether this be so or no, this land having remained without cultivation has reverted to the Government, and is properly included within the State forest.

For the respondents it is contended, that this land has been granted to them by the State, and if through non-cultivation the land has reverted to the State, the procedure to be adopted is that pointed out by Law 14 of 1885, that is to say, that the Government are bound to offer it for its equivalent value to the plaintiffs in the first instance.

The facts appear to be, that in the year 1288, the possession of a large tract of land, described in the kochan as 150 donums in extent lying within certain boundaries (which include, however, several hundreds of donums) and which was stated to be neither of the category "mubah (mountains), nor mera which had been left ab antiquo for the use of the people, but to be good for cultivation," was conceded on a sale by auction to the plaintiffs, for the purpose of being cultivated, and for a yearly title to be paid.

Within the area lying within the boundaries as stated there are, as we gather from what was stated without any denial before the District Court, 298 donums of land which has either been cultivated or is cultivable, and this portion of the land has not been delimited. With regard to the remainder, it is admitted that with the exception of a small piece marked on the plan with a cross, it has never been cultivated, and is in fact uncultivable, as we are informed that the plaintiffs have cultivated all that they can; and we gather that they claim the right to use this uncultivable portion as a mera, and to cut brushwood on it. We have to decide whether this tract of land has been wrongfully delimited as State forest by reason of the registration in the plaintiffs' name.

There is no doubt that the tract of land in question is forest land within the meaning of Article 1 of the Forest Delimitation Ordinance of 1881, and unless it is the "private property" of the plaintiffs, it has been, rightly delimited

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under that Ordinance. The term "private property," is not a very felicitous one; but at the time the law was framed, the distinctions between the different kinds of property were probably not so well understood as they are now, and we think that the meaning of the term is "property which is properly registered in the plaintiffs' name," or perhaps property which they are entitled to have registered in their names.

What then is the meaning of the kochan relied on by the plaintiffs, and does it make the tract of land claimed by them their private property within the meaning of the Ordinance?

It is perfectly clear that whatever the extent of land intended to be ceded to the plaintiffs, the possession of it was granted in order that it might be cultivated, and that tithe should be paid on its produce. We cannot believe that it was the intention of the State to concede to the plaintiffs, under a kochan which in express terms asserts that the land is fit for and is to be cultivated, a very considerable extent of land which cannot be cultivated at all. The boundaries mentioned in the Land Registry Office registers, especially the older registers, are very loosely stated; in the absence of any natural or artificial boundaries must necessarily perhaps be so. Taking the present case as an example, a considerable extent of cultivable land appears to be bounded on one side only by a still more considerable extent of uncultivable land, with, so far as appears, no natural boundary to mark off the one from the other. In our opinion, a fair and reasonable construction of a grant of the right of possession of land for the purposes of cultivation, lying within boundaries which include both kinds of land, would be, that it is a concession of the right of possession of all the land included within the boundaries which can be cultivated, and that it does not include such of the land as cannot be cultivated. If it were intended to include forest or mera, a proper registration should have been effected; but the concession is expressly limited to land fit for cultivation and to be cultivated.

We think that we should give the utmost effect to this registration that we can, and we do this by holding that it conferred on the plaintiffs the possession of so much of the land, as is comprised within the boundaries stated, as can fairly and reasonably be described as cultivable land.

If this be the proper construction to be placed upon the kochan, the question as to whether the uncultivable portion has reverted to the Government does not properly arise; but if it can be assumed that under this kochan, the State purported to grant to the plaintiffs the whole extent of land included within the boundaries mentioned, we are of opinion that under the circumstances of the case, the Government is entitled to amend the registration in the plaintiffs' name, and to include this uncultivable land bearing forest trees, within the State forest.

The District Court decided that the Government were bound to take legal proceedings to set aside the registration in the plaintiffs' name before this could be done.

We are of opinion that this opinion was not well founded, and that the registration in the plaintiffs' name could be amended, and the land included within the State forest, without any legal proceedings having first been taken.

It appears from what was stated at the trial in the Court below, that at the recent registration of the village lands where the tract of land in dispute is situate, the Defter Khane officials registered in the plaintiffs' names all that portion of the land comprised in the kochan of 1288 that was cultivable, with the possible exception of the small piece marked on the plan with a cross, and which, according to the evidence adduced for the plaintiffs, was cultivated up to a few years ago. It would appear, therefore, that at the present time, the registration in the plaintiffs' names had been already amended, by excluding therefrom the tract of land which is admitted to be unsusceptible of cultivation, and which was subsequently delimited as forest.

It appears, therefore, that by virtue of this new registration the plaintiffs are no longer registered as the possessors of this piece of land that they now claim, and have no right to withstand its delimitation as State forest, and that there are no further proceedings which could be taken, or are necessary to be taken on the part of the Government, before including this piece of land within the forest.

This action on the part of the Government appears to us to be justified by the emirnamés that were referred to both in the Court below and in this Court.

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With regard to these emirnamés we may remark that it was contended, that whatever effect they might be held to have, they were subsequent in date to 1288, and, therefore, could not affect the registrations in question in this case.

We have perused them, and they appear to us to have, and be intended to have, a retrospective effect. They are instructions issued to the officials of the Defter Khane, as to the course they should pursue, principally with regard to forest lands which had been wrongly registered. It has been contended that these emirnamés have not the force of laws; but they are orders emanating from Constantinople, which the officials, to whom they are addressed, would be bound to carry out, and it appears to us that they clearly lay down the principle, that where immovable property has been wrongly registered, the Government will insist on their right to amend their registrations, so as to prevent the acquisition of rights of property, which had been conceded either by mistake or by fraud.

We would particularly refer to the emirnamé of the 22nd September, 1290, which recites that in many cases it has been ascertained that forest lands have been wrongfully registered as arazi mirié, and directs officials at the Yoklama then being made, to reject claims to forests not sustained by the proper titles. If any such registrations were so amended by the officers of the Defter Khane, in pursuance of the instructions contained in the emirnamé, we are not aware that the person affected by the amendment of the registrations, would formerly have had any redress, though it is possible that he might be entitled to bring an action against the Government under Clause 44 of the Cyprus Courts of Justice Order, 1882, if he could establish that the registers had been wrongly amended. If a Yoklama took place of the lands of the village where this tract of land in dispute is situate, and if this land would have been registered as forest by the Ottoman Government, we have no doubt that the officials carrying out the Yoklama should, in pursuance of their instructions, have amended the registration, by excluding from it so much of the land conceded to the plaintiffs for the purposes of cultivation, as was not susceptible of being cultivated, and had forest trees upon it.

There does not appear to be in the Ottoman laws relating to the forests, any definition of the word "forest;" but we see no reason to suppose that uncultivable land bearing forest trees would not under that law have been held to be forest, and it undoubtedly falls within the definition in the Delimitation Ordinance of 1881.

We see no reason in principle why if such corrections may thus be made in the case of woods and forests, they should not be made in other cases; and where we find that under a concession of land for the expressed purpose of being cultivated and in order that tithe should be paid, a large tract of land is claimed that cannot be cultivated, but can only be used for pasture ground or forest, we have little doubt that the officials of the Defter Khane would, in virtue of their instructions, have amended the registration, and that they still have the right to do so.

It appears to us to be contrary to the whole spirit of the Turkish Land Code and the official regulations, that a person should be allowed to hold, under a registration which entitles him to the possession of land for the purpose of cultivation, land which cannot be cultivated, and for which if the possession were granted to him, he ought to pay the equivalent of tithe.

We see nothing in the law which compels the Government to bring an action to set aside a registration of its own which is mistaken or wrong; and we are of opinion that it was competent for the officials of the Defter Khane at the new registration of the lands of the village, to exclude from the plaintiffs' registration so much of the land as was not susceptible of cultivation. We think that it is clear that in every case the Government could not be bound to bring an action to set aside their own registration. For instance where a concession of mevat land has been made, and the land had not, within the three years specified in Article 103 of the Land Code, been broken up, the Government could cancel the registration and grant a new concession of the land to some other person.

Though not necessary for us to decide, we may remark that the argument addressed to us by the respondent's counsel,

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that if the land had become forfeited to the Government by reason of non-cultivation, the proceedings contemplated by Law 14 of 1885 must be complied with, and that the land must under Clause 3 be offered by the Government to the plaintiff at its equivalent value, does not appear to us to be well founded. The application of that law is expressly confined to *cultivable land*, and with the exception of the small piece to which we have before referred, it is admitted that the tract of land claimed by the plaintiffs cannot be cultivated. The other argument addressed to us by the respondent's counsel, that the possession of forest may be granted by tapou, and that the person having the possession may clear the forest and cultivate the land is correct; but Article 19 of the Land Code no doubt intends that the forest shall be registered as forest land, and it does not affect the present case.

We have referred to the case of *Hadji Yanni Ekonomou and others v. the Queen's Advocate* (not reported) quoted by the respondent's counsel, but it is quite distinguishable from the present case. In that case the plaintiffs were the owners of a chiftlik held under a separate kochan, which it was admitted was a valid kochan, and one which the plaintiffs were entitled to have exchanged for tapou kochans. A tract of land which was proved to be within the boundaries of the chiftlik, was claimed by the Government as forfeited by reason of non-cultivation. The plaintiffs proved that the land so claimed had never been cultivated and has always been used as mera, and the Supreme Court decided, that as the grant of a chiftlik might include both arable land and pasture, and as there was abundant evidence that the land claimed had always been used as mera, the plaintiffs were entitled to continue so to hold it, and that consequently it cou'd not have been forfeited by reason of non-cultivation.

For all these reasons we are of opinion that the objections of the plaintiffs to this delimitation must fail, except with regard to the piece of land which has been cultivated and to which we have already adverted.

If it is the intention of the Government to assert any rights over this piece of land, it appears to us that the proceedings pointed out by Law 14 of 1885 should be taken.

We consider on the evidence before us at present, that it should not have been delimited, and our judgment will be, that the appeal be allowed, and the claim of the plaintiffs dismissed, except as regards this piece of land. Unless the defendant consents to exclude this piece of land from the State forest, we must have the necessary information supplied to us, in order that we may by our judgment direct it to be excluded from the delimited forest, or if there is any dispute as to its area, evidence must be adduced before us, to show what it is.

We may add in conclusion that there does not appear to us to be any hardship in this case.

The State conceded to the plaintiffs the right to possess and cultivate 150 donums of land, and even allowing for a difference between the customary and the legal size of the donum, the plaintiffs have actually the possession of considerably more than was conceded to them.

Having regard to the circumstances of the case we shall make no order as to costs.

Appeal allowed.