PRIVY COUNCIL.

J.C.* 1893.
Nov. 30.
Dec. 1.

PARAPANO AND OTHERS *Defendants*,

v.

HAPPAZ AND OTHERS *Plaintiffs*.

On appeal from the Supreme Court of Cyprus.

LAW OF CYPRUS—HATTI HUMAIOUN OF 1856—LAW OF 11TH APRIL, 1884—LAW OF MARRIAGE—LEGITIMACY—ROMAN CATHOLIC OTTOMAN SUBJECTS.

HELD: That by the law of Cyprus the legitimacy of a Roman Catholic Ottoman subject is to be ascertained by applying the Canon Law of the Roman Catholic Church.

HELD: That by the Canon Law the infant appellants had been legitimated subsequent to their birth by the marriage of their parents authorised by Papal dispensation.

HELD: That by the Hatti Humaïoun of 1856 and the Cyprus Statute Law of 11th April, 1884, succession is regulated by creed, and, accordingly, the right to inherit in this case follows from the establishment of legitimacy.

APPEAL of the defendants from a decree of the Supreme Court (April 30th, 1892), reversing a decree of the District Judge of Larnaca (March 21st, 1891).

The facts of the case are reported in Vol. II., C.L.R., p. 33.

Mayne, for the appellants, contended that the Supreme Court took an erroneous view of the Mohammedan Law. As regards the doctrine that the recognition of the children only raised a rebuttable presumption of a prior marriage, it would in most cases destroy the effect of recognition and render it useless. Recognition where it is allowable and has any effect at all, constitutes by force of Mohammedan Law legitimacy and is not merely evidence of it.

Further the doctrine is erroneous that recognition is inapplicable in the case of children procreated by fornication. That is unlawful and prohibited. The offspring of concubinage may be legitimated by recognition. It is in fact to such cases that the doctrine of recognition applies, since no recognition is necessary where marriage can be established.

But it was contended that inasmuch as this was a suit between Christians, relating to marriage and legitimacy, and to the rights of inheritance dependent thereon, it ought not to have been decided according to Mohammedan Law at all, but by the Canon Law of the church to which the parties belong. The Court below regarded it as settled law that a marriage of any of its infidel subjects celebrated in accordance with the rites of their own church will be regarded as valid by a Mohammedan power. See on this

* *Present*: Lord Watson, Lord Hobhouse, Lord Macnaghten, Lord Shand and Sir Richard Couch.

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point the preface to the Hedaya and to Baillie's Mohammedan Law. The Court, however, held, that the legal consequences of the marriage are not necessarily to be governed by the law of the church. It was contended that if the Moslem Law recognised the validity of the marriage in this case, it will also recognise its effect in giving legitimacy to the children of the married pair in such a way as the Canon Law recognises it. Except where a Mohammedan was a party to a marriage or affected by it, the rule of the Mohammedan Law appears to have been to treat a Christian marriage with all its results and incidents as something with which the law of the Koran had nothing to do. It, at all events, lay on those who asserted the contrary view to shew that the claim to legitimacy in this case was founded on a principle repugnant to the Mohammedan Law. So far from that being the case, the Mohammedan doctrine of legitimacy by recognition involved the same principle of retrospective legitimacy as allowed by the Canon Law. It was also contended, that when the followers of Mohammed conquered countries which possessed a settled law, an established religion, and an organised priesthood, their policy had always been to leave the subject race in the full enjoyment of their own law and religion, except for purposes of government and revenue. This policy was fully recognised by the Ottoman Power in all its public acts and legislation. If the parties were Mohammedan instead of Christian, their legitimacy was equally well established.

[Reference was made to Grady's Hamilton's Hedaya, p. xiv.; Baillie's Digest of the Sunni Law, pp. 142, 169, 179; Hertzlet's Map of Europe by Treaty ii., pp. 1002, 1243.]

The respondents did not appear.

1894. *Feb.* 10.

The judgment of their Lordships was delivered by Lord Hobhouse.

The contest in this case relates to the inheritance of one Peppo Happaz, who died on the 4th June, 1889. The defendants, now appellants, are his widow and children, who claim the whole estate. The plaintiffs, now respondents, who have not appeared in this appeal, are collateral relatives of Peppo. They admit that the widow is entitled to one-third of the estate, but claim the other two-thirds for themselves on the ground that the children are illegitimate. That claim is made under the rules of Mohammedan Law. Peppo was, and his relatives are, Christians, and members of the Roman Catholic Church. The District Court dismissed the suit. The Supreme Court on appeal decreed the plaintiffs' claim, except that they gave partial effect to a gift made by Peppo to his children two days before his death.

In the year 1879, the widow Eudoxia, then a single woman, and with child by Peppo, went to live in his house, and she lived with him there till his death. While there she gave birth to the four infant defendants, the youngest of whom, Rosa, was born on the 6th August, 1886. Afterwards Peppo wished to marry Eudoxia, with the double object of living in a more orderly manner, and of making his children legitimate. Eudoxia was a member of the Greek Church, and a dispensation was necessary for Peppo to marry her. This was granted out of the Patriarchate office in Larnaca on the 3rd January, 1888; and on the same day Peppo was married to Eudoxia by his parish priest. The dispensation takes notice of his intention to legitimate the issue, and the marriage certificate states that a formal recognition of them then took place. When Peppo was on his death-bed, on the 26th May, 1890, he made another formal recognition of his children in the presence of witnesses, and declared that they should be his heirs. Possibly this was done the better to satisfy the requirements of Mohammedan Law, so that whichever law was found to apply to his case, his wishes might prevail. At all events he did what he could to make his children legitimate.

The first step in the contest is to find out what is the law applicable to the case: the Christian or the Mohammedan. In the language of the Cyprus Courts of Justice Order, 1882, Section 3, Ottoman Law means the law which was in force in Cyprus on the 13th July, 1878, and an Ottoman action means one in which the defendants are Ottoman subjects. By Section 23 the Court in an Ottoman action is to apply Ottoman Law as from time to time altered and modified by Cyprus Statute Law. The only Statute Law bearing upon this point is that of the 11th April, 1884, "To amend the Law relating to Inheritance and Succession." By Section 16 of that law it is provided that the property of the deceased shall devolve on all his legitimate children. That seems to narrow the contest down to the one point of legitimacy. If legitimacy is proved, the right to succession follows. By what law then is the legitimacy of a Christian Ottoman subject in Cyprus to be ascertained? By Christian Law or by Mohammedan Law?

The Courts below have both applied Mohammedan Law to the case, though they have differed in their views of that law. Their Lordships will now assign their reasons for thinking that the Christian Law applies. And they will first consider how the question would stand independently of the Hatti Humaïoun of 1856.

When the Turks conquered Cyprus, that island had been for nearly four centuries in the hands of adherents of the Latin Church. The conquerors did not enforce all

Mohammedan usages on their Christian subjects, but they allowed non-Mussulman sects to be governed by their own laws in divers matters connected with religion and domestic life. Among such matters are marriage, divorce, alimony, and dower. Now if the status of husband and wife among Christians is determined by reference to Christian Law, it is not difficult to suppose that the status of their children as regards legitimacy may be determined by the same law. It is a matter of well-known history that the Catholic priesthood claimed to treat the sacrament of marriage and its incidents as matters appertaining to religion and as subject to ecclesiastical jurisdiction, and that these claims were the subject of much controversy in England, where the lay powers rejected the canonical doctrine of legitimation by subsequent marriage. The Christian view of this question in Cyprus can hardly be doubted, though, of course, the Turkish view might be different.

Upon this point the learned Judges below say "We feel "that it is extremely improbable that the Ottoman Govern- "ment should have consented to confer on its Christian "subjects any larger privileges with regard to the legiti- "mising of children than belong to its Moslem subjects." Their Lordships cannot follow the remark.

In the first place the privileges claimed for Christians are not larger. They happen to take in the case which the learned Judges are discussing, and which they hold that the Mohammedan Law would exclude, viz.: the case of a child born in *zina*. On the other hand the Christian Law will not allow of any legitimation except by marriage of the parents, whereas the Mohammedan Law gives the father much greater liberty of action. It is difficult to predicate of either law that it gives larger privileges than the other. They are quite different.

In the second place, if any inference may be drawn from the policy of one set of Mohammedan conquerors to that of another, the policy of the conquerors of India is at variance with what the learned Judges think to be probable. During the period of their rule, as at the present time, there has been such wide liberty for each religious community to follow its own laws in private affairs, that it may almost be said that territorial law has not existed there except for matters of Supreme Government, such as the collection of revenue, the maintenance of order, the administration of justice between persons of different sects, and so forth.

Their Lordships have been referred to a passage from Hamilton's Introduction to the Hedaya in which this policy is stated :—

"Many centuries have elapsed since the *Mussulman* "conquerors of India established in it, together with their "religion and general maxims of government, the practice

"of their courts of justice. From that period the Mussul-
"man Code has been the standard of judicial determination
"throughout those countries of India which were subju-
"gated by the *Mohammedan* princes, and have since
"remained under their dominion. In one particular indeed
"the conduct of the conquerors materially differed from
"what has been generally considered in Europe (how un-
"justly will appear from many passages in this work) as
"an invariable principle of all *Mussulman* governments;
"namely, a rigid and undeviating adherence to their own
"law, not only with respect to themselves, but also with
"respect to all who were subject to their dominion. In all
"*spiritual* matters, those who submitted were allowed to
"follow the dictates of their own faith, and were even
"*protected* in points of which, with respect to a *Mussulman*,
"the law would take no cognizance. In other particulars
"indeed of a *temporal* nature, they were considered as
"having bound themselves to pay obedience to the ordi-
"nances of the law, and were of course constrained to
"submit to its decrees. Hence the Hindoos enjoyed under
"the *Mussulman* government a complete indulgence with
"regard to the rites and ceremonies of their religion, as
"well as with respect to the various privileges and im-
"munities, personal and collateral, involved in that singular
"compound of allegory and superstition. In matters of
"*property*, on the contrary, and in all other temporal
"concerns (but more especially in the *criminal* jurisdiction),
"the *Mussulman* Law gave the rule of decision, excepting
"where both parties were Hindoos, in which case the point
"was referred to the judgment of the *Pundits* or Hindoo
"Lawyers."

Of course this is not any exact statement of the law, but it serves to show that there is nothing improbable in supposing that when Mohammedans conquered territories inhabited the people of another creed supported by strong religious organisations, they smoothed their way by leaving important local and personal usages to a great extent undisturbed. Such was certainly the policy of Mohammed II. in the 15th century, and probably Selim II. acted on the same principles in the 16th. What are the precise usages so left undisturbed, is matter for enquiry in each country.

The solemn edict of the 3rd November, 1839, which is referred to in subsequent discussions as a sort of Turkish *Magna Charta*, usually under the name of the Act of Gul-Hané, is not at all specific on this point. It is rather concerned with asserting the equality of Ottoman subjects in various matters, and the authority of Courts of law. But during the disturbance caused by the Crimean War, the Christian powers put pressure on the Sublime Porte to give greater security to its Christian subjects; and this

action, after long discussion, resulted in the Hatti Humaïoun of the 18th February, 1856. Before stating the special provisions of that law, it is of some importance to see what was the opinion of Ottoman authorities as to the then existing position of the Christians.

On the 13th May, 1855, Aali Pasha, the Grand Vizier, wrote a memorandum which was circulated to the several Powers concerned, and which contains the following passages :—

"C'est librement au moment même de la conquête dans "la plénitude de la plus entière autorité que les Sultans "fidéles au sentiment de l'humanité et à l'esprit même de "l'Islamisme, ont accordé aux Chrétiens de l'Empire "Ottoman leurs premiers privileges . . . .

"Les Patriarchats . . . . réunissent un tel faisceau "de droits civils et religieux que l'on peut vraiment dire "qu'à la réserve de l'autorité politique, que le Gouverne-"ment Musulman exerce seul, les Chrétiens sont plutôt "administrés, jugés, et dirigés par une autorité Chretiénne "que Musulmane. C'est volontairement sans y être "amenés par aucune considération que celle de leurs "devoirs de Souverains, que les Sultans ont établi un tel "état de choses, qui n'a jamais été sérieusement com-"promis."

Such passages in a despatch must not be taken as exact statements of law. But their Lordships may be sure that in so critical a discussion the Grand Vizier would be well advised, and that his despatch represents that which statesmen, and probably lawyers, considered to be the true position of Christian subjects. It speaks of the privileges of Christians as being in accordance with the very spirit of Islam, and goes on to say that they are civil rights as well as religious, and to describe them in terms not very different from those which their Lordships have just been using with reference to India.

In this state of affairs the Hatti Humaïoun of 1856 was promulgated. The original is in French, a copy of which was handed by Fuad Pasha to Lord Stratford de Redcliffe, and was laid before the Houses of Parliament with an official English translation. Their Lordships remark this, because the version given in the book of Aristarchi Bey, entitled "The Législation Ottomane," is incorrect. They quote from the official English translation furnished to them from the Foreign Office.

The document refers to the Act of Gul-Hané, and confirms and consolidates the guarantees there given. It also confirms and maintains all privileges and immunities granted by the Sultan's ancestors *ab antiquo* and at

subsequent dates to Christians and non-Mussulmans, and declares that the powers conceded to the Christian Patriarchs and Bishops by Mohammed II. and his successors shall be made to harmonise with the new position of affairs. Then follow a number of provisions for the purpose of carrying these intentions into effect. The passages which bear specially on the point now under consideration are as follows :—

"All commercial, correctional, and criminal suits between "Mussulmans and Christian or other non-Mussulman "subjects, or between Christian or other non-Mussulmans "of different sects, shall be referred to Mixed Tribunals . .

"Suits relating to civil affairs shall continue to be publicly "tried, according to the laws and regulations, before the "Mixed Provincial Councils, in the presence of the Governor "and Judge of the place. Special civil proceedings, such "as those relating to successions or others of that kind, "between subjects of the same Christian or other non-"Mussulman faith, may, at the request of the parties, be "sent before the Councils of the Patriarchs or of the "communities."

This seems to their Lordships to do away with such doubts as may have previously existed. It is said by the learned Judges below that the Hatti Humaïoun does not apply, because the Patriarch is only to be called in at the request of the parties. But that remark hardly meets the force of the argument. The question to be decided is one relating to the history of the Turkish Conquest of Cyprus, and to the policy adopted by the conquerors. What disputes arising between Christians did the Turks permit to be governed by Christian Law? The Hatti Humaïoun does not profess to give any larger privileges in this respect than had been given *ab antiquo*. The important purpose it performs is to provide machinery for giving practical effect to those privileges. One of its provisions is the introduction of the Ecclesiastical Superior of the parties in certain processes. That is to take place at the request of the parties. But it is not implied that the law applicable to those processes is changed by the Hatti Humaïoun itself, or that it can be changed at the will of the parties. It seems to their Lordships the just inference that the chief of a Christian community is a permissible Judge, because the process to be decided is one of Christian Law with which he is conversant. And questions of succession are selected as an illustration of such processes.

If the conclusion requires strengthening, corroboration is to be found in ministerial and legal acts subsequent to the Hatti Humaïoun.

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On the 15th May, 1867, Fuad Pasha, the Turkish Minister for Foreign Affairs, addressed a minute on the subject of the Hatti Humaïoun to the representatives of the Sublime Porte at London, Paris, Vienna, Berlin, St. Petersburg, and Florence. A copy will be found in the "Législation Ottomane," Vol. II., p. 24. It is written in French, of which their Lordships will attempt a translation. It commences by referring to the Hatti Humaïoun as the confirmation and the development of the Act of Gul-Hané. Then follows a very full and exhaustive statement of the motives and effect of the Hatti Humaïoun, in which there occur the following passages :—

"The privileges and immunities granted *ab antiquo* to "non-Mussulman communities have ever been respected, "and no complaint has arisen to mark any encroachment "on the spiritual rights of the chiefs of those communities. "The Imperial Government has done more. Whenever "the Councils of these communities have manifested a wish "in the sense of an extension of their prerogatives, it has "met them generously, and has favoured the adoption of "such measures and regulations as are best calculated to "place their spiritual jurisdiction in harmony with new "manners, institutions and needs.

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"As for suits which depend upon religious laws, and "which by their nature can only interest Mussulmans "among themselves or Christians among themselves, such "suits shall be brought before the jurisdiction of the Sheriff "(*sic*) for Mussulmans, and before the ecclesiastical juris-"diction of the community for Christians ; which special "tribunals are governed by their own peculiar laws and "regulations."

From those passages their Lordships infer: first, that the Ottoman Government expected the Hatti Humaïoun to be construed, where doubtful, in a sense favourable to the privileges of non-Mussulmans ; and, secondly, that when the chief of a religious community had jurisdiction it was assumed he would administer the law of his own community.

Again, in the law of 1884 before referred to, Section 8 runs as follows : "If after inheriting any property the "heir changes his religious creed, the property so inherited "shall devolve upon his heir at his death in accordance "with the law regulating the inheritance of persons pro-"fessing the creed professed by him at the time of his "death." That section proceeds upon facts which are not the facts of the present case, but it involves the principle that succession is regulated by creed. The law does not apply to the property of deceased Mohammedans.

The conclusion is that the succession in this case is governed by the Canon Law, under which the infant defendants are clearly legitimate. Taking this view, their Lordships are relieved from considering a question which has given some trouble in England, viz.: the question whether the right to inherit follows from the establishment of legitimacy, because the right to inherit is clearly dealt with by the Hatti Humaïoun and the law of 1884. They are also relieved from considering any question of Mohammedan Law, or the effect to be given to the deed of gift. In their opinion the Supreme Court should have dismissed the appeal, and they will now humbly advise Her Majesty to make a decree to that effect. They do not think it right to disturb the directions of the Courts below as to costs, but they are of opinion that the respondents should pay the costs of this appeal.

Appeal allowed.

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

PETRO KAMBERIAN *Plaintiff,*

v.

HADJI YANNI KOUSETH *Defendant.*

PRACTICE—ORDER ON REFERENCE TO REFEREES—ARBITRATION—POWER OF COURT—ORDER XXII., RULES OF COURT, 1886—CLAUSE 37 OF THE CYPRUS COURTS OF JUSTICE ORDER, 1882.

In making an order of reference of matters of account in dispute in an action to referees under Rule 1 of Order XXII. of the Rules of Court, 1886, the Court has not power in the first instance to name the referees to whom the matters in dispute are to be referred.

APPEAL from the District Court of Nicosia.

This was an action in which the plaintiff claimed the rendering of an account by the defendant, or in the alternative the sum of £400, alleged to have been deposited as capital by the plaintiff in a partnership business which had existed between the parties and was dissolved in August, 1894.

Upon the case coming on for the settlement of issues, counsel on both sides agreed that it was advisable that the accounts in dispute should be referred to some persons agreed on by the parties, but disagreed as to their selection, number and powers.

The President, before whom the case for the settlement of issues came, adjourned the case before the full Court who, purporting to act under Rule 1 of Order XXII. of the Rules of Court, 1886, made an order appointing two persons