[SMITH, C.J. AND FISHER, ACTING J.]

SMITH, C.J. & FISHER, ACTING J. 1894. Nov. 17.

SAVA HADJI KYRIAKO *Plaintiff,*

v.

THE PRINCIPAL FOREST OFFICER *Defendant.*

FOREST LAND—DELIMITATION—PERSONS WHOSE RIGHTS ARE AFFECTED—CULTIVATION—REGISTRATION—MULK—ARAZI-MIRIE—ARAZI-MEVAT—ARAZI-METROUKE—KHALI—BOZ & KIRATCH—H.I.M. THE SULTAN AS SOVEREIGN—AS CALIPH—AS A PRIVATE INDIVIDUAL—NULLUM TEMPUS OCCURRIT REGI—PRESCRIPTION—BEIT-UL-MAL—TIMARS AND ZIAMETS—MULTEZIMS AND MUHASSILS—SERVITUDE (‹.5›)—CULTIVATION OF ARAZI-MEVAT WITHOUT PERMISSION—LAND DISCLOSED BY THE RECEDING OF LAKES AND RIVERS—MAHLUL—THE WOODS AND FORESTS ORDINANCE, 1879—THE WOODS AND FORESTS DELIMITATION ORDINANCE, 1881, SECTIONS 1, 2, 3 AND 8—LAND CODE, ARTICLES 2, 3, 5, 6, 60, 78, 103 AND 123—MEJELLE, ARTICLES 1270, 1271 AND 1272—REGULATIONS REGARDING TAPU SENEDS, 7TH CHABAN, 1276, ARTICLE 5—CYPRUS CONVENTION, JUNE 4TH, 1878.

The mere fact that land is cultivated does not afford any obstacle to its delimitation as a State forest, unless the person cultivating has some legal right to the possession of the land.

The cultivation of arazi-mevat without permission will not give the cultivator a right to be registered. The right to registration for land that was arazi-mevat, taken possession of without the permission of the competent authority, cannot be acquired by prescription.

Where a piece of land, strictly speaking, comes neither under the definition of arazi-mevat, arazi-metrouké or arazi-mirié, the regulations respecting that category of land, which it most nearly resembles, are to be applied to it.

S. for a period of 16 years cultivated a piece of land without interruption or objection on the part of the Government of Cyprus. The evidence shewed that the Government, through its agents, must have been aware that the land was being cultivated. It was alleged by S., and not denied on behalf of the Government, that, prior to the English Occupation, a notice was issued by the Ottoman Government that khali land might be broken up and cultivated. The Government of Cyprus, through its Forest Delimitation Commission, included the land within the limits of a State forest as being forest land within the meaning of the Woods and Forests Delimitation Ordinance, 1881.

HELD: That the invitation to cultivate given by the Ottoman Government not having been negatived on behalf of the Cyprus Government, must be taken to have been a permission to cultivate, and that S. was entitled to be registered as the possessor of the land as arazi-mirié, and to have the same excluded from the Government forest.

APPEAL from the District Court of Limassol.

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The action was brought under the provisions of Sections 8 and 9 of the Woods and Forests Delimitation Ordinance, 1881, claiming the exclusion of a piece of land at Akroteri from the limits of the State forest.

The judgment of the District Court was to the following effect.

The facts in this case are admitted, and are as follows :—

The plaintiff converted the land claimed to be excluded from the delimitation into arable land 16 years ago, and has ever since cultivated it, but has no title-deed. H.I.M. the Sultan has claimed this land amongst others as his private property, and public notice was given in the village that persons were not to cultivate it. It seems doubtful if this land comes under the category of " khali " or " kiratch." The Land Law appears to favour the opening up of both these categories of land, and converting them into arable land even without permission. Article 193 says, " if any " one has opened up and created into arable land any of this " category, " (khali or kiratch) " without permission, the " Tapu value of the place opened up by him shall be taken " from him, and a Tapu sened shall be given on its being " transferred to him." From this it would appear that such person making khali or kiratch arable is entitled to it even before period of prescription has run. " The Tapu value shall be taken from him " presumably means that he becomes a debtor for that amount.

Section 5 of law of 7th Chaban, 1276, enacts that kiratch lands on being made arable are to be given gratis, but khali shall be given by auction, but Tapu value shall be paid for the kiratch lands, if taken without permission. Section 8 of law 25th Ramazan, 1281 (9th February, 1280), is identical with the above article. It would appear, therefore, the law recognises the taking of such lands without permission, and the person taking such land acquires a right to have such land, and to obtain a sened on paying Tapu value.

Article 78 of the Land Law enacts that if a person has possessed " arazi-mirié for 10 years without disturbance, " his prescriptive right becomes proved, and, whether he " has a title-deed or not, such land cannot be looked upon " as mahlul, but a new Tapu sened shall be given to him " gratis. But if he admits such land was mahlul and he " took it without right, no consideration will be paid to " passage of time, but the land will be offered to him at " its Tapu value, and if he refuses, it will be sold by auction," and in instructions concerning Tapu affairs it is laid down that new title-deeds will be issued to persons " who have " no title-deed, but who have established their prescriptive " right on account of having cultivated the land for 10

"years." In action of *Ibrahim Mehmet v. Hadji Panayoti Kosmo and others* (7th June, 1884), the Supreme Court state that the word "tapulé" is introduced into Article 20 "in "contradistinction to Article 78 which gives a person who has "had undisturbed possession for 10 years a right to land "as against the Government . . . . Article 78 seems "to suppose a case of a person acquiring by simple pos- "session for 10 years the legal right to possess as against "the Government, and we see no reason why there should "be any distinction in principle between a possession that "gives a prescriptive title against the Government, and the "possession which gives a title against a private individual."

Article 78 says, "without disturbance." Can the fact of notice being given in the village that persons were not to cultivate, even if such notice was proved to have come to the plaintiff's knowledge, be said to be a disturbance within the meaning of that article? I think not; his possession has not been disturbed in any way. I think the only disturbance contemplated is a disturbance by legal procedure (as prescription is only stopped from running by a legal claim, etc., Mejellé, Article 1660 *et seq.*) or a physical disturbance.

The Court are, therefore, of opinion that the plaintiff, whatever category the land may be, has acquired certain legal rights against the Government. Putting those rights at the lowest, he has acquired the right to have the land offered to him at Tapu value. If this land were delimited as a forest without objection the plaintiff would lose his legal right. Plaintiff has, therefore, a legal right to object under Section 7 of Ordinance VIII. of 1881. Section 8 expressly states "it shall be lawful for every person whose "rights shall be affected by the delimitation to object." It does not state that only the owners by title-deed can object, and certainly in this case it would be a denial of justice if it were held that only holders of title-deeds could object, as the defendant has expressly stated that he will not give a title-deed to the plaintiff; and to hold that, because plaintiff has no title he cannot object, would be allowing defendant to take advantage of his own wrong, as the plaintiff is clearly entitled to have a title-deed.

There is yet another question whether this land can be delimited as a State forest under Ordinance VIII. of 1881. By the Ordinance "forest land" is defined to be "all un- "cultivated land bearing forest trees . . . . or which "is covered with scrub," etc., and such forest land is held to be a State forest, and by Section 5 it is only State forests that can be delimited. Now, since 1878, or three years before the passing of the Ordinance, this land was cultivated and had no forest trees or scrub on it; it was not, therefore, forest land and could not be delimited under that law.

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For these reasons I think judgment should be for plaintiff, and that this land should be taken out of limits of the State forest.

Judgment for plaintiff. No costs.

The defendant appealed.

Templer, Q.A., for the appellant.

The respondent was absent and unrepresented.

The facts and arguments sufficiently appear from the judgments of the Supreme and District Courts.

1895. *Jan.* 19.

Judgment: This is an appeal on the part of the defendant from a judgment of the District Court of Limassol, ordering a piece of land, 20 donums in extent, to be excluded from the Akroteri forest, which has been delimited as a State forest under the provisions of the Woods and Forests Delimitation Ordinance, 1881.

The facts of the case are very simple and appear to be undisputed. At the settlement of issue the plaintiff alleged that 15 or 16 years ago "in the Sultan's time," he opened a piece of khali land situated at Akroteri. He further alleged that notice was given that any one could open khali land. These facts were not disputed on the part of the defendant, but the sole allegation then made was that the plaintiff had no right to the land. At the hearing of the action the plaintiff gave evidence reiterating some of these facts, and stating what crops he had sown on the land for the past two years.

It was admitted for the defendant at the hearing that the plaintiff had cultivated the land for 16 years, but it was contended that he had not had undisturbed possession "because the Sultan has claimed the land since the English." Evidence was called on the part of the defendant to show that ten years ago notice had been given to the "village" of Akroteri not to cultivate "this land," as it was Sultan's claim.

There is no evidence to show whether notice was ever given to the plaintiff directly, that his cultivation of this land, which presumably had been going on for five or six years at the time when notices began to be sent to Akroteri village, should cease, and the expression "this land" in the Commissioner's evidence, can hardly be meant to apply specifically to the piece the plaintiff was actually cultivating, as the notice was given to Akroteri village. It is stated that Bessim Eff., who was, we believe, an official in the Land Registry Office, went every year to see if "it" was cultivated, and as it is admitted that the plaintiff has cultivated for 16 years, the officials of the Land Registry Office at Limassol were presumably aware of the cultivation and took no steps either to stop the plaintiff's cultivation, or to warn him that he cultivated at his own peril. The

plaintiff was not cross-examined as to whether he had had or been made aware of the notice referred to.

The inference of fact that we should draw from this evidence is, that the notices spoken of applied to new cultivations to commence from the date of the first notice, and not to cultivations which had been going on for some years prior to that date. For, as Bessim Eff. went every year to see if lands were being cultivated, and must, therefore, have seen that this particular piece of land was being cultivated year by year by the plaintiff, we think that notice would specifically have been given to him that the Government did not acquiesce in his cultivation, if for any reason they desired to object to it.

On these facts the Court below has decided in favour of the plaintiff's claim, holding that he has acquired legal rights against the Government and is, therefore, entitled to object to the delimitation of this land as State forest under Section 8 of the Forest Delimitation Ordinance, 1881.

The Court also finds that this land being cultivated land does not come within the definition of forest land contained in the Ordinance and, therefore, could not be delimited.

With regard to this latter point, it appears to us that the Ordinance contemplates that only such persons as have "rights" shall be entitled to object to the delimitation of land as State forest: and, therefore, if a Forest Delimitation Commission should include within the boundaries of a State forest, land which does not fall within the definition of forest land contained in the Ordinance, nobody, except some person having "rights," could successfully maintain an action for the exclusion of this land from a State forest. If, for instance, a tract of mevat land on which there were no forest trees and which was not covered with scrub or brush-wood, were delimited as State forest, we do not see how any person could object to its delimitation. In theory, the land is the property of the Sultan, or, at the present time, of the Government of Cyprus as representing the Sultan, and if the Government choose to delimit it as State forest, we do not see how it could be said that there is any person whose rights were affected, and who could under the Delimitation Ordinance claim to have that land excluded from the delimitation. The Government could certainly decline to give permission to any person applying to cultivate arazi-mevat, and could, in our view of the law, stop an unauthorised person from cultivating, when the fact was brought to their knowledge, unless that person had by long cultivation acquired a right to compel the Government to register him as the possessor—assuming that such a right can be obtained, a point we shall discuss hereafter.

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A person who clears a piece of forest land without the permission of the Land Registry Office officials who are authorised to give consent to the clearing and cultivation of uncultivated lands, would not, in our opinion, be able to object to the inclusion of this piece of land within a State forest, by reason of the fact alone, that it was cultivated land, and, therefore, not within the definition of forest land contained in the Ordinance. To take a case as an example, we will assume that a short time before a Forest Delimitation Commission arrived at a certain locality, a person had cleared and broken up a track of forest land without the assent or knowledge of the Government or any Government official: could it be held in that case, that the mere fact that the land was cultivated rendered it necessary for the Delimitation Commission to exclude it from the State forest, even though forest trees had been left growing upon it? We think not, and whether the land be arazi-mevat, which does not fall within the definition of forest land, or whether it be cultivated land we see nothing to prevent its delimitation, unless in the latter case some person has acquired some "right" to the land which is affected by the delimitation.

If we were to hold the reverse, we might be driven to this position: Assuming the cultivation we spoke of had occurred subsequently to 1881, the person who cultivated could have obtained no right over the land according to Section 4 of the Delimitation Ordinance of 1881, yet it could not be delimited because it had been cultivated. It was forest land at the date of the Ordinance, and no one could acquire any right in or over it, except under a grant or contract made by or on behalf of the Government.

The question, therefore, narrows itself to this, viz.: has the plaintiff proved that his rights have been affected by the inclusion of the land he claims within the boundaries of a State forest. The rights mentioned in Section 8 of the Ordinance must be rights capable of being legally enforced. The right claimed by the plaintiff is a right to possess and cultivate the piece of land he claims, and as the legal right to possess land depends upon registration, the question may be stated in this way: has the plaintiff proved that he is entitled to be registered as the possessor of the land he claims? It is admitted that he is not actually registered.

The first point to be considered with regard to the question as to whether the plaintiff is entitled to be registered, is to determine the category of land to which the piece claimed by the plaintiff belongs.

There is no evidence as to its exact situation, and the Court below were doubtful as to whether it was "khali or kiratch"; but there is nothing in the file of proceedings to

show what led to the doubt, or to what category of land the Court thought that this land should originally have been assigned. We may observe that under Article 103 of the Land Code "kiratch" is one description of khali land. The plaintiff himself alleged it to be "khali," probably meaning land which had not been cultivated before, or which bore no signs of having been cultivated. It was suggested for the appellant before us that this piece of land was within such a distance of the village of Akroteri, as that the voice of a person calling from the village could be heard by a person at the land, and that it could not, therefore, be mevat. There was no evidence that it ever was forest within the meaning of the Delimitation Ordinance, or that it ever had trees or bushes upon it, which might lead to the conclusion that it was a forest to which the Ottoman Laws or regulations repealed by the Woods and Forests Ordinance, 1879, would have applied.

It appears to us very difficult to say to what category of land this particular piece should be assigned. It is not mulk, certainly, and it must, therefore, either be metrouké, arazi-mirié or mevat. It does not appear to us that it was metrouké for, even if we assume that this piece of land could be proved to be within 1½ miles or half an hour from the last house nearest to it of the village of Akroteri, we do not think we could, on that ground alone, hold it to be metrouké. The definition of metrouké, in the Land Code, is lands which are left or assigned to the use of the public or the inhabitants of a town or village.

Article 1271 of the Mejellé defines metrouké lands as those which, being in the neighbourhood of inhabited places, are left to the inhabitants as pasture lands, threshing-floors, and for wood-cutting purposes.

Article 1270 defines arazi-mevat much in the same words as the definition contained in Article 6 of the Land Code, and there may be a presumption that the lands extending from the confines of a village to the spot where land begins to assume the character of arazi-mevat is metrouké, but we do not think that this presumption is a necessary one and one which could not be rebutted.

This construction, if adopted, would have this practical inconvenience, that in case of a number of villages which were situtate within a mile and a half of each other, the land between would be metrouké, and it is possible that some villages would have no cultivable lands at all, and the inhabitants be compelled to go many miles before arriving at arazi-mevat which, by permission of the Sultan, they could turn into arazi-mirié and use for purposes of cultivation. There are not a few places in Cyprus where, if this construction be adopted, districts of some considerable extent should, in theory, be metrouké, but which are all

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under cultivation now, and, no doubt, have been so for many years. Whatever may have been the case in the early days of the Ottoman Empire, when the rules of the Sheri Law, on which the Land Code is largely founded, were laid down, if it ever were really the case that lands surrounding a village to the extent of a mile and a half on every side were presumed to be arazi-metrouké, and, therefore, incapable of possession and cultivation by an individual, it seems to us that the presumption has in practice long ceased to have any force.

To hold that all land surrounding a village to the extent of a mile and a half on every side is necessarily metrouké would be an unreasonable construction of the law, and one contradicted by general experience.

As metrouké, such land could not be bought or sold or built upon : and we doubt whether there is any village in Cyprus surrounded by metrouké lands to the extent of a mile and a half on every side, and, indeed, it is no uncommon thing to find cultivated lands extending right up to the confines of a village. At some period or other these lands must have been metrouké within the meaning of Article 1271 of the Mejellé, if it be held that all land surrounding a village to the extent of a mile and a half is necessarily metrouké. A reasonable construction of the law, and one that we should adopt, would be that such lands surrounding a village as are used in common by the inhabitants as threshing-floors or grazing grounds or places for cutting fuel alone are metrouké.

We may observe that Article 5 of the Land Code defines arazi-metrouké as places left to the public generally, such as roads, and places left or assigned to the inhabitants of a town or village generally. It does not say that all lands surrounding a village to the extent of a mile and a half on every side, are to be considered as left or assigned to the inhabitants of that village.

There is no evidence in the case before us that the land claimed by the plaintiff in this action was ever metrouké within the meaning we attribute to the word : but, on the contrary, the fact that the plaintiff has cultivated it for 16 years without opposition or complaint on the part of the other villagers of Akroteri, tends to show that it was not land over which all had and enjoyed common rights.

If this land be, therefore, neither mulk, as defined by Article 2 of the Land Code, nor metrouké, as defined by Article 5, it appears to us that it must either be mevat or arazi-mirié.

If it be the fact that it is situate at a less distance than half an hour from Akroteri, it would appear to be not strictly within the definition of arazi-mevat, and it does not appear to us to come within that of arazi-mirié as defined

by Article 3. This article defines arazi-mirié as "such places as *cultivated* fields, pastures, etc., which have up to the present been granted by the State, the servitude belonging to the Beit-ul-mal, and which, when sales or reversions took place were formerly possessed by permission of the owners of Timars and Ziamets, who were considered as the owners of the soil, and during a certain interval by the grants of Multezims and Muhassils, but, subsequently, by reason of the abolition of these, they are up to the present possessed by the permission of the officer appointed by the State," etc.

Arazi-mirié, in the opinion of the commentators of the law, is land which, at the time of the Ottoman Conquest of a country, was assigned to the Beit-ul-mal, or land which has been granted out since by the Sultan for purposes of cultivation, on condition that the "servitude" vests in the Beit-ul-mal. They also lay down that lands which, whether by becoming mahlul or *in any other way*, are left to the Beit-ul-mal are arazi-mirié, meaning by "left to the Beit-ul-mal," we suppose, lands of which the Beit-ul-mal has in any way acquired the servitude.

It is not easy to define the meaning to be attributed to the word translated "servitude": but it includes the obligation of the possessor to pay an annual tax, and the right of the Beit-ul-mal to take possession of land left uncultivated without lawful excuse, or which has become mahlul owing to failure of heirs, and to re-grant the right of possession to those having the right to Tapu on payment of the Tapu value, or to sell the right of possession, on failure of persons having the right of Tapu, to strangers, by public auction.

The Land Code does in one article contemplate that land, which in all probability has never been cultivated before, may be arazi-mirié. We refer to Article 123, which provides for the case where cultivable land comes into existence, if we may use the phrase, owing to the receding of the waters of lakes or rivers. Such land is treated as arazi-mirié, and follows the same procedure as other arazi-mirié. It is not easy to see why such land, assuming it in other respects falls within the definition of arazi-mevat, should not be so treated.

Uncultivated lands lying near to villages, *i.e.*, within a mile and a half, do not, therefore, appear to us to be strictly within the definition given in the law of arazi-mirié, arazi-metrouké or arazi-mevat, but as they must be governed by some regulations, we must apply to them those provisions of the law which apply to that category of land to which they come nearest, *i.e.*, those applying to other lands which have not before been cultivated—arazi-mevat, or, possibly, arazi-mirié.

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We proceed, therefore, to enquire what rights the plaintiff has acquired by reason of his cultivation and possession of this land for the past 16 years, if the regulations respecting arazi-mevat are to be applied to it.

Article 103 of the Land Code says that land of the category of arazi-mevat can be opened up and created into arable land by a person having need for it gratis with the permission of the official, meaning an officer of the Land Registry Office, and by the regulations regarding Tapu seneds, a kochan is to be issued to him on payment of three piastres, cost of paper, and one piastre, the clerk's fee.

If any person has cultivated land of this category without permission, then he has to pay the Tapu value of the land. Regulation 5 of the regulations respecting Tapu seneds says: "As the opening up of 'boz' and 'kiratch' lands, and making "them into arable lands, is dependent on getting per- "mission from the Government, as stated in Article 103 "of the Land Code, land which has been opened up and "made into cultivated land, without getting permission "from Government after the publication of the said law, "shall be conferred on the owner on payment of the Tapu "value at the time of seizure and cultivation; but that, "if without excuse, the owner does not come within six "months and pay the Tapu value, as stated above, and "ask for a kochan, in that case it shall be conferred on him "on payment of the present Tapu value." It is not easy to say exactly what is the meaning of "boz" and "kiratch": both words mean, according to Redhouse's dictionary, rough sterile land, and they probably mean rough uncultivated land. The judgment of the District Court, as we read it, lays down the proposition that the mere cultivation of arazi-mevat gives the cultivator a right to call upon the Government to register him as the owner. This is a very wide proposition, and would appear to involve this, viz.: that a man who cultivates arazi-mevat without the permission or knowledge of the owner, the Sultan, or, in Cyprus, the Island Government, can thereby convert the land into arazi-mirié, and force the Government to register him as the possessor, even although his cultivation would have been objected to had it been known, and even although the land be required by the Government for some other purpose.

Mevat land is in the Ottoman Empire, we believe, in theory, the property of the Sultan as Caliph; and in Cyprus, since the Convention of the 4th June, 1878, by which the Island was assigned to be occupied and administered by England, such land must be regarded as vested in Her Majesty's Government as representing the Sultan.

The persons to whom possession of such land is granted, are in the same position as tenants with fixity of tenure, their possession being subject to a condition, viz.: that they will cultivate the land. To hold that a person by cultivation, without the assent or knowledge of the Government, is entitled to force the Government to recognise him as a tenant, is to place a limitation upon its powers which would place it in a worse position even than if it were a private owner. In our opinion Article 103 when it says "if a person cultivate this land and turn it into arable "land there is taken from him the Tapu value of the "land, it is granted to him and a Tapu sened given to him," does not mean that the Government is bound to grant the possession of the land to him, but may do so. The Government might, as owner of the land, object to its being broken up and cultivated, and we do not, therefore, think that the Government is bound to recognise a cultivation which has taken place without its knowledge. It is to the interest of the Government, undoubtedly, that as much land as is susceptible of cultivation should be brought under cultivation, as the individual cultivator, the community, and the Government are all thereby benefited, and in ordinary cases, no difficulty would be made in granting for its Tapu value arazi-mevat which had been broken up and cultivated without permission; but in those cases in which the land so broken up without permission is required for purposes beneficial to the community at large, there is nothing in the mere fact that it had been cultivated which would disentitle the Government to refuse to grant the possession of the land to the person who had cultivated without obtaining permission to do so. Article 1272 of the Mejellé appears to contemplate that the Sultan may, if he chooses, grant the land as mulk; if the true principle of the law be that mevat land in the Ottoman dominions is the property of the Sultan as Caliph, which he may grant to individuals, as their absolute property (mulk) or on condition that they cultivate it, that the persons in the latter case only obtain a right to possession on fulfilment of that condition, and that on their decease those of their heirs who are defined by the law are entitled to the possession on the same condition, and that failing those heirs the land may be acquired by their relations, or failing them by strangers, on the payment of the Tapu value, and that persons to whom possession of land is thus conceded, are in the position of tenants, then it appears to us that on principle the Sultan or the Government of Cyprus, as representing him, cannot be compelled without his or its consent to accept a person as tenant, merely owing to the fact that this person has broken up and cultivated arazi-mevat.

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We proceed, therefore, to enquire in the next place whether the plaintiff by reason of his cultivation for the past 16 years has acquired any rights against the Sultan or the Government as representing him. The question at once arises as to whether a person by continuous cultivation of land that was arazi-mevat can acquire a prescriptive title against the Sultan or the Government of Cyprus. Article 103 of the Land Code, after defining what is arazi-mevat, and stating that this category of land can be cultivated gratis, on condition that the "servitude" shall belong to the Beit-ul-mal, goes on to say that "all "other provisions of the law concerning other cultivated "lands are applicable to land of this category also." The article then goes on to deal with lands which have been granted and have not been cultivated, and lands which have been cultivated without permission. Does the law, when it says that all other regulations applying to other cultivated lands are applicable to lands of "this category also," mean that these regulations apply to arazi-mevat that has been cultivated, or only to arazi-mevat that has been cultivated by permission of the official? The strict construction of the sentence, that the regulations applying to other cultivated land apply to land of this category also, would be that these regulations apply to arazi-mevat, but it is obvious that they cannot do so until arazi-mevat is cultivated.

One of the regulations regarding cultivated land is, that if a person take possession of and cultivate, for 10 years, land which has become mahlul, he acquires a right to the possession against the State, and is entitled to be registered as the possessor without paying the Tapu value. If, then, the paragraph of Article 103 of the Land Law we have quoted above means that the regulations concerning other cultivated lands apply to all arazi-mevat that has been cultivated, whether it has been so cultivated with or without permission, the plaintiff in this case has obtained a prescriptive right as against the State to be registered gratis as the possessor of this land by reason of his cultivation for 16 years. But it appears to us that the true construction to be placed upon Article 103 is, that arazi-mevat can be granted to those persons who have need of it by permission of the official, and that when so granted, the regulations applicable to other cultivated land are to be applied to it.

If the law intended that these regulations were to be applied also to the case of arazi-mevat that has been cultivated without permission, we should have expected that it would have said so explicitly: but, far from this, we find that after saying that arazi-mevat can be turned into cultivated land with the permission of the official, and that all the regulations of the law as to cultivated land are

applicable to lands of this category also, the article of the law goes on to deal with the case of a person who has obtained permission to cultivate but neglects to do so, before referring to the case where persons cultivate without permission. Had the law intended that the provision as to the applicability of the regulations concerning other cultivated lands should apply to lands cultivated without permission, we should have expected to find the provision inserted at the end of the article and worded so as to make it clear that it was intended to apply to both cases where arazi-mevat was cultivated with and without permission. Inserted, as it is, in the middle of the article and immediately after the provision dealing with the cultivation, by permission, of arazi-mevat, the strong presumption is that the words relating to the applicability of the provisions of the law with regard to other cultivated lands are intended to apply to the case with which the law has just been dealing. If this be the true construction of the article, then it appears that the law has designedly made the provisions which apply to arazi-mirié, apply also to arazi-mevat cultivated by permission, and has designedly omitted to make these provisions applicable to arazi-mevat cultivated without permission; in other words, arazi-mevat cultivated without permission cannot be regarded as arazi-mirié; if cultivated with permission, it is so regarded.

It may be said that there is no distinction between the case where mahlul land is cultivated for ten years, and the right of the cultivator to be registered is acquired by prescription, the right of the State to the Tapu value being barred, and the case where arazi-mevat is cultivated without permission. On consideration, we think that the distinction is this: in the case of land which has become mahlul the prescription dealt with in Article 78 of the Land Code is a prescriptive right against the Beit-ul-mal which loses its right to receive the Tapu value of the land.

With regard to arazi-mevat it is, in the eye of the law, the property of the Sultan as Caliph, and is, in the Ottoman Empire, granted by him generally on condition that the "servitude" (عشر), belongs to the Beit-ul-mal or public treasury, though, as we have already mentioned, it appears from Article 1272 of the Mejellé, the Sultan might, if he chose, grant the land as mulk. It may well be that the intention of the law is that as against the Sultan, the Caliph, prescription will not run, though it does, as provided by Article 78, against the Beit-ul-mal. *Nullum tempus occurrit regi.* In the case where a person cultivates arazi-mevat without permission there can be no prescriptive right acquired against the Beit-ul-mal or the State, inasmuch as, in accordance with the views of those jurists whose opinions have been adopted in Turkey, the permission of

the Sultan to cultivate is a condition precedent to arazi-mevat becoming arazi-mirié: that is to say, arazi-mevat cannot, by the mere fact of cultivation alone, for, however, long a period of time, acquire the character of arazi-mirié, inasmuch as one essential condition, the permission of the Sultan, as Caliph, to its cultivation has not been obtained: and, if this is so, then there can be no question of prescriptive rights having been obtained as against the State or Beit-ul-mal, as the right of the State or Beit-ul-mal to demand and receive the Tapu value of the land does not come into existence until the consent of the Sultan to the land being converted into arazi-mirié has been signified.

If the Sultan could grant arazi-mevat either as mulk or as arazi-mirié, and if we assume that a person by cultivation could acquire a prescriptive right to the possession of arazi-mevat which he has cultivated without permission, would it be open to him to contend that he had acquired a right to the land as mulk if he possesses and cultivates it for 15 years? If the land might have been granted to him either as mulk or arazi, and if by possession and cultivation for 10 years he is entitled to be registered for the land as arazi, he might just as well, if he possesses and cultivates for 15 years, claim to be entitled to be registered for the land as mulk. This would involve this absurdity: that after the lapse of 10 years' cultivation, the land would be arazi-mirié, and that after another five years' cultivation, land that was arazi-mirié would become mulk. But no one can turn arazi-mirié into mulk without the express permission of the Sovereign, and hence this result would be impossible. This difficulty of ascertaining what rights a cultivator without permission of arazi-mirié acquires is another argument against holding that he acquires any rights of possession at all.

If we turn to the law on prescription contained in the Mejellé, we find nothing to lead to the conclusion that prescriptive rights can be acquired by the possession of arazi-mevat.

The law deals with the prescriptive rights that may be obtained as regards arazi-mirié, or mulk, but is entirely silent as to the possibility of any rights being acquired by the cultivation of arazi-mevat, and, in our opinion, the law did not contemplate that any such prescriptive rights can be acquired.

If our view of the theory of the ownership of arazi-mevat be correct, that is to say, that it is vested in the Sultan as Caliph when we find that it may be converted into arazi-mirié with his permission, but not without: but in the case of arazi-mirié the law distinctly allows of prescriptive rights being acquired by cultivation against the Beit-ul-mal

or the State, and is silent as to the acquisition of any rights being acquired by the cultivation of arazi-mevat, and when we find that it would be impossible to define what rights a person could obtain by cultivation of arazi-mevat, if it were admitted that he could acquire any, we are driven to the conclusion that no prescriptive rights can be acquired by the cultivation of arazi-mevat without permission.

The theory of the law that arazi-mevat is the property of the Sultan as Caliph, and is not the property of the State, is apt to become obscured owing to the fact that under the Land Code the permission to cultivate on condition that the land becomes arazi-mirié is given by the official of the Defter Khané, the department which has the control of arazi-mirié properties. It might thus appear that mevat lands were, in theory, the property of the State to the same extent as arazi-mirié: but the view of those commentators, whose words we have had an opportunity of consulting, is that, at the time of the Ottoman Conquest, lands that were uncultivated, or whose owners were unknown, are regarded as booty which belongs to the Caliph as the successor of the Prophet. The Sultan has, by distinct legislative enactment in Article 103 of the Land Code, empowered his officials—meaning, we have no doubt, the officials of the Land Registry Department—to consent to arazi-mevat being converted into arazi-mirié, but we think it necessary to hold that this consent is given by them as representing the Sultan as Caliph, to whom all arazi-mevat, in theory, belongs, and not in their capacity as representing the State or the Beit-ul-mal.

We have, therefore, come to the conclusion that no rights are acquired by cultivation without permission of arazi-mevat.

We, therefore, decide that the mere fact that land is cultivated does not afford any obstacle to its delimitation as State forest, unless the person cultivating has some legal right to the possession of the land, that the mere cultivation of arazi-mevat, without permission, will not give the cultivator a right to be registered, and that the right to registration for land that was arazi-mevat cannot be acquired by prescription; and we, therefore, think that the judgment of the District Court cannot be supported on the grounds on which it proceeded, if the regulations regarding mevat are to be applied to this piece of land.

It appears to us, however, that the facts admitted at the settlement of issue and proved in the case, are sufficient to satisfy us in coming to the conclusion that the judgment in declaring this piece of land to be excluded from the State forest is correct, if it is to be regarded as governed by the provisions of the law regulating arazi-mevat. The plaintiff alleged, without any contradiction, that a notice was

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issued that anyone might break up khali land, that prior to the English Occupation he did break up the land, and has cultivated it ever since without disturbance.

The statement as to the notice is rather vague, but we think that we are justified in assuming that the meaning is, that a notice was issued by or on the part of the Ottoman authorities. Had the plaintiff's allegation been denied, he would have been obliged to prove that such a notice was, in fact, issued, but it was admitted; and, considering that for a period of 16 years the plaintiff's cultivation has been allowed to continue without interruption, in spite of the fact that the Commissioner, who is the head of the Land Registry Office of the district, has for the last ten years sent a person each year to the land to see if it was cultivated, and the latter must have been aware that this piece claimed by the plaintiff was being cultivated, we come to the conclusion that the invitation to cultivate must be taken to be a permission to cultivate, and that the plaintiff is entitled to be registered as the possessor of this land, and is entitled to have it excluded from the limits of the State forest.

It may be a question, too, whether when arazi-mevat is cultivated for a long period of time with the knowledge of those officials whose duty it would be to stop the cultivation, if the Government of Cyprus intended to object to it, the Government must not be held to have acquiesced in the cultivation and impliedly to have given permission for its cultivation; but it is not necessary for us to decide the point now.

If, however, the regulations applying to arazi-mevat cannot properly be applied to this piece of land, and it should be treated as though it were arazi-mirié, the following considerations arise. The only fact known to us about this land is, that according to the plaintiff's statement, it was khali 16 years ago, the meaning of which, as we have before stated, we understand to be that it then bore no signs of cultivation. The only theory on which, according to our view, this land can be regarded as arazi-mirié, is on the assumption that it is mahlul, and if it be considered as mahlul, then it appears to us that the plaintiff, by virtue of 10 years' undisturbed possession and cultivation, has acquired under Article 78 a prescriptive right, and is entitled to a kochan gratis.

There are cases mentioned in the law in which lands are presumed to be mahlul, which appear to us to be much stronger than the present case. We refer to the cases mentioned in Article 123 where cultivable land is brought to light owing to the receding of the waters of lakes and rivers which have existed as such *ab antiquo*. The article provides that such lands are to be put up to auction and

sold to the highest bidder, and the procedure relating to other arazi-mirié is to be applied to them. It seems clear from the words of this article that such land is not regarded as arazi-mevat, as might have been anticipated, assuming, at all events, that it happened to be at the required distance from an inhabited place; as, in the first place, the law itself does not say so, and, in the second place, it contemplates that the land shall not, like arazi-mevat, be given gratis to the person applying for permission to cultivate it. The commentators on the Land Code, to whose works we have access, all agree in the conclusion that such land is not regarded as arazi-mevat. Two of them say specifically that it is presumed to be mahlul, and that the regulations applicable to arazi-mirié which has become mahlul are applicable to these lands also. One says that whilst, according to the Sheri, such lands were regarded as mevat, now, under Article 123 of the Land Code, they cannot be cultivated, meaning in the same way as arazi-mevat, that is, gratis, on permission being given. On this point, then, the Land Code would appear not to have followed the Sheri.

It is not easy to see why such lands should be regarded as mahlul. As by the hypothesis the rivers and lakes have existed in that condition *ab antiquo*, the probability of their beds having ever been cultivated is so remote as to amount practically to an impossibility. It does not appear to be because the lakes and rivers are regarded as the property of the State, and that, therefore, their beds may be regarded as arazi-mirié, because, according to the Mejellé, large lakes and rivers are regarded as common property. The Mejellé, after stating that, amongst other things, water is common to all and that all men are joint owners of it, goes on to say that the large lakes and rivers are common to all, and, therefore, their waters the property of all. If such lakes and rivers are considered as land covered by water, the inference should be that, as the water is the property of all men, the land under it is the property of all men, and there is nothing in the law to show how it comes about that the cultivable land under the water is to be regarded as land the servitude of which belong to the Beit-ul-mal.

Here, therefore, we find a case of cultivable land which, in all probability, has never been cultivated regarded by the law as pure mahlul, and subjected to the regulations prescribed in Article 60 of the Land Code regarding such mahlul, that is to say, it is put up for sale by auction and the possession given to the highest bidder. It seems to us, also, that other regulations regarding mahlul lands would be applicable also, and including that one mentioned in Article 78 which enables a person by possession and cultivation to defeat the right of the Beit-ul-mal to the Tapu value of the land.

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If, in such cases as those we have alluded to, lands are presumed to be mahlul, it seems to us very reasonable to hold that cultivable land which appears to be neither mulk nor metrouké, would be presumed to be mahlul also.

We have considered whether the reason why the lands mentioned in Article 123 are to be regarded as mahlul and not as mevat, may not be because the lands are said in that article to be *cultivable*, and whether some distinction is meant to be drawn between cultivable lands and arazi-mevat. It is difficult to say how the distinction could be drawn, as arazi-mevat is regarded as capable of cultivation: for it may be granted for the purposes of cultivation. There is no means laid down by the law of determining what is meant by cultivable land as distinct from mevat; but if this is the reason for the cultivable land mentioned in Article 123 being regarded as mahlul, it seems to us that the same presumption may be made as regards all cultivable land, and that the piece of land in dispute in this action having been, as a matter of fact, cultivated for 16 years, must be cultivable and presumed to be mahlul.

We, therefore, come to the conclusion that, if the piece of land claimed by the plaintiff in this action is to be regarded as arazi-mirié, it must be considered as mahlul subjected to the same regulations as apply to mahlul, and that in this case also the plaintiff is entitled to have the land excluded from the State forest.

There remains only one circumstance to be mentioned.

It was alleged at the hearing of this action that the plaintiff's possession could not be regarded as undisturbed, inasmuch as the Sultan had claimed it "since the English," meaning, we presume, the English Occupation.

No evidence was given as to what the Sultan's claim is, or how or when it was acquired or made, and the Sultan's claims are not matters of which the Courts have judicial cognizance. But, assuming that the Sultan has claimed this piece of land, it appears to us that his claim must be that he is entitled as a private individual to the possession of the land, as, since the Convention of 1878, it appears to us impossible that he could claim *quâ* Caliph, or as the head of the Ottoman State, any sovereign rights over the lands of Cyprus. No claim is put forward in the Court by or on behalf of the Sultan to the possession of this piece of land, and whatever may be the rights as between the Sultan, regarded as a private individual, and the plaintiff, it appears to us that, on the evidence before the Court, the plaintiff has succeeded in establishing that this is land to which he is entitled to be registered as against the State.

Appeal dismissed.