[HUTCHINSON, C.J. AND PARKER, ACTING J.]

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1904

May 3

MUZAFFER BEY AND OTHERS, *Plaintiffs*,

v.

W. COLLET AND M. IRFAN EFFENDI, *Defendants*.

VAQF—MAHLUL—LENGTH OF POSSESSION NECESSARY TO BAR CLAIM OF DELEGATES OF EVQAF—"EXCUSE"—MEJELLE, 1660, 1661—LAWS 4 OF 1886 AND 5 OF 1887.

T. was registered in the Malie books as owner of a Chiftlik, which was a mazbuta ijaretein vaqf; he died in 1861 leaving several heirs, two of whom died out of Cyprus, without leaving heirs, in 1862 and 1871 respectively. The Delegates of Evqaf did not become aware of the deaths of the two heirs until 1897, when they claimed the shares of those two as mahlul. The Plaintiffs, who were the other heirs of T., were in possession of those shares from 1873 until the commencement of this action in 1902.

HELD: *that the claim of the Delegates, not having been brought within 15 years after their right accrued, was barred.*

This was an appeal by the Defendants from a judgment of the District Court of Papho dated 1st May, 1903, by which they were restrained from interfering with certain shares in Poli Chiftlik.

The Chiftlik is a mazbuta vaqf of the ijaretein class. It was registered in the Malie books in 1856 as belonging to Tahsin Bey. Tahsin Bey died at Constantinople about 1861; one of his heirs, Shevket, died without issue about 1862, and another of them, Ahmed, died without issue in 1871. The Plaintiffs are some of Tahsin Bey's heirs; the Defendants are the Delegates of Evqaf and claim as mahlul the shares of Shefket and Ahmed, which are the shares in question in this action.

Besides some issues of fact which are not material to this report the following questions were raised.

The Plaintiffs claimed that they had acquired a right to be registered as owners of the shares of Shevket and Ahmed by possession for more than 15 years; and it was proved that they had been in undisputed possession of those shares since 1873. The Defendants replied (1) that the possession which would bar their claim to the property as mahlul was not 15 but 36 years, and (2) that, even if it was 15 years, the time did not begin to run against them until 1897, because Shevket and Ahmed had died out of Cyprus and the Defendants did not know of their deaths until 1897.

The majority of the District Court held (1) that the period allowed by law for enforcing by action a claim such as that of the Defendants is 15 years; and (2) that the Defendants' ignorance of their rights was no excuse. The President differed from the other Judges on the 2nd point and held that the ignorance which is no excuse is ignorance of circumstances which ought to be within one's knowledge, or which due diligence would have brought within one's knowledge, and that the Defendants

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did not know and were not bound to know of the deaths of Shevket and Ahmed until 1897, and that time did not begin to run against them until 1897. Judgment was given for the Plaintiff in accordance with the opinion of the majority of the Court.

The Defendants appealed.

The King's Advocate (*A. Kyriakides* and *Sevasly* with him), for the Defendants.

Pascal Constantinides and *Artemis* for the Plaintiffs.

THE CHIEF JUSTICE after stating the facts, proceeded as follows:

Judgment: The answer to the first question is, in my opinion, 15 years. It depends on Sec. 1660 and 1661 of the Mejellé, which enact that actions for the " tassaruf " (*i.e.*, possession), by ijaretein or muqataa in respect of immovable vaqf property are not heard after 15 years; and that actions of the Muteveli, or of the people who receive salary and food from the vaqf, in respect of the corpus of vaqf property, are heard up to 36 years. That is, where a man claims the possession of property which both he and the other party admit to be vaqf, his action is heard up to 15 years; but where he claims vaqf property as trustee (Muteveli), or as beneficiary, from a person who denies that it is vaqf, his action is heard up to 36 years. The claim of these Defendants belongs to the first of these classes.

The answer to the second question was, I think, correctly given by the majority of the District Court. Sec. 1663 of the Mejellé states certain " excuses " which prevent time running; it calls them " the " excuses allowed by the Sher' law; such as "—and then it gives four examples.

The same language exactly is used in Sec. 20 of the Land Code. The four excuses mentioned seem to be only examples. I should want some authority however to show that ignorance is " one of the excuses allowed by the Sher' law "; and on the other hand it is expressly stated in Omer Hilmi's Commentary on the Evqaf Laws, Sec. 444, that ignorance is not an excuse.

As a matter of Law I must hold that, under the Mejellé, mere ignorance of his rights (at all events where it was not caused by the fraud or false statement of the other side), is not an excuse to a claimant, And as a matter of fact I think it is not proved here that the Plaintiffs might not with reasonable care and diligence have learnt of the deaths of Ahmed and Shevket many years before 1897.

It was also argued for the Defendants that the excuse of " being in a foreign country " applies whether it is the claimant or the person against whom he might claim who is abroad, and that, as the heirs of Tahsin

Bey have always lived out of Cyprus, the time of their absence does not count. Our English translations of the Mejellé certainly seem to imply that it is an excuse only when it is the claimant who is absent; and the Greek translation (Nicolaides) is, " if *the Plaintiff* is under age or of un- " *sound mind* or *in a distant city.*" In the absence of any authority on the point I should hold that, under the Turkish law, absence is only an excuse when it is the absence of the claimant.

In my opinion however the answer to this question does not depend on the Turkish law but on the Immovable Property Limitation Laws, 4 of 1886 and 5 of 1887. I think that these Laws apply to all actions for recovery of immovable property of every kind; and under them, if the Defendants were suing the Plaintiffs for the 2/30th shares in dispute, and the latter were to prove undisputed adverse possession for 15 years, the action would not be maintainable; for under those Laws time begins to run when the right to bring the action accrues, unless the claimant is under one of the disabilities mentioned therein; and ignorance is not one of the disabilities; and absence from Cyprus is only a disability when it is the claimant who is absent.

PARKER, ACTING J., concurred.

Appeal dismissed.

The case of *Gregori Haji Lambro v. W. Rees Davies* as King's Advocate reported in pages 110–121 of the original edition is no longer of any importance.

The case of *Diophanto Themistocles v. A. Christophi* reported in pages 121–123 of the original edition is no longer of any importance.