HUTCHINSON, C.J. & TYSER, J.

ANNOU HJ. POLYCARPOU *v.* JULIANI HJ. SOLOMO AND OTHERS

TYSER, J.: I find no reason to differ from the Court below on any finding of fact.

The finding on the 4th issue is that from time immemorial the water has been allowed to flow into the tank and has then been distributed.

The Plaintiff now claims to take the water before it reaches the tank and to use it for irrigating land which cannot be irrigated from the tank. But in disputes about irrigating land consideration is paid only to *ab antiquo* user (Land Code, Sec. 124).

Therefore the Plaintiffs cannot use the water in the way they claim and which is not in accordance with *ab antiquo* user.

Moreover these lands cannot have a right of irrigation from the stream because while following the immemorial user, *i.e.*, when the water flows into the tank, they could not be irrigated.

Therefore by Sec. 1269 of the Mejelle the Plaintiff was not entitled to send his turn into these lands.

The contention of the Plaintiff that Sec. 1269 only applies to rivers and does not apply to such a stream as this is clearly without foundation when the Turkish text is looked at.

Therefore as joint owners the Defendants are entitled to prevent the Plaintiff from so using the water and no injunction should be granted.

The Court therefore was right in refusing the injunction which was the part of the judgment complained of and the appeal must be dismissed with costs.

HUTCHINSON, C.J. & TYSER, J. 1902 *December* 8

[HUTCHINSON, C.J. AND TYSER, J.]

VASSILIO GRIGORI DELLA AND OTHERS, *Plaintiffs,*

v.

SAVA HAJI MICHAELI AND OTHERS, *Defendants.*

ARAZI MIRIE—SUCCESSION—LAW OF 17 MUHARREM, 1284—IRS—INTIQAL—CHILDREN — EVLAD — ILLEGITIMATE CHILDREN — VELID-I-ZINA — PATERNITY MATERNITY—LAW XX. OF 1895.

Under the Law of 17 Muharrem, 1284, children born out of wedlock, have, when their mother is dead, a right to take the place of their mother for the purposes of succession (intiqal) to Arazi-Mirié on the death of their mother's father. The right of children to inherit under the Sher' law does not depend upon their being born in lawful wedlock but on the fact of their paternity or maternity, as the case may be, being established.

SEMBLE: *where there is a difference between the Turkish Law and the Law of the Church of Christian Ottoman Subjects, the Turkish Law will govern the succession to Arazi-Mirié.*

APPEAL of the Plaintiffs from the judgment of the District Court of Famagusta, dismissing the claim of the Plaintiffs.

The facts so far as material are as follows:

Haji Michaeli Georgi died in 1899, possessed of certain Arazi-Mirié, and other moveable and immoveable property.

He had three children: Sava (one of the Defendants), Yanko (the father of the other Defendants) and Eleni (the mother of the Plaintiffs).

Yanko and Eleni died before their father.

Before the Plaintiffs were born, Eleni had contracted a marriage with Grigori Della, the father of the Plaintiffs, and she had always lived with him up to her death, and they had brought up the Plaintiffs as their children.

The brother of Grigori Della had married the sister of Eleni's mother, and Grigori and Eleni were admitted to be within the 5th degree of affinity.

The questions in the action were:

1. Whether the Plaintiffs as the legitimate children of Eleni were entitled to share in the inheritance of the estate of the deceased Haji Michaeli Georgi (Eleni's father).
2. Whether the Plaintiffs had any right of inheritance to the property of the deceased Haji Michaeli Georgi.

There was a further question as to whether the Defendants had acquired prescriptive rights by occupation of part of the immoveable property, but this question was by agreement in the District Court reserved until the other questions had been decided.

The District Court found that the Plaintiffs were not the legitimate children of Eleni and were not entitled to inherit any of the property of the deceased Haji Michaeli Georgi.

Theophani for the Appellants contended that by the Canon Law marriage between persons within the 5th degree of affinity was not prohibited, on this point he cited Oikogeniakon Dikaion by Krassa published in Athens, 1895, p. 59, Armenopoulos, p. 490, Pedalion, p. 515.

That if such marriage was prohibited and the Plaintiffs were illegitimate, the Plaintiffs would be entitled to succeed to a share of the Arazi-Mirié of the deceased. That a Veled-i-Zina could inherit from

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its mother by Turkish Law, and so could an illegitimate child under Canon Law.

He cited Armenopoulos, p. 619, Art. 44, p. 627, Art. 66 and p. 629.

Sevash for the Respondents contended that the parents of the Plaintiffs were within the prohibited degrees of affinity. He cited The Pedalion, ed. 1800, p. 519, Krassa, p. 135.

He also contended that illegitimate children could not inherit, either from their mother, or their mother's father.

Theophani in reply, cited Krassa, p. 584.

December 9 *Judgment:* After setting out the facts the judgment of the Court was, so far as it is material to this report, as follows:

It was contended for the Appellants and denied by the Respondents.

1. That a marriage between persons within the 5th degree of affinity was legal.
2. That if the Plaintiffs were not the legitimate children of Eleni, they would be entitled to take their shares of the Arazi-Mirié left by the deceased Haji Michaeli Georgi.

As to the point of Ecclesiastical Law, after reading the evidence given at the trial and the authorities cited by the advocates in the argument, we think that it is proved that marriage between persons within the 5th degree of affinity is prohibited by the Greek Church.

Consequently it is proved that the Plaintiffs were not born in lawful wedlock.

It has never been contended that they are not children of Eleni, it has always been admitted and the evidence shows that they were from their birth brought up as her children and as the children of her reputed husband.

We find therefore the following facts to be proved, viz.:—(1) that the Plaintiffs were children of Eleni, (2) that they were not born in lawful wedlock, and (3) that they were brought up by Eleni as her children.

Are they under the circumstances entitled to take a share in the Arazi-Mirié left by their mother's father by virtue of the provisions contained in the Law of 17 Muharrem, 1284 ?

Mr. Theophani for the Plaintiffs does not contend that they would be entitled to share in the Mulk property in dispute, so it is not necessary to consider that question. Probably Mr. Theophani's reading of the Law XX. of 1895, is right as to this point. It is however not necessary for us to decide it. It is neither proved nor contended that there is any vaqf property in dispute so we give no judgment as to what would be the law if it should turn out that any of the property is vaqf.

As to the property which is of the category Arazi-Mirié, Mr. Sevasli has not contended that it is affected by the Law XX. of 1895. We are of opinion that that Law does not apply to Arazi-Mirié, because although the definition of " Property " in Sec. 2 of the Law is wide enough to cover Arazi-Mirié, it would be necessary to include Arazi-Mirié under the head of " Moveables " if the definition were so construed, and a reference to Sec. 5 of the Law shows that this cannot have been intended.

The manner therefore in which the tasarruf of Arazi-Mirié passes by descent is governed by Sec. 54 of the Land Code, and the Law extending the category of persons to whom it will so pass, dated the 17 Muharrem, 1284.

Mr. Theophani contends that the Land Law and the Law 17 Muharrem, 1284, extending the right of succession to Arazi-Mirié gives the right to " children " generally, the Turkish word being " evlad;" and that therefore illegitimate children may succeed to such property.

He further contends that in any case a Veled-i-Zina, a child begotten by unlawful carnal intercourse, can take by succession from its mother.

Mr. Sevasli relies on the rule in Turkish Law, as laid down in the authorities, that illegitimate children cannot inherit.

The rules referred to by the advocates are rules of the Sher' Law laid down with regard to inheritance (irs) and not to succession (intiqal) under the enactments contained in the Land Code and its amendments.

It will be useful however to consider those rules, as the rules for inheritance will be of assistance in arriving at the intention of the legislative power with regard to the enactments of the Land Code.

Now the first thing necessary to enable one to ascertain the Sher' Law with regard to these matters is to rid oneself altogether of western ideas in regard to marriage, legitimacy and the like, and to endeavour to place oneself in the wholly different standpoint of a Moslem or Oriental. In this way we will endeavour to arrive at the meaning of the rules referred to.

We will first take the term Veled-i-Zina. " Zina " has been defined to be " the carnal intercourse which occasions punishment " (Hedaya, 2nd ed., p. 182, Neil Baillie Hanifeea, p. 152).

It appears from Neil Baillie that the only carnal intercourse which is Zina is intercourse which is unlawful in itself, *i.e.*, " when the man has " no right in a woman, or having such right she is perpetually prohibited " to him."

When the intercourse is only temporarily prohibited it is not Zina.

According to the Hedaya " Zina " is " the carnal conjunction of a man " with a woman who is not his property either by right of marriage or of " bondage, and in whom he has no erroneous property."

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The term erroneous property means property erroneously supposed. These errors are divided into " error in respect to the act " and " error in respect of the subject."

Error in the act is where a man has acted under a mistaken idea that the connection was lawful.

" Error in respect of the subject is where the argument of the legality " of carnal conjunction exists in itself but yet practice cannot take place " on account of some obstacle " (Hedaya, p. 182).

It is thus clear that " Zina " does not correspond to our terms " adultery " and " fornication."

It may further be remarked that " Parentage is established in a case " of error with respect to the subject, but not in case of error with respect " to the act " (Hedaya, p. 182).

We will next consider what is meant by the term " illegitimate children " as used in the rule relied on by Mr. Sevasli.

As to marriage, the prohibited degrees are set out at p. 27 of the Hedaya.

It would seem that if a man marry a woman whom it is not lawful for him to marry and afterwards have carnal connection with her he does not incur punishment according to Hanifeea (Hedaya p. 184).

As to parentage of children it appears that an invalid marriage after consummation is joined to valid marriages as to its effects, one of which is the establishment of the child's paternity (Ibid.).

Paternity may also be established by " iqrar " or acknowledgment (Hedaya, p. 438).

In the case of a child by a slave when slavery existed, an acknowledgment by the father was necessary to establish its paternity, unless its mother had already borne him a child which he had acknowledged (Neil Baillie Hanifeea, pp. 391, 392) (Imamœa, pp. 291, 292).

According to the Hanefite doctrine maternity is estalished by birth alone without any regard to the connection of the parents being lawful or unlawful (Introduction to Neil Baillie's Imamœa, p. 19).

And in the Hanifeea the learned author states the law as follows:—

" When a man has committed Zina with a woman and she is delivered " of a son whom he claims, the descent of the son from the man is not " established, but it is established from the woman by the birth." (Neil Baillie's Hanifeea, p. 411).

The term translated " parentage " in Neil Baillie's Hanifeea is given as " nusub " (Hanifeea, p. 389).

The word " nusub " or " neseb " means relationship.

Now the right to inheritance under Moslem Law is founded on Nusub or Subut. (Neil Baillie's Imamœa, p. 261, and Hanifeea, p. 684) that is to say on relationship (nusub) or special connection (subut) such as husband and wife and nusub by acknowledgement may be sufficient (Neil Baillie's Imamœa, p. 289) and in a case where paternity can be established by acknowledgement the right of inheritance will follow.

The Law is illustrated by the following cases taken from Macnaghten's Mahomatan Law.

CASE VII. (p. 322.)

"*Question:* A person has a family by his wife, and also a family by "one or two concubines, to whom he was not married. These concubines "were slave girls, but it is not clear whether they were the property of "the person in question, or of another. The question is, can the issue "of those concubines inherit the property of their father on his death ?"

"*Reply:* Children born of a concubine, who was the slave of another, "and to whom the father was not married, are not entitled to inherit his "property; and the reason is, that, being the fruit of fornication, their "parentage cannot be established in that person, and secondly, because, "leaving fornication out of the question, the children begotten on the "slave girl of another person are the property of her master, and this "being the case, they can have no claim to the property because slavery "is one bar to inheritance. If the concubine were the property of the "father, and either she or her mother had been made captive in an "infidel country, and had been duly subjected to slavery, the connection "without marriage is legal, and the parentage of his offspring would "vest in the father, if he claimed them, and after his death they would "be entitled to a portion of inheritance. But if she had not been "duly subjected to slavery by being made captive in an infidel country, "as above described, such concubine is not a slave in the legal sense "of the term, and connection with her is unlawful, without marriage; "nor will the parentage of her offspring be established in the father, "because it is a requisite condition in the establishment of parentage "that there should be a consort; and consorts are either principal or "inferior. A wife is of the first description, the parentage of whose "offspring is established in the husband independently of any claim on "his part and cannot be disavowed by his denial. A slave is of the other "description, the parentage of whose offspring is not established in the "father without claim. The right of inheritance depends on the estab-"lishment of parentage; consequently the children of such concubines "are not heirs."

Again it is held that if a marriage was not proved to have taken place between a dancing girl and a deceased person to whom she had borne

children, and if it were evident that the children were the fruit of fornication, then parentage would not be established in the deceased and consequently no part of his property would belong to them (Macnaghten, p. 90, case xii).

In the last mentioned case it is stated to be laid down in the Kafee that the offspring of fornication take the maternal estate only and not the paternal (Ibid.).

Again it is stated in the Imamœa, p. 305, that " the Veled-i-Zina has " no nusub or parentage. Consequently neither the Zanee, or he who " has unlawfully begotten, nor she who bore him, nor any of their " relations can be his heir nor has he any title to their succession."

In a note the learned author says there is a remarkable difference between the Imamœa and Hanifeea Codes on this point and he refers to p. 411 of the Hanifeea set out above.

In Cyprus the Hanifee doctrine is in force.

It appears from all the authorities set out above that the right to " irs " or inheritance under the Sher' Law does not depend upon children being born in lawful wedlock, but on the fact of their paternity or maternity, as the case may be, being established.

The term " illegitimate children " in the rule relied on by Mr. Sevasli must be interpreted in accordance with the above authorities, and the rule does not deprive a child of a right where the paternity or maternity, as the case may be, is established.

That is to say, that a person is entitled to take as heir if the requisite relationship between himself and the deceased can be established.

That where a person is the mere offspring of fornication his paternity cannot be established.

That where he is born of a person who is in possession of the father, such as a slave, his paternity may be established by the claim of his father, which is equivalent to an acknowledgement.

That in every case his maternity is established according to the Hanifee Code.

That when a person's paternity or maternity is established he is entitled to inherit his part of his deceased father's or mother's estate, as the case may be, as a child of the deceased.

The presumption is that the word " evlad " (children) in the Land Code with reference to succession to Arazi-Mirié would be used in a sense similar to that in which the word " children " would be understood, at the time when the Land Code was enacted, with reference to inheritance under the Sher' Law.

The authorities support this presumption. In the Commentaries on the Land Code by Khalis Eshref published at Constantinople in 1315, at p. 306, there is the following passage:

" The relation (neseb) of a child who is not lawful can only be proved " from his mother and consequently he can only be heir or successor by " intiqal to his mother."

We have also had the advantage of consulting Ali Rifki Effendi the learned Mufti of Cyprus as to how the Law is administered in the Sher' Court with reference to the estates of Moslems and what is the interpretation put on the Law.

The learned Mufti says that if to a woman who is not married or in iddet with any one there comes an illegitimate child and she says " It is my child " and makes an admission (iqrar) and she afterwards marries a man and from him also a child is born, that child also becomes her child. On her dying both will be her heirs. And afterwards when the father of the deceased mother dies without children the two children will take by intiqal the land found in his tasarruf by reason of its being clear. And the word " evlad " in the Law about intiqal includes both children.

To a further question whether it would make a difference if the woman died without making an iqrar the learned Mufti said:—

" It is clear that a mother who gave birth to a child and brought him " up will make an iqrar that it is her own child. Therefore whether it is " proved or not that they are illegitimate, they inherit their mother's " property."

To a further question whether the fact that the father of the woman left a child of his own living who was brother of the whole blood to the woman would affect the right of the illegitimate children to share in the inheritance of the woman's father the learned Mufti said:—

" When a person dies who left a son living neither the legitimate nor " illegitimate children of his daughter will inherit his property according " to Sher'. But by reason of their being his child's children they will " take a share of his land according to the Nizam Law."

To a further question whether the illegitimate children of a woman would be entitled to share in the property of the mother's father, if the mother's father left a son living and the mother of the children had made no iqrar, but it was proved and admitted by all parties that the children were her illegitimate children the learned Mufti said " In case there is " no lawful father of a child it is necessary that it should be descended " from its known mother because a child cannot be produced without " mother and without father. Therefore as long as the father is " (na-meshrou) not a father recognised by the Law, the child will

"necessarily be descended from his mother and will be heir to his "mother."

The view of the learned Mufti with reference to the right of the children to inherit from the mother's father is in our opinion entirely in accordance with the wording of the Law of 17 Muharrem, 1284.

The expression for grand children "Ahfad" is explained to mean "son and daughter of his male and female children (evlad)."

It is admitted that the mother of the Plaintiffs was one of the children (evlad) of the deceased Haji Michaeli Georgi. The Plaintiffs are in the eye of the Law her sons and daughters, therefore they are the sons and daughters of a child (veled) of the deceased.

If once the relationship to the mother is established we are of opinion that it follows that the relationship to the grandfather is established.

But it may be argued that the authorities only show that an illegitimate child may be regarded as the legitimate child of the mother in Moslem Law, and that the word "evlad" in the Land Code still means "legitimate children"; and that the marriage in this case has been proved to be unlawful and consequently the children being illegitimate do not take by intiqal.

The reply to this may be found in the authorities cited by Mr. Theophani showing that by the Law of the Greek Church illegitimate children have a right to inheritance from their mother.

Armenopoulos, pp. 627, 628, and Krassa, p. 584, Sec. 291, are clear on this point.

The word "illegitimate" has no technical legal definition.

As applied in questions of inheritance to children it merely means "not recognised by the Law."

Both by Ottoman and Canon Law children born out of wedlock are recognised as the children of the mother.

Therefore there is in this case no conflict between the Turkish Law and the Law of the Greek Church.

We are of opinion, however, if there were a difference the Turkish Law would govern the right to intiqal and not the Canon Law.

For example: If the note to Armenopoulos in the edition by N. Havisiades at p. 628 is correct it would appear that in some cases children born out of wedlock would by the Canon Law have a right of inheritance from their father, who would have no such right under Turkish Law if they were Moslems; we are, however, of opinion that they would not take by intiqal unless in such cases the Ottoman Law would give the right to intiqal to Moslem subjects.

By the Law extending the right of intiqal to Arazi-Mirié certain rights of the Crown were abandoned in favour of the holders of Arazi-Mirié. The rights so abandoned must be ascertained in our opinion by the

Ottoman Laws and not by the Laws of any non-Moslem Christian Community. This point, however, is open for further consideration as in our view the Plaintiffs are entitled to succeed, whether Canon or Moslem Law governs the case.

In either case we are of opinion that the Plaintiffs are entitled to succeed to any Arazi-Mirié property to which their mother was entitled at the time of her death, and to her share of her father's property which he was entitled to at the time of his death.

The judgment of the District Court on this point must be set aside.

[HUTCHINSON, C.J. AND TYSER, J.]

SADYK AND OTHERS,

v.

PAPA MICHAELI YANNI AND OTHERS,

EXP. HAJI ECONOMO AND OTHERS (CERTAIN OF THE DEFENDANTS REPRESENTING THE VILLAGES OF BEDULA AND MODULA).

JUDGMENT—CORRECTING ERROR IN JUDGMENT—TEMYIZ COURT JUDGMENT CORRECTED BY THE SUPREME COURT—RULES OF COURT—VILLAGE ACTION—SERVICE OF NOTICE.

A judgment of the Temyiz Court forms part of the records of the Supreme Court.

The Supreme Court has the same power to rectify a judgment of the Temyiz Court as it has to rectify one of its own judgments.

Every Court has inherent power to rectify mistakes in its own records.

In village actions under the Turkish Law the villages sue in a quasi-corporate capacity.

The Rules of Court 1880, *do not apply to an action in the old Turkish Courts.*

There being no existing rules to enable notice to be given to certain villages, parties to an action, of an application before the Court affecting their rights, the Court gave directions as to the manner of service, and directed that the villages should be served in the manner provided for serving villages with notice under the Malicious Injury to Property Law.

When it was proved to the Supreme Court that a difference existed between the Turkish version of the decision of the Temyiz Court contained in a mazbata and the English version written below it, and that the English version correctly set out the decision of the Temyiz Court, the Court directed the Turkish part of the mazbata to be amended so as to make it agree with the English.

This was an application to rectify a judgment of the Temyiz Court dated the 28th February 1880, given on appeal from a judgment of the Daavi Court of Nicosia in an action in which Sadyk and three other persons representing the village of Lefka were the Plaintiffs, and Papa Michaeli Yanni and eleven other persons representing respectively the villages of Modula, Bedula, Kalapanayoti and Ikou were the Defendants.

Three of the Plaintiffs and four of the Defendants having died, an order was made on the 4th February, 1902, prior to the application, that the action be continued, the heirs of such Plaintiffs as were dead being