TYSER, C.J. & BERTRAM J. 1910 March 1

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

G. SMITH AND M. IRFAN EFFENDI, DELEGATES OF EVQAF, *Plaintiffs,*

YUSSUF ZIA, AS NAZIR OF HALA SULTAN TEKKE,

v.

AHMED KENAN AND OTHERS, *Defendants.*

VAQF—IJARETEIN—BUILDING ERECTED BY MUTESSARIF ON IJARETEIN SITE—ERRONEOUS REGISTRATION AS MULK—PRESCRIPTION—ESTOPPEL—LAW OF FORCED SALES, 1288, ART. 13—MEJELLE, ART. 1661.

The mutessarif of an ijareteinlu site, who has erected buildings upon the site, does not acquire a prescriptive right to the buildings as against the Nazir of the vaqf by the mere fact of occupying them for 36 years.

Neither the Nazir of the Vaqf, nor the Delegates of Evqaf are estopped from bringing an action to have the buildings registered as ijareteinlu, because the Land Registry Office has erroneously registered them as mulk.

Art. 13 of the Law of Forced Sales (which requires claims to be made before the conclusion of the auction) does not apply to a claim by a Nazir that property erroneously registered and sold as mulk shall be registered as ijareteinlu.

In 1869 an ijareteinlu site, part of the vaqf of a Tekke was sold by public sale and the purchaser proceeded to erect buildings upon it. In 1893 he obtained a registration of the buildings as "mulk upon ijaretein," and mortgaged them to the Defendants. In 1899 the buildings were sold by forced sale under the mortgage and acquired, directly or indirectly, by the Defendants. Neither the Nazir of the vaqf, nor the Delegates of Evqaf were aware of the erroneous registration, but on discovering it at the time of the sale they warned the Defendants that the buildings were vaqf but did not commence an action before the close of the auction.

HELD: *That they were entitled to have the registration of the buildings corrected, so as to indicate that they were mevqufé.*

The principles of the law of estoppel explained.

This was an appeal from a judgment of the District Court of Larnaca.

The question at issue was whether five shops, built upon an ijareteinlu site were themselves ijareteinlu, or whether they were the mulk property of the mutessarif of the site.

The site was part of the Vaqf known as "Hala Sultan Amul Haram." The action was brought by the Delegates of Evqaf and by the Nazir of the Vaqf, and claimed that the title-deeds in the hands of the Defendants should be amended, so as to make it appear that both buildings and sites were ijaretein mevqufé, and not the sites alone.

The original building upon the site of the shops was a Turkish bath. This was destroyed by fire and on the 30th September, 1869, the site

was sold by auction by the Muteveli of the Vaqf. The auction bill was as follows:—

AUCTION BILL.

The tevliet of a bath Hali site situated near the town of Scala was conferred upon me by vitrue of a Berat, and as the said site belongs to the Vaqf of Hala Sultan Amul Haram, on the authority given by the Mudir of Evqaf this auction bill is drawn up for the assignment and letting by ijaretein of the said site to any applicant.

L.S.

16th May, 1286.

HUSSEIN,

Sheikh of Amul Haram.

The purchaser was one Mehmed Gazavi, who either immediately or a few years after the purchase proceeded to build the five shops. No registration of the shops took place till 1893, when Mehmed Gazavi, desiring to mortgage the shops applied to the Land Registry Office and obtained a registration of the shops as mulk. He then mortgaged the shops to the Defendants. On April 17th, 1899, the shops were sold by forced sale under the mortgage.

The Delegates of Evqaf knew nothing of the registration of 1893, but in 1898, their attention was drawn to the matter owing to the fact that Mehmed Gazavi died without leaving direct heirs, and in consequence the question of escheat came up for consideration. Discovering that the shops were registered as mulk the Delegates of Evqaf applied to the Land Registry Office for an amendment of the registration. The Land Registry Office declined to make the amendment except in pursuance of a judgment of the Court. Proceedings for the sale under the mortgage were then pending, and the Evqaf authorities warned the sellers (the mortgagees) of their claim, but did not commence an action before the conclusion of the sale. In spite of the warning received from the Evqaf authorities, the mortgagees (the present Defendants) either directly or through intermediaries, themselves bought in all five shops.

Legal proceedings were not immediately taken to assert the claim of the Vaqf, as the Phaneromene case (reported 6 C.L.R., 55) which

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was regarded as a test action on the question of the ownership of buildings on ijareteinlu sites, was then pending. Finally in 1907, after correspondence between the Evqaf and the Defendants this action was instituted.

The District Court gave judgment for the Plaintiffs.

The Defendants appealed.

Rossos for the Appellants. I admit the general rule that buildings erected upon an ijareteinlu site are themselves ijareteinlu, but I say the right of the Muteveli may be waived or lost. Immediately on the erection of these shops, it became the duty of the foundation to lay claim to these shops and have them registered as the property of the foundation. A period of prescription commences to run from the moment the foundation acquired the right to do this and failed to assert it.

In the second place the Plaintiffs are estopped by the issue of qochans for the shops as mulk. For the purpose of the issue of these qochans the Land Registry Office must be considered the agent of the Evqaf authorities.

Finally, the forced sale in 1899, is conclusive. Art. 13 of the Law of Forced Sales, 1288, requires the claimant to take action before the conclusion of the sale.

Bucknill, K. A., for the Respondents. There is no obligation on us whatever to see that new buildings are registered. The registration is of the *tessaruf* and not of the *raqabé*. The obligation to register is on the *mutessarif*. See Regulations of 25 Ramazan, 1281, (Ongley, p. 138), and of 6 Rejeb, 1292, Art. 3 (Ongley, p. 250).

Nor are we in any way responsible for an erroneous qochan which the predecessor in title of the Defendants contrived to get from the Land Registry Office. The duty of maintaining a register of mevqufé property of all descriptions was finally transferred from the Evqaf authorities to the Land Registry Office by the Instructions of 9 Rebi-ul-Evvel, 1293 (Ongley, p. 260). But this does not make the Land Registry officials our agents. It was an administrative measure freeing the Evqaf from all responsibility for registration. We have no knowledge and no control of registrations effected at the Land Registry Office.

The Court dismissed the appeal.

Judgment: THE CHIEF JUSTICE: The judgment of the District Court must be confirmed. We have had a very interesting argument and a great deal of learning has been displayed on both sides, but the case really comes down to a very small point.

It is admitted by Mr. Rossos that the building being built upon an ijareteinlu site is itself ijareteinlu but he claims that the foundation has lost the property, on three grounds:—

1. Prescription; 2. Estoppel; 3. The Law of Forced Sales.

As to the first ground I am not quite sure that I follow his arguments.

The first overt claim to treat this property as mulk would appear to be the mulk registration of 1893.

Before this registration the occupiers had this land as tenants, and if they erected anything on it, they held it as tenants also. No right of action arose at this point.

In 1893 they did register the shops as mulk and this appeared to set up a claim to them as mulk.

I do not know what effect this would have and it is not necessary to consider it. But even assuming that the registration of this property as mulk gave a cause of action and that the time of prescription continued to run against the Evqaf authorities from that date, 15 years did not elapse between the date of this registration and the commencing of the action.

As to the second ground I do not know what the Plaintiffs have done to be estopped. Mr. Rossos says that they are estopped because there is a registration of the land as mulk.

Estoppels only arise when a person by words or conduct makes a representation which he intends to be acted upon, or which, whatever his intention may be, a reasonable man would take as intended to be acted upon, and thereby causes another to alter his position because he relies upon the act so done or the representation so made. Conduct by negligence or omission, when there is a duty cast upon the person to disclose the truth, may often have the same effect. (See *Freeman v. Cooke* (1848) 2 Ex., 663, 76 R.R., 719).

But what has the foundation done in this case ? There is nothing to show that they knew of the mulk registration. As soon as they found it out they protested. They have been trying all the time to prevent this property remaining registered as mulk. They have done nothing to mislead and they have consequently done nothing to come within the rule.

Further, if the Defendants, in setting up the plea of estoppel, claim to do so as the mortgagees or as claiming title through the mortgagees, then the mortgagees were not led into taking the mortgage by any action of the foundation. The foundation is not therefore

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estopped as against the mortgagees, or their successors in title. If they do so as purchasers at the sale, they cannot claim in this capacity that there was any estoppel by reason of the registration, for it is clear that notice was given to them, and they are consequently not purchasers without notice.

Finally as to the third point. If we look at the law, we see that Art. 1 is as follows:—

"Arazi-Mirié and mussaqafat and musteghillat mevqufé held in ijaretein will be sold like pure mulk for a judgment debt."

This property is mevqufé, *i.e.*, mussaqafat ijareteinlu and can only be sold for debt under this law. Now the law does not deal with the rights of the foundation, but with what I may call the "tenant right." The word "*tessaruf*" in Art. 13 is a well known term. In mulk property the owner has both the tessaruf and the raqabé. The law provides solely for the sale of the "*tessaruf*" and Art. 13 only creates a bar to a claim of the "*tessaruf*." That is to say, that a person cannot set up a claim as *mutessarif* at the expiration of the time prescribed by that section where the "*tessaruf*" has been sold under the law. The section does not bar the foundation from bringing a claim where mevqufé property has been sold as mulk and the claim is for the raqabé.

I say nothing as to the effect of selling mevqufé property upon a subsequent claim by the mutessarif.

The appeal must be dismissed with costs.

BERTRAM, J.: I entirely agree.

The first question is that of prescription. It is suggested that the claim is prescribed. Art. 1661 of the Mejellé says that "Actions "of the Muteveli and of persons who receive salary and victuals from "the Vaqf in respect of the property included in that originally made "Vaqf are heard up to 36 years, but after the lapse of 36 years they "are heard no longer." But in this case, what was there 36 years ago which the Muteveli or the Nazir ought to have done which they failed to do? What legal claim had they which they failed to enforce? Art. 1661 can only apply to cases in which some adverse possession takes place, or some adverse claim is asserted.

The second point is that of estoppel. Now the substantial Plaintiff in this case is the Nazir. The Delegates of Evqaf are only joined in their capacity of supervisors of pious foundations. How can the Nazir be estopped because the Land Registry Office have issued a wrong qochan? Further how can the Delegates of Evqaf be estopped? They did not make the registration nor did they do anything to induce it.

As to the third point—Art. 13 of the Law of Forced Sales, I agree with the solution suggested by the Chief Justice. The case to which the article applies, is where the "*tessaruf*" of a property is being sold for the debt of a person said to be the *mutessarif*. In such a case any one else who claims to be the real *mutessarif* must assert his claim before the close of the auction. This does not apply to a case where the person in whom the *raqabé* is vested asserts that property which was sold as mulk ought to have been sold as ijaretein.

Appeal dismissed.

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EUDOXIA NISSIPHOROU

v.

DESPINOU ANASTASSI AND OTHERS.

ACKNOWLEDGMENT—ACKNOWLEDGMENT OF DEBT IN CUSTOMARY FORM—LAW AS LAID DOWN BY SUPREME COURT—FICTITIOUS ACKNOWLEDGMENT IN SUBSTANCE A WILL—WILLS AND SUCCESSION LAW, 1895—LAW OF DEATH-BED ACKNOWLEDGMENTS—INAPPLICABILITY TO CHRISTIANS—MEJELLE, ARTS. 73, 77, 1572—1612, 1628.

The law as to the conclusiveness of acknowledgments of debt in customary form, as laid down by the Supreme Court, though not in accordance with the interpretation accepted in the rest of the Ottoman Empire must be taken to be part of the law of Cyprus

An acknowledgment of a genuine debt, though coupled with an agreement between the parties that it shall not be enforced till after the death of the maker, if made "in customary form," is conclusive upon the heirs of the maker after his death.

A fictitious acknowledgment of a non-existent debt, if coupled with an agreement between the parties that it shall not be enforced until after the death of the maker (though in customary form) is in substance a will, and if the maker is not a Moslem, is invalid unless duly attested as a will in accordance with the Wills and Succession Law, 1895

PER TYSER, C.J.: *Rules of procedure and evidence in the Mejelle are now superseded by those in force in the Courts of Cyprus*

In construing any enactment in the Mejelle so much of the enactment as concerns practice and procedure must be severed from that which regulates the rights of the parties.

In Art. 1610 of the Mejelle the enactment that "if the acknowledgment (sened) *is free from the taint of fraud and suspicion of forgery it is done in accordance with it," must be read with reference to the procedure then existing, under which in spite of this enactment the Defendant might bring his "defi dawa." Under the practice now existing it is allowable for the Defendant to set up any matter, which by the existing law and practice can be regarded as a defence to the claim.*

Consequently, proof that an acknowledgment was intended by all parties thereto to be a fraud on the heirs would be a defence to an action upon it.

PER BERTRAM, J.: *The provisions of the Mejelle relating to gifts and acknowledgments made in mortal sickness are part of the Sheri law of inheritance and since the Wills and Succession Law, 1895, have no application to Ottoman Christians.*

This was an appeal from the District Court of Papho.

The action was brought upon an acknowledgment of debt in customary form for £100. The document in question is set out in the judgment of the Chief Justice.