

Anna Agop Brounsouzian and others - - - - *Appellants*

v.

Moses Smoira and another - - - - *Respondents*

FROM

THE SUPREME COURT OF PALESTINE, SITTING AS A
COURT OF APPEAL, JERUSALEM

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1938.

Present at the Hearing :

LORD ATKIN

LORD THANKERTON

LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD THANKERTON]

The appellants claim a certificate of succession recognising them as heirs to the estate of Frederick Murad, who died intestate at Jerusalem on the 21st April, 1932, leaving considerable property in Palestine, both movable and immovable. Their application for such certificate was dismissed by a judgment of the District Court of Jaffa, dated the 1st March, 1935, which, on appeal by them, was affirmed by a judgment of the Supreme Court of Palestine sitting as a Court of Appeal, dated the 20th July, 1937. This appeal is from that decision.

Frederick Murad, hereinafter called the deceased, at the time of his death was a German subject, and, under the law of Palestine, substantially the whole of his property descended according to German law, under which the relatives of an intestate are marshalled in classes, those of the nearest class being entitled to succeed to the exclusion of the more remote classes. The deceased left no direct descendants, who would form the first class, or descendants of his parents, who would form the second class. The appellants claim to be descendants of the grandparents of the deceased, who fall into the third class. In addition to the appellants, there were other groups of claimants to the succession, some of whom dropped out before the hearing by the District Court; the remaining groups, all of whom would have fallen into more remote classes than the third class, maintained their claims at the hearing and contested the appellants' claim, but their claims were all disallowed by the judgment of the District Court, and no appeal was taken by most of them to the Supreme Court. The present

respondents are the administrators *pendente lite*, appointed by the President of the District Court on the 24th May, 1932, and they are sued and defend as such administrators. They defended the judgment of the District Court on the appellants' appeal to the Supreme Court, and they now defend the judgment of the latter Court. Counsel on their behalf stated to their Lordships that the respondents did not conceive it to be their duty to contest the appeal as hostile litigants, but merely to see that the case was fully submitted to their Lordships' judgment.

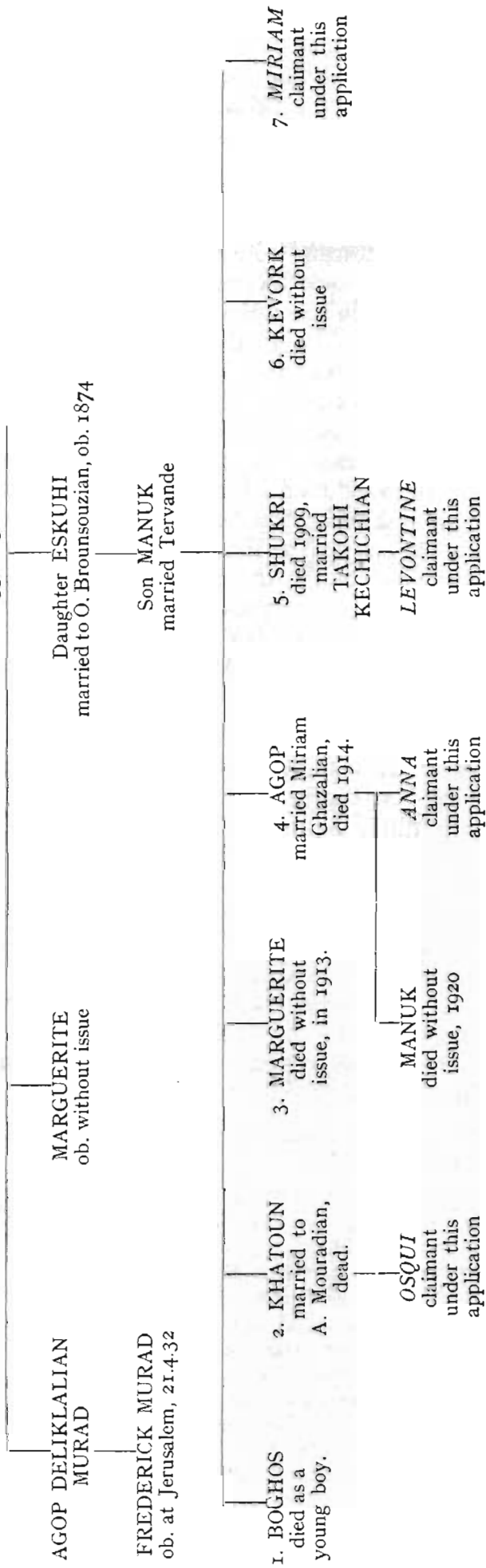
It may be added that the judgment of the District Court concluded as follows:—

“ The only order I can make is that there is a failure of heirs and that therefore the property is escheated. As to whether all or any part of it will fall to the German Government or Palestine Government is a matter on which I shall have to hear further argument. The date for these arguments will be fixed on motion by the Attorney-General.”

No appearance has been made for the Attorney-General in this appeal.

The pedigree which was annexed to the appellants' statement of claim, is as follows:—

SERAPION DELIKLALIAN
ob. 1853, in Jerusalem.



21228

The paternal grandfather of the deceased was Serapion Deliklalian, who was born in the Caucasus about the year 1763, and in 1785 settled at Marash in Syria. He married in 1787 and had nine children born to him at Marash—Agop, the father of the deceased, Esquhi, born in 1811, alleged by the appellants to be their ascendant, and Margaret, born in 1814; the other six children died in infancy. These facts have been accepted as proved by both Courts below, who were also satisfied that the appellants had proved their descent from one Esquhi Deliklalian, who lived at Marash and died there in 1874, aged about 60 years. The only question in the appeal is whether the appellants have sufficiently proved that their ancestor Esquhi Deliklalian was Esquhi, the daughter of Serapion Deliklalian, and its turns mainly on the admissibility and value of certain oral evidence given by aged witnesses on behalf of the appellants. Before dealing with that evidence, it is necessary to state the facts so far as accepted by the Courts below. These rest mainly on certain scraps of paper bearing handwriting in Armenian and Arabic, which were found among the papers of the deceased, and which have been accepted where they were proved to be in the handwriting of the deceased or a member of his family, and also on entries in the registers of the Armenian Catholic Church at Marash.

Serapion Deliklalian, who was an Armenian Catholic, migrated with his wife and his son Agop to Jerusalem in 1818, leaving his daughters Esquhi and Margaret behind him with his father. Serapion lived in Palestine till his death in 1853, when he was buried in the Armenian Catholic cemetery in Jerusalem. He had three more children there, of whom one, Simon, is referred to later. There is no further trace of Margaret. Serapion's father is said to have been born in 1703 and to have died in 1823 at the age of 120 years. This appears from a paper (Exhibit 6 B.B.) proved to be in the handwriting of the said Simon, a son of Serapion and uncle of the deceased. Another paper, in Simon's handwriting (Exhibit 6 X.) is as follows:—

“Copy from Frederick 1879, November 27/15 which I forwarded to Serapion.

“Concerning my grandfather I asked my grandmother, who told me that my grandfather was appointed A/Patriarch on behalf of the Patriarch Gabriel in Jerusalem. Four or five years later he went to bring his daughters, his father was still alive, but had not reached Marash. He remained in Aintab and sent for his daughters in Marash,* being afraid that his father would not allow him to return to Jerusalem. After the return his son Haroutun was born. My grandmother does not know the date of the death of my grandfather's father, but knows that after the return of my grandfather, my grandfather's father did not live long. He was 120 years old when he died. This is what I could understand and could not get more information about this.”

On the other hand, the death of the appellants' ancestor, Esquhi Deliklalian, is recorded in the register of the

* Note: or, had his daughters brought to Aintab.

Armenian Catholic Church at Marash in an entry the translation of which is as follows:—

“ On the 6th September, 1874, buried by Priest Mathios: Isquuhi Deliklalian, aged 60 years, mother of Manuk Brounzouzian.”

As regards the identification of this Esquhi as the daughter of Serapion, the President of the District Court, who tried the case, states as follows:—

“ The claim that this Esquihi, who was the mother of Manuk, is also the daughter of Serapion depends entirely upon oral testimony. That testimony was given in the main by three aged witnesses who came from Aleppo whose names are Nishan, Sarkis and Boghos. These three witnesses all say either that Esquihi told them that her father was Serapion or that they had heard from others that the father of Esquihi was Serapion. With regard to those who heard it from others, that is to say, from others than Esquihi, that is pure hearsay and I disregard it. But there are two of these witnesses who say definitely that Esquihi, who was a very old woman then indeed, told them for some reason or other that her father's name was Serapion and that he was in Jerusalem. Now these witnesses are at the present day between 70 and 80 years old. The event on which they are giving testimony is a conversation which occurred some 60 or 70 years ago. During these 60 or 70 years they have had no occasion whatsoever to speak to anybody about this matter or to recall it to their memories. And I am asked to believe that these old gentlemen, after an interval of 60 or 70 years during which no reference whatsoever was made to these conversations, can now remember it in all their intimate details when they were both perhaps themselves 12 or 15. And I do not believe it. Whilst I believe a great deal of their evidence, yet in that particular respect I am satisfied that they are not speaking from their memories. I am aware that one of the witnesses, Sarkis, has tattoo marks on his arm which show that many years ago he did go to Jerusalem. He says that before he went he was asked by this Esquihi to see if he could find Serapion, her father. At this particular time Serapion, we had it known from other sources, had been dead some 17 years. Holding this view on the question of the evidence of these witnesses, I am not satisfied that it has been proved that this Esquihi who was the mother of Manuk is also the daughter of Serapion, who was the grandfather of the deceased.”

There can be no doubt that the evidence of these three witnesses, if admissible and believed, affords ample proof that Esquhi, the mother of Manuk, was the daughter of Serapion. The relevant parts of their evidence may be stated.

Sarkis Arkalian, whose evidence was taken on the 4th July, 1933, stated as follows:—

“ At present residing in Alep. I swore an affidavit before British Consul at Alep, a short time ago. It was translated into Turkish to me, and I well understood it. I cannot read, I was living at Marash. I am now 88 years old. Since 11 in Alep: all time before in Marash. I was in Palestine once 60 years ago as a pilgrim to Jerusalem. I was tattooed there (shows marks). Produce my Tazkarat Nafous. In Marash lived in Akmajji quarter. Innkeeper. Knew Manouk Brounsouzian. Lived near me, about 20 paces away. Also knew his mother—Esquihi—daughter of Serapion Deliklaroghlu. My name is Arkaloghlu—in Armenian Arkalian. Did not know Serapion. I know that Serapion was father of Esquihi because I was friends with Manouk and used to talk to me. He left his animals in my knan. Manouk used to tell me his grandfather's name was Ohannes: this was his father's father.

When I was about to go to Jerusalem, Esquihi and Manouk spoke to me. Esquihi said to me she had a father-in-law in Jerusalem, i.e. Manoukh's father-in-law. Esquihi's father she meant. When I got there I was told he had died. I remember the Esquihi died four years after my return from Jerusalem. (Cross-examined.) Heard in Manoukh's house that Serapion was father of Esquihi."

Nishan Akelian, an Armenian Catholic, examined on the same date, stated as follows:—

"Born in Marash. I am about 74. I knew Manoukh Brounsouzian very well. I had business with him: related by baptism. We stood godfather to each other's children and had properties in partnership. My father and Manoukh in partnership when my father died our vineyards ruined: no registration then. Knew Manoukh's mother: used to see her: an old woman: Esquihi. Her father was Deliklarian Serapion. She used to use snuff: not a usual thing. I also use it. I was 16 or 17 when she died. I remember her as long as I can remember anything. We used to talk of her father and she said he was Serapion. We were as one family and live in our vineyards three or four months together. All was in partnership. At Amout Alagh about five hours from Marash. Deliklarian used to live in Marash. Esquihi told us her father went to Jerusalem and no news had come from him since."

Boghos Bardagian, examined on the 22nd January, 1935, stated as follows:—

"Live now in Antioch; Quarter Durk Ayak. Lived there 12 years. Came from Marash where I had been born. Am now 75. Left Marash because compelled by Turks when French left. Left with my family. Myself, two sons, one daughter, wife. Got a passport. This is it. B.B.1. Shew 12.12.22 left Marash, shows my Marash Quarter. Hatouniah Quarter. Give details of family. Dated 29.11 (no year) 'Seen 9.12.1938' also seen '8.12.38.' Also '12.12.21 seen' and dated 12.12.22. Previously lived in Hatounieh Quarter: later in Boustanji Quarter. House Hatounieh belonged to family father grandfather. There I was born. Left when 18. My neighbours were Bronsos Oghlu Haji Manouk. Also called Brounsouzian: called Haji since had been to Jerusalem. Also Alwaji Minas also Turks. Windows of my house overlooked yard to Manouk's (Witness draws plan—B.B.2). Manouk's house no window nor doors overlooking our house. At a short distance—a Khan behind wall. Inn-keeper was Akelli Sarkis (Sarkis Akelian). Knew Manouk Brounsouzian very well indeed. Great friendship with his sons, visited one another: slept together. Knew all Manouk's family. Wife Tervenda, son Boghos (disappeared when out to get married—never came back). Son Hagop, daughter Hatoun, son Kevork, son Shukri, daughter Margarit, daughter Miriam. His mother Esquihi: an old woman. She died in Marash when I was 15. When I played with children used to see her. When Esquihi died ceremony of funeral took place in Armenian Catholic Church. No other Catholic Church. First Armenian Church (Protestant built in 1872). I was 13 or 14 at time. Esquihi died after this. I took Hagop son of Manouk to the celebration and after three or four years later Esquihi died. Remember funeral. Hagop and I great friends. When I was child used to hear Esquihi from Delikdarian family. Her father I did not know. Was told her father was Serapion. When Esquihi died her father blamed for going away far and leaving her alone. People said he went to Jerusalem. I did not know him. Many people used to go as pilgrims to Jerusalem in big crowds. All in quarter know each other very well."

In the first place, their Lordships agree with the learned Judges of the Supreme Court, who unanimously held that the President of the District Court erred in his exclusion

of what he termed "pure hearsay" evidence. Their Lordships have no doubt that the evidence of these witnesses was admissible on a question of pedigree, leaving for consideration the question of its value. But their Lordships are unable to agree with the further opinion of the majority of the Supreme Court, that the admission of the rejected evidence could not have affected the conclusions of the learned President; they agree with the contrary view of Frumkin J., who dissented from the decision of the majority of the Supreme Court.

In the next place, the learned President disbelieved the evidence of all three witnesses on the material point, because of their present age, the long lapse of time, and of their having been only 12 or 15 years of age at the time spoken to. All the learned Judges of the Supreme Court appear to have treated this finding as one with which they were not entitled to interfere, but Frumkin J. found sufficient in the wrongly rejected evidence to establish the appellants' claim. Their Lordships are unable to agree with this view of the finding of the learned President, who does not make any adverse observations on the demeanour of the witnesses, but bases his finding on their ages and the lapse of time. As regards the ages, he is in some error. Sarkis would be born in 1845, and would be about 29 at the time of Esquhi's death; Nishan would be born in 1850, and would be about 15 at the time of Esquhi's death; Boghos would be born in 1860, and would be about 14 at the time of Esquhi's death. The learned Judge made an obvious error as to the age of Sarkis at the material time. There was no suggestion that the evidence was not honestly given or that it had been instructed, and the question of the probability of its accuracy is open to the Court of Appeal, due weight being given to the opinion of the Judge who tried the case. In their Lordships' opinion the class of facts spoken to, and in particular the discussion on the occasion of Esquhi's funeral, are at least as likely to impress the memory of a boy of 14 or 15 as that of a grown up man. Their Lordships are of opinion that the President of the District Court might have well have come to a different conclusion, if he had accepted the evidence which he rejected, and had realised the age of Sarkis at the time in question, so that the whole formed an array of evidence, mutually corroborative, and which, if accepted, would put beyond doubt the appellants' claim. There is further evidence, which, though it is that of an interested witness, is of some value, as corroborative of, and corroborated by, the above body of evidence. The appellant Anna Brounsouzian, wife of Stephan Kourkujian, states:—

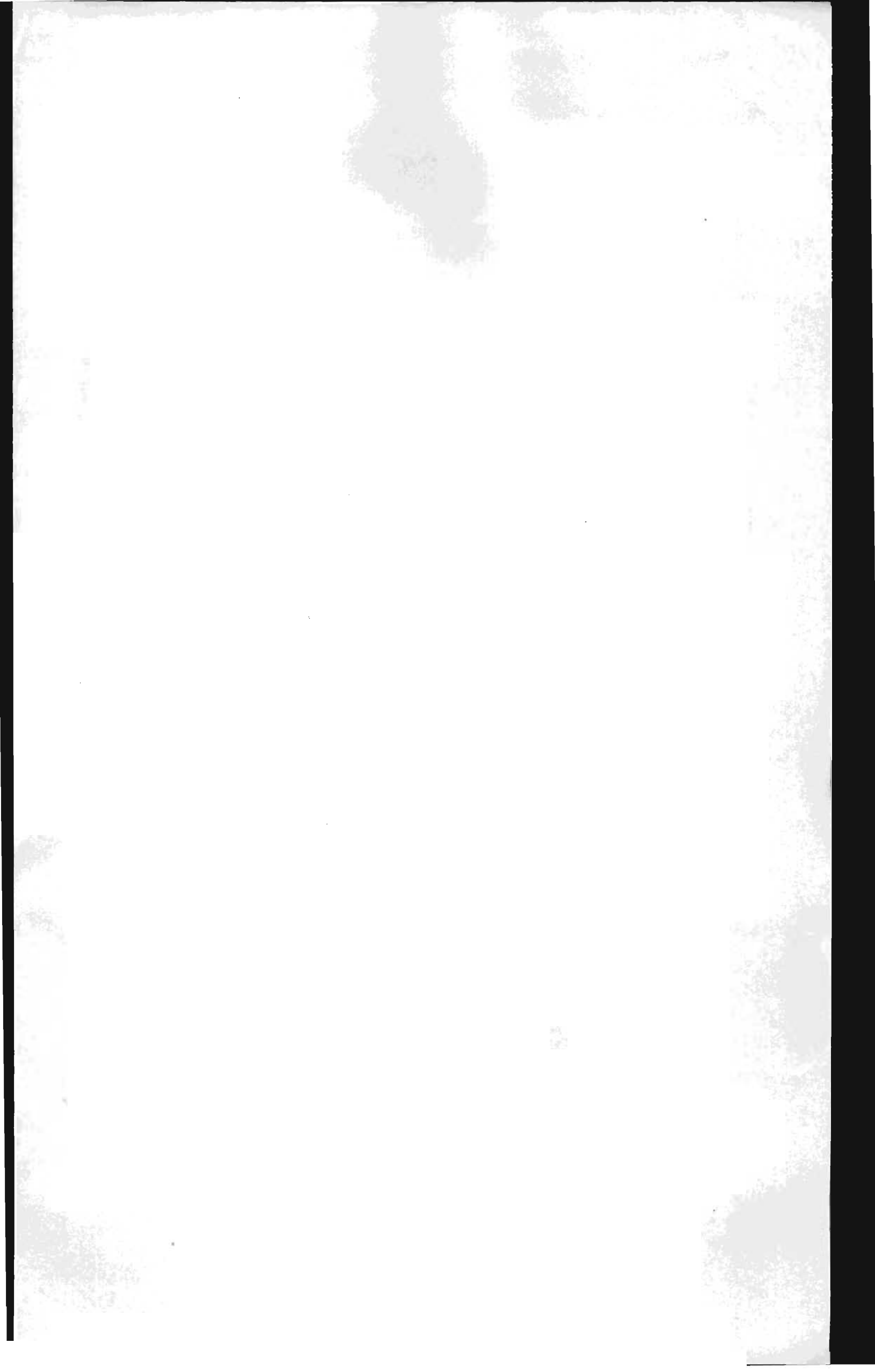
"A few years ago my husband read in newspapers that a great man called Delikdarian died. I said he must be related to us. My father used to say we belonged to Delikdarians. My father used to say we had a relative in Palestine; used to say mother of my grandfather was a Delikdarian. I myself did not know him. My father died in Marash."

The learned President did not refer to this piece of evidence, and the Senior Puisne Judge of the Supreme Court was

led into an unjustified criticism by a misquotation of the passage, the word "brother" having become substituted for "mother."

Finally, their Lordships would observe, it is important to note the setting of the events at Marash. All the parties concerned were members of the Armenian Catholic Church, who clearly formed an enclave in the community at Marash, and, as made clear by Boghos, they knew each other very well; while there is no definite evidence as to their numbers, there was only one Armenian Catholic Church, which was established in 1858. Serapion's daughter Esquhi was a Deliklalian, and the appellants' Esquhi was also a Deliklalian, admittedly an uncommon name. The former's age would be 63 in 1874, and it is proved that the age given in the Church register was often an estimate made by the relatives or the priest, which would explain the age of 60 years found in the register. Lastly, the story of Serapion's journey to see his daughters, given in Exhibit 6 X, may be taken as inconclusive, as it seems most unlikely that Serapion should have taken his daughters back to Jerusalem with him on that occasion, without some evidence of their presence in Jerusalem having been found, especially considering the very prominent position that Serapion occupied in the Armenian Catholic Church in Jerusalem.

Their Lordships are therefore of opinion that the evidence is amply sufficient to establish that the appellants' ancestress Esquhi Deliklalian was Esquhi, the daughter of Serapion Deliklalian, and that the appellants are entitled to a certificate of succession, recognising them as heirs to the extent of one-fourth each, to the intestate estate of Frederick Murad, the deceased. Their Lordships accordingly will humbly advise His Majesty that the judgment of the District Court so far as relating to the appellants' claim and the judgment of the Supreme Court, should be set aside except as to costs and that a certificate of succession should be issued to the appellants as above stated. The costs of both parties in this appeal to be paid out of the estate.



In the Privy Council.

ANNA AGOP BROUNSOUZIAN
AND OTHERS

v.

MOSES SMOIRA AND ANOTHER

DELIVERED BY LORD THANKERTON

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