Privy Council Appeal No. 46 *of* 1950

Thrasyvoulos Ioannou and Others – – – – – *Appellants*

v.

Papa Christoforos Demetriou and Others – – – *Respondents*

FROM

THE SUPREME COURT OF CYPRUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER, 1951

Present at the Hearing :

LORD MORTON OF HENRYTON
LORD REID
LORD TUCKER

[*Delivered by* LORD TUCKER]

This appeal arises out of litigation between the inhabitants of two villages in Cyprus concerning their rights to the water of the river Karkotis for the purpose of irrigating their lands. The plaintiffs in the action were the present respondents (hereafter referred to as " the Petrans ") and the defendants the present appellants (hereafter referred to as " the Kakopetrians ").

The village of Petra is situate at the mouth of the river Karkotis some 12 miles distant as the crow flies to the north of Kakopetria which lies just above the confluence of two rivers called Ayios Nicolaos and Karvounas which unite at this spot to form the river Karkotis. There was some dispute at the trial whether the name Karkotis applied to one or both of the two confluent rivers above Kakopetria or was confined to the river below the junction. It was however agreed by Counsel on both sides that this dispute had no bearing on any issue before the Board and accordingly it will be convenient to confine the use of the word Karkotis to the river below the confluence and to refer to the two confluent rivers by the names Ayios Nicolaos and Karvounas. Between Kakopetria and Petra there are some ten or eleven other villages on the banks of the Karkotis river. These villages (with the exception of Galata) draw their water supply for irrigation purposes from the Karkotis by means of dams, sluices and channels by which the water is diverted in the required direction. The village of Petra claims that it relies for this purpose on four dams situate in or near the villages of Evrychou, Tembria and Korakou a few miles up stream. In the Ayios Nicolaos river there are four dams, two of which are said to serve the village of Galata, which is the first village just below the confluence, and the other two are claimed by Kakopetria, as also are two other dams in the Karvounas river. One of the two dams in the Ayios Nicolaos is called the Frantziko dam and was the scene of the incidents giving rise to the present litigation. The summer of 1941 was dry and on 27th and 28th May in that year the Kakopetrians diverted the water or part of it at the Frantziko dam into the Kakopetrian irrigation channels despite

the protests of watermen who were present at the spot and who had been deputed by the Petrans to attend for the purpose of ensuring that the whole of the water of the river was allowed to flow down without interception so as to reach their dams at Evrychou, Korakou and Tembria. The Writ in this action was issued by the Petrans on 26th September, 1941, and the issue between the parties may for present purposes be briefly and sufficiently stated as follows. The Petrans claimed that by ancient user they were entitled to have for their own use the full natural flow of the water of Karkotis, including the full natural flow of the water of the upper rivers Ayios Nicolaos and Karvounas, between certain specified times on certain days of the week at certain seasons of the year. The Kakopetrians on the other hand contended that the Petrans had no such right, but that they by ancient and uninterrupted user had the right to take from certain dams and sluices in the rivers Ayios Nicolaos and Karvounas (including in particular the Frantziko dam) such quantity of water as is proportionate to the area of irrigable land of Kakopetria viz. approximately 300 donums being the equivalent of 100 acres.

The present appeal is concerned with the admissibility of a certain document which was tendered in evidence by the Petrans at the trial before the District Court of Nicosia. The document was received in evidence and its admissibility has been upheld by the Supreme Court of Cyprus who, however, gave the appellants leave to appeal to His Majesty in Council. The District Court granted to the Petrans an injunction in the terms claimed, and this judgment was confirmed on appeal, subject to a slight variation in the terms of the injunction, with the effect that the Kakopetrians are restrained from unlawfully interfering with the plaintiffs' rights to take or irrigate their lands from the water of or running through the rivers Ayios Nicolaos, Karvounas and Karkotis and/or of the dams Ayios Nicolaos, Frantziko, Appliki and Karidhi at the times specified in the Statement of Claim.

The document tendered and received in evidence is Exhibit 5 and appears at page 262 of the Record. It is called " Report and Reference of Salim Effendi " and is in two parts the first being the Report signed and dated 13th August, 1901, and the second headed " Reference " and signed and dated 10th August, 1901. Annexed to this document is a sketch marked " B " which is Exhibit 6 in these proceedings. The sketch shows the course of the rivers from above the confluence at Kakopetria down to the mouth of the Karkotis at Petra. On it there are a number of spots marked with numbers from 1 to 28 and the " Reference " contains explanations of these numbers.

The Report is headed L.E. 164 with the figures /900 beneath and is addressed to the Registrar General. It begins as follows: " In compliance with your instructions respecting the enquiries to be made to the taxims (divisions), etc. of the running water of Petra described in papers L.E. 164/900 I have the honour to report " and it proceeds to deal with the rights of the inhabitants of Petra *inter se* to the Karkotis water. It later states that Petra water was never assessed for Verghi (i.e., tax) but the lands irrigated by it were assessed at a higher rate than those which are not irrigated by this water. It concludes as follows: " Although the water of Petra has not been separately assessed for Verghi during the Tahrir Emlak it is perfectly clear that the value of the water is assessed with the lands which can be irrigated by this water, but nothwithstanding to that the Muhtar and the Commission of Petra gave a village certificate on behalf of the villagers of Petra declaring that the water running to their village of Petra has never been assessed to Verghi and they agree that the value described in the attached certificate may be assessed on every hour of water.

" They gave this V. Certificate for the anticipation that the water be registered in the names of the present holders as Mulk so as to enable them to deal with as they like. I prepared 148 forms showing the present possessors of the water of Petra and enclosed herewith."

The Report—as distinct from the " Reference "—contains no mention of the rights of the Kakopetrians or of the rights of Petra village *vis-à-vis* Kakopetria or any of the other intervening villages.

The document was produced by a witness from the Land Registry from a file which he said related to local enquiries made in respect of Karkotis water. He added " This local enquiry was made under Law 5 of 1880." He stated that Salim was a surveyor of the L.R.O. and that he is now dead. Since the date of the report it had been kept in the office of the Land Registry. Objection having been taken to the admissibility of this document the Court adjourned to enable the witness to ascertain how the local enquiry was held and whether it was for record purposes or otherwise. On the resumption the witness did not produce any instructions in writing given to Salim but stated: " It was made on the instructions of the Director of the L.R.O. to register those lands which were sold or purchased and for the other lands to make a note that they have the right of irrigation."

In cross examination the witness stated that Salim's instructions were the same as those given to Yusuf Zia which he produced (Ex. 4). This document is dated 11th August, 1893, and relates to the registration of water at Flasso, Linou and Katydata which are villages on the Karkotis river. The instructions refer to previous instructions which had not been properly carried out and conclude " Please make a list of water other than that flowing from sources and running through wells entered separately in the Field Books of Flasso, Linou, Katydata and explain why you did not follow your instructions ".

Law 5 of 1880 gives power in section 1 to the High Commissioner to direct a Survey. By section 2 he can appoint a Director of Surveys. Section 3 requires owners and others to attend and give information when required with liability to be fined if they refuse. Section 4 gives power to enter lands for the purpose of survey and by section 8 occupants are required to point out boundaries.

Such was the material before the District Court upon which the admissibility of this document fell to be decided.

For the plaintiffs, the Petrans, it was contended before the Board that the document was admissible under section 4 of Law 14 of 1946 of the Laws of Cyprus (The Evidence Act of 1946) which corresponds with the provisions of sections 1 and 6 (2) of the English Evidence Act of 1938. Further or alternatively it was submitted that it was admissible as a " public document " under English Common Law rules of evidence which are made applicable to Cyprus by section 3 of Law 14 of 1946 which enacts:—" Save in so far as other provision is made in this Law or has been or shall be made in any other Law in force for the time being, every Court, in the exercise of its jurisdiction in any civil or criminal proceeding, shall apply so far as circumstances may permit, the law and rules of evidence as in force in England on 5th day of November, 1914."

The material parts of section 4 of Law 14 of 1946 are as follows:—

" 4.—(1) In any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:—

(*a*) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have personal knowledge of those matters; and

(*b*) subject to sub-section (2) of this section, if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead. . . .

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the Court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances . . . and the Court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

The District Court admitted this document under section 4 of Law 14 of 1946. They said " These exhibits apart from being ancient documents (being prepared on 10th August, 1901) satisfy the requirements of section 4 of Law 14 of 1946." A little later they say " These have been produced from the archives of the Land Registry, i.e., they were in proper custody and we have no doubt that these documents were purported to be a continuous record."

In the judgment of the Supreme Court the matter was dealt with in the following passage:—

" The document which seems to have had most influence on the trial Court and which has certainly influenced us, was a report accompanied by a map made by a surveyor in the Lands Office, on the instructions of his superiors, on 14th August, 1901. It is an official document, produced from proper custody and it is nearly 50 years old. It was admitted by the District Court under section 4 of the Evidence Act, 1946, and also as an ancient document.

Whether or not this document is part of a continuous record, as mentioned in section 4 (1) (*a*) (ii) of the Law, seems at least doubtful, but the maker must be supposed to have had personal knowledge of some at least of the matters that he records, particularly the physical situations that he describes and records on his map. Moreover, the document is an ancient document produced from proper custody. We think therefore that the trial Court was right in admitting both the report and the map and there is no reason to think that the Court gave improper weight to them."

There appears to have been some confusion in both Courts as to the ground for admitting this document apart from the provisions of section 4 of Law 14 of 1946. It was not contended before the Board that its admissibility depended upon its being an " ancient document " though its age and production from proper custody dispensed with the requirement of formal proof provided it was otherwise admissible in evidence. The ground upon which its acceptance is sought to be justified—apart from section 4 of Law 14 of 1946—is that it is a " public document " within the meaning of these words as appearing from a long line of English authorities.

Before considering these contentions it may be convenient at this stage to set out an extract from the " Reference " which contains the statements the reception in evidence of which was clearly the purpose for which this document was tendered, and to which statements both the District Court and the Supreme Court attached considerable weight as tending to corroborate the evidence of the plaintiffs' witnesses.

The first three paragraphs of the Reference referring to the sketch plan are as follows:—

" No. 1 represent the dam of the channel called Frandjiko through which the people of Kakopetria take their water every day except Tuesday. They take their water from the Karioti river and convey it through the aforesaid channel by blocking up the river with brush wood and stone so much as the channel could carry.

The people of Kakopetria take their water on Saturday, Sunday, Monday, Wednesday and Thursday from the appearance in their village of Pleiades till the sunrise, and on Friday from the appearance of Pleiades until the shadow of a standing man will approach 7 feet, a.m., from the spot standing to the shadow of his head.

They continue to take their water in the aforesaid time from 14th June to 14th August, and from the 15th August to the 13th June of the following year they commence to take their water from the appearance of Orion's belt instead of Pleiades."

Apart from the question of the admissibility of this document, Counsel for the Petrans contended that he had concurrent findings of fact in his favour which could be supported even if the document should have been excluded. Their Lordships have carefully considered the judgments of the District and the Supreme Court from this angle, but have reached the clear conclusion that this document played a large part in the determination of the questions of fact and that it is, to say the least, open to considerable doubt whether in the absence of this document the trial Court would have arrived at the same conclusion. If therefore this document was not properly received in evidence a new trial cannot be avoided.

Their Lordships will accordingly proceed to address themselves to the question of the admissibility of this document as the determining factor in this appeal.

The applicability of section 4 of Law 14 can be dealt with quite shortly. Counsel for the respondents did not contend that Ex. 5 together with the attached sketch was of itself a " continuous record " within the meaning of the section, but he argued that the document came from a file which contained a collection of inquiries and reports on one subject matter, viz., Karkotis water and was therefore admissible as forming part of a record purporting to be a continuous record. Their Lordships are unable to accept this submission. The evidence with regard to the file was very scanty and amounted to little more than that it appeared to contain the instructions given to Yusuf Zia in connection with the registration of water at Flasso, Linou, and Katydata in the year 1893. Without attempting to give a definition of " continuous record " it is sufficient to say that the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject matter does not necessarily make the contents of the file a " continuous record " within the meaning of the section. It is not necessary to consider in this connection whether in any event the Court could reasonably infer that there was any duty imposed upon Salim to record the matters set out in the opening paragraphs of the " Reference ", but this question will be dealt with hereafter in relation to the admissibility of the exhibit as a public document. Their Lordships are accordingly of opinion that the necessary foundation for the admissibility of this document under section 4 of Law 14 of 1946 was never established.

It remains to consider its admissibility as a " public document ". Public documents in this connection may be classified under different heads, but the class with which the Board is now concerned is that class which comprises documents which are brought into existence as a result of a survey, inquiry or inquisition carried out or held under lawful authority and it is to this class of document that the observations which follow are confined.

The classic authority on this question is the speech of Lord Blackburn in *Sturla* v. *Freccia* (1880) 5 A.C. 623. That case was concerned with the report of a committee appointed by a public department of a foreign State and acted upon by the Government of that State but held to be inadmissible as a public document. Lord Blackburn referring to the judgment of Parke, B. in *Irish Society* v. *Bishop of Derry* 12 Cl. and Fin. 641, used these words at page 643:—

" Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and

made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. . . . But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. It is meant to be where there is a judicial, or quasi judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards."

At page 646 referring to *Arnold* v. *Bishop of Bath and Wells* 5 Bing. 316 he said:—

"The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent it should be public."

These passages stress the dual requirements that the document should not only in fact be available for public inspection but that it shall have been brought into existence for this very purpose, and Lord Blackburn was explaining his interpretation of the judgment in *Irish Society* v. *Bishop of Derry* (supra) where Baron Parke in the year 1846 had said:—

"In public documents, made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not."

One hundred years later Lord Goddard, L.C.J., sitting as a member of the Divisional Court in the case of *Pettit* v. *Lilley* (1946) 1 A.E.R. 593 had occasion to consider this language of Baron Parke in the light of Lord Blackburn's speech in *Sturla* v. *Freccia* (supra) and said:—

"In my opinion it is quite clear that Parke, B., did not mean to lay down that every document that may be prepared by a servant of the Crown for the information of His Majesty is a public document. It may be that the words 'for the information of the Crown or all the King's subjects who may require the information they contain' should be read as meaning 'for the information of the Crown, that is to say, all the King's subjects who may require the information they contain'. But however that may be he was there dealing with documents of record in the Courts. Many documents are prepared for the information of the Crown (i.e., the Executive) which are of a highly confidential nature and it is well known, as has recently been held by the House of Lords, that the Crown has an absolute right to object to produce any document on the ground that it would be against the public interest so to do: see *Duncan* v. *Cammell Laird & Co.* (1942) A.C. 624. It is difficult, therefore, to see how a document to which the public can have no access and which the Crown can refuse to produce under a subpœna could by any possibility be described as a public document."

Later at page 596 Lord Goddard observed: "It seems to me clear from Lord Blackburn's speech that to be a public document it must be one made for the purpose of the public making use of it. Its object must be that all persons concerned in it may have access to it."

Save for the doubts expressed by Vaughan-Williams, L.J. (which doubts were not shared by the other two members of the Court of Appeal, viz., Stirling and Cozens-Hardy, L.JJ.) in *Mercer* v. *Denne* (1905) 2 Ch. 538 as to whether Lord Blackburn's speech may not have been expressed in rather

too wide terms, his definition has now been generally accepted for over seventy years and their Lordships can see no reason for attempting to qualify it in any respect.

A number of cases prior in date to *Sturla's* case were cited by leading Counsel for the respondents in support of his submission that the document being a Revenue Survey made for the Crown under a public statute was admissible as a public document made in the public interest regardless of whether it was preceded by a public inquiry or was subsequently available to the public. If this were the true test it would be contrary to Lord Blackburn's definition, but their Lordships find nothing in the authorities relied upon which is necessarily inconsistent with *Sturla's* case which, as stated above, they regard as containing an authoritative statement of the law as to the admissibility of this class of document.

Applying Lord Blackburn's test to the document in question their Lordships consider that it was not shown by the plaintiffs in the action either intrinsically from the contents of the document itself or from other evidence (1) that a judicial or semi-judicial inquiry was ever held by Salim as to the rights of the Kakopetrians to Karkotis water or as to the conflicting claims of Petra and Kakopetria to such water; (2) that the inquiry in fact held by Salim was held with the object that his report thereon should be made public; or (3) that the report was in fact at all times open to public inspection or that an inference to this effect should be drawn from the fact that it was produced in evidence without objection by the Land Registry authorities. Furthermore they are of opinion that in any event it was not established that it was any part of the duty of Salim to record the matters set out in the opening paragraphs of the "Reference" which have been set out above, and they consider that it is implicit in the authorities (and indeed it was expressly so stated in *Nothard* v. *Pepper* 17 C.B.(N.S.) 39 at pages 49 and 52 and *A.G.* v. *Antrobus* (1905) 2 Ch. 188 at page 194) that the statements in a document tendered in evidence as a public document should be statements with regard to matters which it was the duty of the public officer holding the enquiry to inquire into and report on.

For these reasons their Lordships are of opinion that the document Exhibit 5 was wrongly admitted in evidence and they will accordingly humbly advise His Majesty that this appeal should be allowed and the judgments of the District Court of Nicosia and the Supreme Court of Cyprus set aside and the action remitted to the District Court for a new trial of the action. The respondents must pay the costs of the appeal to the Board (such costs not to include the costs of printing in the Record the arguments of Counsel in the Courts below) and the costs of the appeal to the Supreme Court of Cyprus. The costs of the first trial will be in the discretion of the District Court on the new trial.

(13817) Wt. 8137—69 100 12/51 D.L./Pl/3

In the Privy Council

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DELIVERED BY LORD TUCKER

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