

LEGAL RULES CONCERNING LAND TENURE IN THE OTTOMAN EMPIRE

by

Prof. Dr. Yılmaz ALTUĞ

Istanbul University

I — INTRODUCTION :

The Ottoman Empire was one of the greatest empires of history. It lasted more than six centuries (1299-1923). Ottoman Turks, in spite of their decline in the Nineteenth and Twentieth centuries, had something remarkable in their organizations worthy of modern studies. Through these organizations they preserved a huge empire composed of a multitude of nationalities of different religions, languages, and interest until the First World War.

The perfection of the Turkish governmental organizations is attributed to Suleyman the Magnificent or Law Giver as he is known in Turkey :

"The greatest achievement of Suleiman's outstanding rule was the perfection of the governmental organization, so that in spite of feeble leadership, internal decay and the growth of powerful enemies the Ottoman Empire was able to endure substantially unchanged for three centuries¹.

One of the original aspects of the organizational structure concerns land, Land tenure and ownership rules are a very important part of Ottoman legislation.

1) **Albert H. Lyber**, *Encyclopedia of the Social Sciences*, New York, Vol. 14, p. 459.

The subject is important not only for historians who study or will study the legal, economic, sociological, military and many other phases of Turkish Empire, but for lawyers who still apply Ottoman legal rules on Land, as in Israel, as part of the law of the own land, other lawyers who have to deal still with conflicts arising from these old rules.

II — HISTORICAL BACKGROUND :

Legal rules on land tenure had developed as common law. But since Mehmet the Conqueror (1421) many decrees (*irade*) had been issued by the Government upon request. Really as there was no Parliament these *Irade*'s constitute the first legislation on the subject. These *Irade*'s were registered in the Imperial Divan's Books (Divan-ı Hümayun Defteri). So really they were codified. The Sheikh-ul Islam who was the ultimate judicial authority of the empire gave many fetvahs based upon these *Irade*'s. His fetvah was in the form of an answer to a stated case, deciding all judicial and administrative issues. There was a parallel collection of these fetvahs too. The *Ulemas* who were moslem scholar and often a law doctor, collected these fetvahs and codified them into many codes. The earliest was dated 1476 and called Code of "Hüdavendigâr Livası"; in 1506 a code was promulgated for Biga region, and in 1519 two rural codes, one for Aydin region, and the second for Kütahya region².

But the most famous is the Code of Ebussud (Maruzat-i Ebussud). The general libraries of Berlin, Vienna, and Dresden have each one copy of this code³.

Turkish land law was then partly Common Law, partly based upon fetvahs — decisions of the highest judicial interpreters — and partly imperial decrees of the Sultan.

In 1849 with an irade, a code was published under the title of Ahkam-i Mer'iyeh (Rules in Force). This code showed legal rules relating to land tenure. Nine years later, in 1858, a real property code was published. It modernized many rules of the 1849 code

2) **Bülent Köprülü**, *Toprak Hukuku Dersleri*, Istanbul, 1958, C. I, p. 13.

3) **Ebul'ula Mardin**, *Toprak Hukuku Dersleri*, Istanbul 1947, 4, also see **F. Ongley**, *Ottoman Land Code*, 1892.

and abrogated many previously existing rules and ordinances referring to the premises preserved in the bureau of the imperial divan, in the state's archives, or elsewhere⁴.

The Code of 1858 had 132 articles, divided into an introduction and three chapters. The articles 1-7 (included) which formed the Introduction had definitions of different groups of land. The most important part of the Code was the first Chapter articles 8-90 on public lands. The Second Chapter (Articles 91-103) was on *Metruk* and *Mevat* lands. The Third Chapter (articles 105-132) was on details. The underlying principle was that state lands were once and forever state property, but could be handed over, by means of a peculiar title deed, called *Tapou*, to private persons for their use and that of their children and parents, but that if the holder wished, during his lifetime, to convey it to others or change its character by building upon it or planting orchards upon it and the like, a special permission therefore had to be obtained from the state. It further required, that after the male or female children of the holder, his father or mother shall be considered next of kin, and shall inherit gratis the rights of holding the property; but the other next of kin — wife, husband, brother, sister, half-brother, half-sister — shall pay again for the tapou title-deed. Mineral rights were reserved, to the state. Ancient coins and treasures found therein were subject to the rules of Moslem jurisprudence.

III — GROUPS OF LANDS :

According to the Code of 1858 there were five groups of land in Turkey. They were : *Arazi-i Memluke*, *Arazi-i Emiriye*, *Arazi-i Mevkufe*, *Arazi-i Metruke*, *Arazi-i mevat*⁵.

4) Before the 1858 Code, two reform measures affecting indirectly the question of real estate had been proclaimed by the Ottoman Government. The first is a **Hatti Sharif** of April, 1855 concerning the qualifications to be required of those law doctors who are to be appointed as naibs, that is, deputy judges of the first, second, third, fourth, and fifth classes, by Sheikh ul Islam, to the various courts in the country. The second is the reglement of December 21, 1855 for the formalities to be observed in the adjudication.

5) **Van Dyck**, Report on the Capitulations, ex. Doc. 46th, Cong., Sp. Sess. p. 65-66.

6) The names are given in Turkish; for English pronunciation

1. *Arazi-i Memlûke* :

This was the kind of land which belonged in the most absolute manner to private individuals. This land was held in fee-simple. Four types of land composed this group :

A. Lands which were within the precincts of the old villages or of the old township composed of a number of villages;

B. Lands that had been taken away from the lands of the state and given as *mulk* (property) to a certain person in accordance with some conditions;

C. *Ushuri Arazi* which payed a tenth of the produce as tax;

D. *Haradj* lands.

Now let us explain each of these four in detail.

A. Lands that are composed of two species :

1. The fields in the old villages and towns (any size),

2. The fields which were on the extremities of villages and towns and which were used for the purpose or digging wells, to store wood, to put the carriage, etc. The size had to be under a half acre (about 470 sq. are metres). The essential characteristic of this second species was that in the sale of the real estate the fields could not be separated from the real estate, and so had to be sold with it.

The important quality of these a class lands for ownership was their location. They had to be located in old villages or towns.

B. The existence of some conditions was mentioned. These conditions were seven in number⁷.

1. The existence of some prescriptions : An Islamic law judge did not have great discretionary power. He was bound by certain

they should be written the following way : *Arazih-e Mamlukah*, *arazeh-e Emiriah*, *araze-e mawkufah*, *araze-e matroukah*, *arazeh-e mawt*. See also : *Reşat Dürrü Tesal*, *L'Evolution du droit de gage immobilier en Turquie*, Lausanne, 1939, pp 37-46; *Köprülü*, op. cit. p. 14; *Ş. N. Haydar*, *Ahkâm-ül Arazi*, 1917, s. 40.

7) *Mardin*, op. cit., p. 6-8.

prescriptions, and rules. For example, the sale of real estate belonging to minors was permitted only under eight well defined prescriptions. Under these, only the tutor could ask permission of the court for the sale. In the sale of real estate belonging to the treasury, there were some prescriptions, the most important being necessity, in the case of unbalanced budget. If the income was less than state expenses, the public domain could be sold for its real value not less than its value. If the budget was balanced, the public domain could be sold on prescription called Double value, or twice its actual value. Another prescription for the sale of the public domain was the fear that the real estate could be destroyed for any reason.

2. Public Interest : Mostly this type of land was dedicated to a benevolent purpose, and so the public interest was established accordingly.

3. The sale had to be according to the rules prescribing the sale of the state property.

4. The land to belong to the second group (Arazi-i Emiriye); this sale was made impossible to other groups.

5. The possession could not be made joint possession.

6. The appropriation had to be made with the strongest of the contracts with compensation, thus sale taking place with, both of the contracting parties taxing some compensation.

7. The money had to be payed during the appropriation; no credit was allowed.

The absence of any of these seven conditions prevented the appropriation of public domain still remaining the second group as arazi-i emiriye.

C. Ushuri lands paid a tenth of the produce as tax. Ushr was considered in the nature of Zekât (pious alms) contributed by the owner to the commonwealth of believers as represented by the government, and was intended to supply the Beit-ul Mal or Public Treasury. Difficulties of irrigation in certain domains lead this kind of taxation. Conquered lands were classified under two categories.

1. The lands called *Arz-i Arap* (Arab lands) where the absence of great rivers caused difficulties of irrigation. Water from wells and from rain was used in the cultivation of agriculture of these lands. The tenth of produce was taken not as tax, but in the nature of some assistance to the poor and orphans. Its purpose was to satisfy the farmer morally and materially. The frontiers of these Arab lands were limited in the books of *Fikih Yemen*, *Taif*, *Umman*, *Hejaz*, *Mecca*, and *Kuwait*⁸.

2. The lands outside of the Arab lands. In these lands the existence of great rivers helped agriculture. In this case were two possibilities :

a. The land was taken by peace. In this case, the people residing on the land gave their consent in advance to pay the taxes, and the land was considered *Kharadji* lands. (*Arazi-i Haraciye*).

b. The land was taken by war. In this case if the land was irrigated by *Ushuri* water (rain collections, wells, springs, etc.) and not from the waters of the great rivers, the land automatically became, without any announcement, *Ushuri*. If the land was irrigated by the waters of the great rivers like the *Tigris* and *Euphrates* outside of the Arab lands, the type was determined by the government which was free after conquest to announce it *Ushuri* or *Kharadji* according to its judgment.

If any announcement was made by the government, the following were considered : the government had the liberty to distribute these lands to soldiers, or to give them to the native owners, or to keep them for the Treasury. If the government distributed these lands to the soldiers, they were considered *Ushuri* lands; if they were left to the native owners, they were considered *Kharadji* lands (tribute-paying).

In some treatises on the Land Code of 1858 the authors pretend that the basis of dividing lands into *Ushuri* and *Kharadji* categories was not water but religion. The view cannot be correct in the light of the following principles.

8) *Ibid.*, p. 9; **Köprülü**, *op. cit.*, 17.

1. The lands could not be changed from one category to another; their title was permanent. If the lands were accepted as Ushuri ones; they were always Ushuri lands; and the lands accepted as Kharadji were always Kharadji lands. If religion was accepted as the basic principle and factor of division instead of water, the category would change with the new owner of the land, but this was not the case.

2. If religion were basic principle and factor, the residents of the lands conquered by war could accept Islam before the announcement of the lands as Ushuri and Kharadji and thus would obligate the government to announce lands as Ushuri. This was not possible. The government always kept the liberty of announcing lands Ushuri or Kharadji according its judgment, and in many instances it announced some lands inhabited by Moslems as Kharadji lands⁸.

3. The lands conquered by war and announced as Ushuri land by the government were left in many instances to native people. This does not repudiate the Ushuri character of land. If religion was the basic principle and factor in distribution, however, by the fact of giving Ushuri lands to non-Moslems the land should loose its Ushuri character.

D. Kharadji lands : These lands could be irrigated by Kharadj waters and their ownership was held by individuals. Kharadj means in Moslem law a tribute taken from non-Moslems. Its was of two types :

1. Kharadji-i ruus or djizyah — A personal tax laid upon only-able — bodied men who reached majority. This tribute was dropped if they accepted Islam.

2. Kharadj-i arazi — A pecuniary tax laid or a share taken from the crop as a tax. This kharadj was divided into two other types :

a. Kharadji-i Mukaseme, a proportional tax varying according to the importance and ability of the soil to produce from one tenth to one half of the yearly crop.

b. *Kharadj-i Muvazzaf*, a fixed tax laid directly upon land with an acre or 250 sq. feet being taken as the unity. This tax was not based upon yearly produce. This fixed tax was taken even if there was no crop at all⁹.

In the lands belonging to *Kharadji-i Mukaseme* the *kharadj* was taken twice a year if the soil produced twice a year, three times if it produced three times. Because *Mukaseme* tax was laid on the crop, if the crop doubled, it was taken twice. If the owner did not raise any crop at all, even if he could produce one, he did not have to pay any tax. But in *Kharadji-i Muvazzai* the tax was fixed and if the owner did not raise any-thing he had to pay the tax, except when the soil was not able to produce owing to some of God such as flood, drought, etc. In *Kharadji-i Muvazzaf* if crops were raised twice or three times a year, the owner had to pay only once the fixed tax. It was impossible to collect these two kinds of *kharadj* from the same land. Differences between the *Ushr* and *kharadj* are the following :

1. From the point of view of their nature *Ushr* was a share that rich people had to pay; the *kharadj* was a tax.

2. It was impossible to fix *Ushr*, but it was possible to fix the *kharadj*.

3. *Ushr* could only be used for the needs of some underprivileged classes designated by religion; the *kharadj* could be spent by the State for everybody according to the public needs.

4. It was impossible to write off *ushr* but it was possible to write of *kharadj*.

In the case of spending *Ushr* for some classes other than designated by religion or to write it off, the following procedure was adopted : if the forgiveness of *Ushr* was made in subjective good faith, that is to say if it was written off without knowing the absence of this right, no indemnity was required. If the writing off was done without good faith, there were two alternatives : If the person relieved was poor, he did not have to pay any indemnity; justice was done without knowing it. If he was a rich man, he had to pay indemnity¹⁰.

9) *Mardin*, op. cit., p. 9.

10) *Köprülü*, op. cit., p. 18.

In the books of Fikih the lands of Basra, Bagdad, and Kufe are shown as kharadj lands. In a fetvah the Sheik-ul Islam Ebussuud had declared the lands of Damascus and Aleppo as haradj lands¹¹.

2. *Arazi-i Emiriye* (Public lands) :

These were lands whose ownership was kept by the State but they were committed to the charge of some individuals, who used the land under regulations and conditions indicated by the Code on Land Tenure¹². The State, during commitment, received a cash payment called *Tapu-Muaccele*. Besides this the state collected every year a tax called *Muecceler*. The first term means in Turkish something paid in cash where no credit is accepted. The second term means a debt with a given period of time for payment. The contract of transfer or commitment was called *Tenfiz*. This contract looks like rent, but it has some special provisions which are different from those of rent; the term is indefinite, and the contract is valid without any notice for the heirs of contracting individuals.

In the Turkish Empire there were five ways to transform the lands into (*Emiriye*) Public lands :

1. After the conquest the alternative of keeping all lands for the Treasury could be chosen instead of other alternatives, which were :

a. To distribute the land to soldiers after keeping one fifth for the state.

b. To give it back wholly to native holders and owners without keeping anything for the state.

c. To distribute it to Moslem and non-Moslem population who wanted to have more lands and who were transported there by the state.

11) **Mardin**, op. cit., p. 11.

12) **Ömer Lütüfi Barkan**, *Türk Toprak Hukuku Tarihinde Tanzimat ve 1274 (1858) tarihli Arazi Kanunnamesi*, Tanzimat I, 1940, pp 382-394; **D. Gatteschi**, *Des lois sur la propriété foncière dans l'Empire Ottoman et particulièrement en Egypte*, Paris, 1867, p. 36.

2. The land was accepted as emiriye if it was impossible to know how it was managed or maintained during the conquest.

3. In the case of inheritance by the Imperial Treasury of Arazi-i Memluke, except the first kind, that is, the lands which were within the precincts of the old villages, the inherited lands were registered as emiriye.

4. The land was taken over by the State through prescription, because of lack of information about the owner.

5. If the dead lands (arzi-i mevat) were enriched and developed for the purpose of temporary benefits but not with the idea of permanent ownership the lands were transformed into emiriye lands¹³.

There were two kinds of Arazi-i emiriye :

1. Arazi-i emiriye-i sirfa : The profit made by its use was given to the Treasury.

2. Arazi-i emiriye-i mevkufe. The profit made by its use was not paid to the Treasury but was given for a benevolent purpose chosen by the government¹⁴.

3. Arazi-i Mevkufe (Real Foundations Estate) :

These lands were granted from the first group, Arazi-i Memluke, according to religion's requirements. The property and all other ownership rights belonged to the juridical person founded.

The rules on Vakıf (Pious foundation) were not written into a code¹⁵; they were given and obeyed according to the will of per-

13) **Mardin**, op. cit., p. 19.

14) **Köprülü**, op. cit., p. 22-25.

15) There are several books on Vakıf : **Ali Haydar**, *Ter-tibis Sunuf Fi Ahkâmül Vukuf*, 1924; **Ali Himmet Berki** *Vakıflar*, İstanbul, 1946; **Ekrem Cemal**, *Vakıflar*, 1935; **Osman Ergin**, *Türk Tarihinde Evkaf, Belediye ve Patrikhaneler*, İstanbul, 1937; **Hüseyin Hüsnü**, *Ahkâm-ı Evkaf*, İstanbul 1901; **Köprülü Fuad**, *Vakıf Müessesesi-nin Hukukî Mahiyeti ve Tarihi Tekâmülü*, *Vakıflar Dergisi*, Sayı 2, Ankara 1942; **Bâki Kunter**, *Türk Vakıfları ve Vakfiyeleri üzerinde Mücmel Bir Etüd*, İstanbul 1939; **Ebül-ula Mardin**, *Ahkâm-ı Evkaf*, İstanbul 1904; **Ömer Hilmi**, *Ahkâm-ı Evkaf*, İstanbul 1891; **D. Gatteschi**, *Real Property, Mortgage and Wakf according to Ottoman Law*, London 1889, **Boyabadi Halil Şükrü**, *Kitab-ı Ahkâm-ül Evkaf*, 1913.

sons making such foundations. The real estates forming the object of the act of Vakif (foundation) can be divided into two kinds : first, those which were used directly; second, those which brought some interests, like rent, etc.

1. Those which were used directly were called Benevolent Institutions such as temples, Medreses (Colleges), school foundations, library foundations, poor houses, guest houses, bridges, hospitals, insane asylums, fountains, bath houses, pools, wells, and cemeteries. These benevolent institutions were divided into two groups :

a. Those the use of which was permitted to rich men : temples, libraries, guest houses, fountains, bridges, and general cemeteries.

b. Those the use of which was prohibited to rich men : Public kitchens, hospitals where meals and medicine were furnished by the foundation, and medresses and schools where educational material was furnished by the foundation. The benevolent institutions belonging to the second group were considered founded only for the assistance of the poor. Even if in the will making the foundation there was no evidence that the foundation covering objects of this second group was only for the use for the poor, it was always interpreted in their behalf. In general, rich men could profit from the institutions covered by the first group, if their use was expressly given to them in the will. But a will making a foundation only for rich men was not considered valid; the law rejected it.

2. Foundations which were not used directly but brought some interests¹⁶.

Before describing this kind it is necessary to define two words, Musakkaf and Mustagal. Musakkaf was a building, or any place with a roof, from which the foundation received rent. Mustagal was the field used to grow the crop or to plant trees.

The foundations not directly used were of four kinds :

1. *Icare-i Vahideli Vakıflar* (Foundation with unique rent). These foundations were rented directly by founders on a monthly

16) **Bülent Köprülü**, *Tarihte Vakıflar*, Ankara Hukuk Fakültesi Mecmuası, C. 8, S. 3-4, 1951, s. 138.

or annual basis for a given period of time. They were musakkafs and Mustagals.

2. *İcareteynli Vakıflar* (Foundations with double rents). Two kinds of rent were taken from these foundations : *Muaccele* which was close to the price of the real estate rented and was taken in cash at the conclusion of the contract, and *Mueccelle* which was fixed and taken on a monthly or annual basis. These foundations were Musakkafs and Mustagals rented without any definite period of time for the purpose of receiving rent¹⁷.

3. *İcare-i Vahide-i Kadimeli Vakıflar* (Foundations with old unique rent). These foundations were rented without taking the *Muaccele* in the beginning, and the rent was for an indefinite period of time. Musakkafs and Mustagals were rented in this manner.

4. *Mukataali Vakıflar* (Foundations with a fixed annual rent). They were Mustagal which were rented for an indefinite period of time. The fixed rent taken from the buildings erected as the property of others and from the treesplanted was called Mukataa. This is why this kind is called Foundation with Mukataa.

4. Arazi-i Metruke (Public lands) :

The Code of 1858 calls the lands saved for public use, public lands, and divides them into two parts :

1. Lands saved for general use. The Code gives under this title some examples such as roads, squares, places to pray and to make religions rituals, parks, picnic areas, markets, and quays.

2. Lands, such as forests, harvest places, and pastures, saved for the use of the populace of some towns and villages.

The characteristics of the Arazi-i Metruke were the following :

1. There was no title-deed called Tapou in these lands.

17) **Sıddık Sami Onar**, *İdare Hukuku*, 1. Cilt, 2. bası, 1944, p. 516; **Bülent Köprülü**, *Evvelki Hukukumuzda Vakıf Nev'ileri ve İcareteynli Vakıflar*, *Istanbul Hukuk Fakültesi Mecmuası*, C. 15, No. 2-3, 1949, p. 301.

2. They did not pay any dues, fees, or tolls. The code made some exceptions to this rule :

(a) Tolls levied to market places and quays since time immemorial were taken, but these tolls could not be increased¹⁸.

(b) The Ushr was taken from the trees cut from forests for commercial purpose.

(c) Those who used the summer and winter pastures were levied some fees according to their ability to pay.

3. There was no prescription, no statute of limitations on these lands.

4. The compromise with a deed or document of peaceful settlement of a difference or conflict was not possible, on these lands. That means that no one could give up his right of using these lands in return for some compensation. In the peaceful compromise act, the giving up of some right in return for some compensation was always possible.

5. The exchange was not possible on these lands. The exchange of lands by changing the border did not affect these lands; the new territory annexed to *Arazi-i Metruke* was not considered as *Arazi-i Metruke*, but kept its old character.

6. The Donation was not possible in these lands. In old law, the person making a donation did not lose the ownership on the donated object, and thus he could always change his mind and recover his donation. Because of this inconvenience no person was permitted to donate land to be *Arazi-i Metruke*¹⁹.

5. *Arz-i Mevat* :

These were lands not fit to agricultural needs. The Code of 1858 defines in its 6th article this group of lands as following :

The lands which are under no ones ownership and which are not saved for public use and which are far away from inhabited places to a degree that nobody uses them in one way or other. They are empty spaces about a mile and half thus about at a half hour distance from town residences.

18) *Mardin*, op. cit., p. 80.

19) *Ibid.*, *Köprülü*, *Toprak Hukuku*, op. cit., p. 77-95.

This last group of lands had the following characteristics :

1. The land could not be under anybody's ownership. Otherwise it belonged to the first group, Arazi-i Memluke.

2. The land had to be under nobody's use. If somebody was using it without being its owner, then the land belonged to the second group, arazi-i emiriye.

3. The land could not be saved for public use; otherwise it belonged to the fourth group, arazi-i metruke.

4. This place must not be a cemetery. If it was used as cemetery, it could be a founded cemetery classified as a benevolent institution directly used; or it was saved by the municipality as cemetery, in which case it belonged to the fourth group, arazi-i metruke.

5. This land could not be close to towns and villages. Usually the lands around the towns and villages were saved for public or common use; but the dead land by act of enlivenment could be owned, thus restricting such areas used by the community collectively. Therefore they had to be far away from the towns and villages. How far? In Islamic law there is an interesting criterion : the distance where a high-voiced man's shouting could not be heard. This criterion was accepted because it could be understood by everybody. The Code also gave a more scientific criterion : e.g. about a mile and half or a half hour walk.

6. This land must not be used in any way. The Code for this purpose uses the word "blank"; agriculture of any kind should be impossible. One could by enlivenment develop this land and make it fit for agriculture, thus he could possess this land.

The conditions for enlivenment were :

1. The permission from the government : That permission was required was the view of one of the greatest Moslem thinkers of all times, Imam Ebu Hanefi, who lived in the seventh century. His disciples and students, Imam Ebu Yusuf and Imam Ebu Muhammed, did not require permission from the government²⁰.

20) **Mardin**, op. cit., s. 91. For a detailed study of enlivenment see **Bülent Köprülü**, *Memleketimizde İhya Müessesesinin Geçirdiği İstihaleler*, Ord. Prof. Muammer Raşit Sevig'e Armağan, İstanbul 1939.

The Code of 1858 adopted the Hanefi view.

2. The realization of one act of enlivenment. These acts were not stated in the Code of 1858, but later in the Civil Code published under the name of *Mecelle* we meet some acts of enlivenment.

Article 1275 of *Mecelle* states the following acts :

To sow seed and to plant trees is enlivenment of the soil as to put fertilizer in it to irrigate it or to open canals to irrigate the soil are acts of enlivenment.

Article 1226 :

If a person builds a wall around a dead land or elevates its border to save it from inundation, he commits an act of enlivenment.

Article 1277 states some examples which it does not consider acts of enlivenment :

To cover four sides of a dead land by amassing stones, thorns, or dry wood is not an act of enlivenment as to remove the grass or to burn thorns in it or to dig a well are not acts of enlivenment. This act is called **Tahcir**.

There were two provisions for the enriched dead land by enlivenment. The first was the free ownership of the developed land. The second was the product of the land was a year exempt from Ushur, if the land was rocky it was free for two years from Ushur and any other tax.

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