[GRIFFITH WILLIAMS AND MELISSAS, JJ.]

(March 12th and April 9th, 1948)

CHRYSSANTHI DEMETRI, *Appellant*,

v.

ARESTIS KLEANTHI AND ANOTHER, *Respondents*.

(*Civil Appeal No.* 3791.)

Easement—Right of passage—Ab antiquo right—"Qadim"—Mejellé, Articles 166, 1166 and 1224—Rebuttable presumption of lawful origin—Courts of Justice Law, 1935 (as amended by Law 19 of 1940), section 49 (1) (c)—English common law—Evidence Law, 1946, section 3—English law and rules of evidence—Presumption of lost grant—Period of limitation—Prescriptive right.

The parties were adjoining landowners. The land of the appellant and that of the respondents originally belonged to appellant's grandfather who more than 55 years before action partitioned it among his three children. The appellant became owner of one portion by inheritance through his father, and the respondents came to own another portion as heirs of one I.K. who purchased it at auction in 1928 from one E., a cousin of appellant, with notice of the easement claimed by appellant, namely, a right of way over I.K's land. From the time of the partition the appellant's father and after his death the appellant were passing through the portion now owned by respondents without objection by respondents' predecessors in title. The respondents inherited this land in 1936, and some time after 1942 they disputed appellant's right of passage. The appellant claimed that he had an *ab antiquo* right of way through that land, which right had been exercised by him and his father for over 55 years. The trial Court ruled that no presumption of *ab antiquo* right arose from 55 years' user, and, in the absence of an agreement as provided by Article 1166 of the Mejellé, it held that the appellant had failed to prove the *ab antiquo* right he claimed.

Held: (i) that Article 1224 of the Mejellé created a rebuttable presumption of lawful origin which could be destroyed by proof of an unlawful origin of the easement claimed. Consequently the correct meaning of "Qadim" (=that, the beginning of which no one knows) must be that antiquity or ancientness which obscures the origin of the right and renders proof of its lawful origin difficult.

(ii) the rebuttable presumption of Article 1224 ought to arise from open and peaceable enjoyment over a long period, even though its commencement is ascertainable.

(iii) the trial Court was wrong in declining to draw the presumption of lawful origin of the right, from a very long, open and peaceable enjoyment, because the servient and dominant properties belonged to the same person in the distant past.

Petri v. *Christodoulou* (1928), 13 C.L.R. 96, and *Shemmedi* v. *Shemmedi* (1940), 16 C.L.R. 85, distinguished.

1948
April 9

CHRYSSANTHI DEMETRI
v.
ARESTIS KLEANTHI AND ANOTHER.

Judgment of the Court below set aside and judgment entered for the appellant.

Appeal by the first defendant from a judgment of the District Court of Limassol (Action No. 588/44) in favour of the plaintiffs.

Z. Rossides for the appellant.

N. G. Chryssafinis for the respondents.

The facts appear sufficiently from the judgments:

GRIFFITH WILLIAMS, J.: This appeal is from a judgment of the District Court of Limassol in an action between adjoining landowners. In the action the respondents (plaintiffs in the Court below) obtained an injunction against the appellant restraining him from interfering with the respondent's vineyard by passing through it. The appellant claimed that he had an *ab antiquo* right of way through that land, which right had been exercised by him and his father for over 55 years. The District Court held that 55 years was not time immemorial, and accordingly gave judgment for the respondent. Against this judgment the appellant appeals.

The facts in this case are very simple, and are undisputed. From the plans put in as exhibits, and from the evidence, it appears that the land of appellant, marked as lots 64 and 65, and that of the respondents marked as lots 67 and 68, was contiguous for almost its whole length North and South, and that the only means of access the appellant had to his land was by the path over which he claimed his right of way, which passed through the respondents lot 67.

The District Court found that both the land of the appellant and that of respondents had originally belonged to appellant's grandfather, Hadji Theocharis Papa Yianni who 60 or 70 years before action owned it as one undivided property. Sometime before his death, which occurred about 55 years before the action, he partitioned the property in 3 portions among his children. That part now shown as lots 64 and 65 he gave to his son Kleanthis, upon whose death it devolved on the appellant. That part of the property shown as lots 67 and 68 he gave to his daughter Annettou, upon whose death it devolved on her granddaughter Elpiniki, who in 1928 sold it at auction to one Ioannis Charalambous Kokkinoftas, since deceased, from whom the respondents have inherited it.

From the time of the partition the said Kleanthis and his son the appellant have been passing through the land originally given to Annettou, particularly lot 67, to get

to or from their land, lots 64 and 65. Nor was any objection ever raised to their passage through lot 67, at any rate before the year, 1942.

The District Court held as a fact that when Kokkinoftas bought plots 67 and 68, at the private auction in 1928, he was fully aware of the appellant's claim to a right of way over his land, and that during his lifetime he never questioned the appellant's right.

In deciding the question of whether the appellant had established his claim to a right of way the learned D.J. referred to the two local cases, *Panayioti Petri* v. *Styliani Petri Christodoulou and another*, C.L.R. XIII, p. 96, and *Kiani Osman Shemmedi* v. *Mehmed Osman Shemmedi*, C.L.R. XVI, p. 85. The former case was heard in 1928, and the latter in 1940. It had been argued before him for the appellant that the latter case overruled the former, and established the English principle of the presumption of a lost grant arising after 20 years' uninterrupted enjoyment of a right, and that enjoyment for such a period was sufficient to establish an *ab antiquo* right.

The respondents relied on the judgment in the former case *Petri* v. *Christodoulou*, in which the facts were almost identical with those in the present case. In that case the Court, after considering the meaning of *ab antiquo*, decided that user of a right of way for 24 years was neither in itself user from time immemorial nor did it raise a presumption of the same state of things having existed from time immemorial, and that therefore no *ab antiquo* right was acquired.

The learned D.J. decided that *Shemmedi* v. *Shemmedi* did not overrule *Petri* v. *Christodoulou* ; and in this I agree ; as the Shemmedi case, though the English doctrine of lost grant is set out in the judgment, was not a decision on that point. Indeed in that judgment it is clearly stated : " in this case there can be no question of a lost grant." That case, therefore, cannot be held to be authority that the English doctrine of 20 years' user establishing a presumption of a lost grant is Law in Cyprus ; and the part of the judgment referring to it must be considered as obiter. Whether in fact the doctrine does apply in Cyprus will be considered later in this judgment.

In *Petri* v. *Christodoulou and another* the facts were almost identical with those in the present case, except as regards the length of user, which in that case was only 24 years ; and it is on that case that the learned D.J. based his judgment in the case before us. It is therefore of importance to examine carefully that decision.

At p. 97, after considering the meaning of *ab antiquo*, Belcher, C.J., goes on: "I do not propose to lay down any proposition as to the minimum lapse of time that can be regarded as time immemorial in this connection; but the burden of proof must be on the person alleging the antiquity of the right he claims to exercise; and, if the latter means what Article 166 (Mejellé) says it does, i.e. what Article 1224 (Mejellé) contemplates, then I am prepared to hold that user for 24 years is neither in itself user from time immemorial nor does it raise a presumption of the same state of things having existed since time immemorial." With this passage both the other Judges sitting were in agreement, though Sertsios, J., dissented on other grounds.

This case decided no more than that 24 years was an insufficiently long period of user to establish an *ab antiquo* right of way. Had the period of uninterrupted enjoyment been over 55 years, as in the present case. it is impossible to say what the decision of the Court would have been.

The meaning of "*ab antiquo*" and its Turkish equivalent "Qadim", was also considered by Belcher, C.J., in that case. The relative passage from the judgment is as follows:—

> "'*Ab antiquo*' appears to be the current translation of 'Qadim', the Turkish word used in Tyser's translation of Article 166 of the Mejellé, and there defined as 'that, the beginning of which no one knows.' The Greek equivalent is doubtless as the learned Judge in the Court below gives it, 'ἀρχαῖον' i.e. 'antique'; 'time immemorial' being the usual English phrase to represent the same idea."

From this passage it would appear that the learned C.J. treated "*ab antiquo*", "Qadim" and "time immemorial" as having the same meaning. If we can define all three of them as meaning when applied to rights that those rights are so ancient that no one living knows or could know the origin, then perhaps they can be regarded as synonymous; but the phrase "time immemorial" has a long history, and it cannot be said, at the present time, to have an exactly similar meaning to the Turkish "Qadim." Consequently "*ab antiquo*" may not mean quite the same in English law and Turkish.

"Time immemorial", as explained in the preamble to the Prescription Act (2 and 3 Will 4 C 71), is as follows: "time immemorial or time whereof the memory of man runneth not to the contrary" is now by the Law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed

is sometimes defeated by showing the commencement of such enjoyment. From this preamble it appears that "the memory of man" did not mean living memory, but what was known as "the time of legal memory" which was supposed to date back to 1189, the year of accession to the throne of King Richard I.

Originally by Common Law "time immemorial" meant literally "the time whereof the memory of man runneth not to the contrary", that is the time beyond living memory. But by a statute of Edward I seisin of land in a real action was required to be proved back to the first year of the reign of Richard I; and by analogy proof of "time immemorial" to confer a title to easements was required to date back to the same year. According to Blackstone: "Now 'time of memory' has long ago been used and ascertained by the law to commence from the reign of Richard the First." "Time of memory" or "time immemorial" having acquired this meaning, it naturally followed that as the years went by, and the reign of Richard I receded ever further into the distant past, it became more and more difficult to prove title back to that remote period. Though, as regards rights to real estate, the legislature in the reign of Henry VIII (32 H. VIII) fixed a period of limitation, it did not affect any claim to a prescriptive right, and long enjoyment could still be defeated by shewing that at any point of time since the commencement of legal memory the right had not existed (Hals. XI p. 295 & *seq.*) *Norfolk (Duke)* v. *Arbuthnot* 1880 5 C.P.D. 390. 49 L.J. Q.B. 782. It was to overcome this that the Courts began to hold that from the usage of a lifetime the presumption arose that a similar usage had existed from remote antiquity. Later from a user during living memory or even twenty years, juries were told that they might, and finally were bound, to presume a lost grant or deed. (Per Cockburn, C.J., in *Bryant* v. *Foot*).

The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period. *Jenkins* v. *Harvey* 1 Crompton, Meeson and Roscoe Rep. Exch. 894. Quoted in Gale on Easements 7th Edn. p. 167.

Theoretically an ancient house at this period was a house which had existed from the time of Richard I. Practically it was a house which had been erected before the time of living memory, and the origin of which could not be proved. Per Lush, J., in *Angus* v. *Dalton*—1877 L.R. 3 Q.B.D. p. 89.

1948
April 9

CHRYSSANTHI DEMETRI
v.
ARESTIS KLEANTHI AND ANOTHER.

It was only by the Prescription Act (2 & 3 Will IV c.71) that uninterrupted user for a long period was made indefeasible. By that Act any uninterrupted user for a period of 20 years could not be defeated by showing the beginning of the enjoyment of the right if it occurred prior to the 20 years period. If the user had continued for 40 years then the right became altogether indefeasible, unless it were proved to have been exercised by express consent or agreement in writing. The Prescription Act applied to easements such as that in question in the present case, there were however certain rights by custom and usage which were not included in the Act, and to these the old law still seems applicable; and they can therefore be defeated, even though exercised for over 60 years, if it can be shown that they could not have existed in the reign of Richard 1. *Vide Bryant* v. *Foot* 1867. 30 L.R. Q.B. Vol. 11, p. 161., *Angus* v. *Dalton* 1877, L.R. 3 Q.B.D. 89.

The result of this is that in English law "time immemorial" has a legal meaning which is inconsistent with its literal meaning; as, clearly, "the time whereof the memory of man runneth not to the contrary" should mean, what it seems to have originally meant at Common Law and prior to the statute of Edward I, namely "time so remote from the present that no one living could remember any event then happening." In other words "time to which living memory could not extend." The meaning of the phrase however was altered, and, as far as I can find, its original Common Law meaning has never been regained. For this reason it seems to me that to translate the Turkish word "Qadim" as "time immemorial" is to say the least very unsatisfactory, and likely to give rise to notions of an antiquity far more remote than the Turkish conception requires.

The definition of "Qadim" in Article 166 of the Mejellé is "that, the beginning of which no one knows", which, on the face of it, seems equivalent to "the time whereof the memory of man runneth not to the contrary." But if the "memory of man" means "time of legal memory", this similarity can only be superficial. The beginning of which no one knows, suggests "no one at present alive" knows; which is another way of saying "within living memory."

No specific length of time has ever, as far as I can ascertain, been fixed in English or Turkish law as the time of living memory, and the period is therefore indefinite and variable. It seems probable that the 60 years fixed in England by the Prescription Act, as the length of user after which a title to a profit *à prendre* became indefeasible, the longest express period mentioned in that Act,

was fixed on an estimation of the time of living memory; it being presumed that no one could remember accurately any state of things existing 60 years before. But though this appears to be about the limit of memory, there is in our law no definite period, and it may perhaps be considered that in general living memory does not extend further. Should we feel ourselves bound by any such period of time in the case of "Qadim"? In Baillie's Digest of Moohummudan Law at p. 647 is a note reading as follows: "A bequest to one's Kudma (plural of 'Kudeem' 'former' or 'ancient') is to all those who have associated with him for thirty years." In this passage "Kudeem", another spelling of "Qadim", appears to be used in a much wider sense. And though it here has a purely technical legal meaning, it does tend to show that its use is not like "time immemorial" restricted to remote antiquity. It therefore appears to me that the translation of the word as "time immemorial" in Tyser's translation of the Mejellé is loose and inaccurate. Baillie translates "Qadim" as "former or ancient"; and it seems to me that if its interpretation be restricted to its literal meaning as defined in Article 166 we shall not go far wrong in understanding it, viz.: "That, the beginning of which no one knows." And by Article 12 of the Mejellé "In the case of a word, the sense in which it is presumed to be used is the literal sense."

Applying this interpretation to the case before us, the appellant and his father before him had exercised his right of way over lot 67 for a period of probably more than 55 years, and perhaps 60 years or over, while that lot belonged to three successive owners, without any objection or hindrance. Many of the oldest people in the village were called as witnesses, and none of them could remember when that right of way did not exist. There was ample opportunity for the respondent to call witnesses, if such were to be found, to prove the beginning of the right of way, but none was produced. It can therefore be presumed that no one knew the beginning of the right. It must therefore be considered on the wider meaning, or perhaps more literal meaning in accordance with the definition in Article 166, I have given to the word "Qadim", that appellant's right of way is established. It is actually "That, the beginning of which no one knows."

The learned District Judge in his judgment (at p. 11) stated: "I have it in evidence that this property (all 4 plots) was some 55 years ago owned by one and the same person, who then partitioned it among his children. There is no evidence that at the time of this partition any

1948
April 9

CHRYSSANTHI DEMETRI
v.
ARESTIS KLEANTHI AND ANOTHER.

stipulation was made that the property, now plot 67, would be under a servitude of a right of passage by the person to whom plot 65 was given. Had I had evidence to that effect then the matter would have to be decided according to Article 1166 of the Mejellé which is still good law."

Now, the only evidence regarding the ownership of the four lots by one person, namely the appellant's grandfather, and his dividing these lots among his children, was that of the appellant himself. He was not able to speak of his own knowledge, but only from what he must have learnt from his parents; as he was only 60 years old in the witness box and was speaking of a state of things 60 or 70 years before that time. He was either not yet born or at most a very young child when the land was partitioned, and therefore could not give evidence as to the fact of or absence of any stipulation that would have enabled him to base his action on Article 1166 of the Mejellé. He did not do so but relied entirely on "Qadim", on which he could not hope to succeed had he been able to produce evidence of the said stipulation. For then the right of way would not be "Qadim", "that, the beginning of which no one knows."

Knowing by hearsay of a condition of things existing before the beginning of a prescriptive right is not the same thing as knowing the beginning of that right. We are not in this case dealing with the English law of Prescription where a specific date 1189 was fixed for time immemorial and every presumption was that the right had existed from 1189—when it followed that a prescriptive right could be defeated by showing its non-existence at any point of time since that date. But if a prescriptive right is "Qadim" it cannot be defeated by showing that at some earlier period it did not exist.

By Article 6 of the Mejellé what is from time immemorial (Qadim) will be kept in its ancient state. But by Article 1224 "what is contrary to the Sheri Law is not considered to be of time immemorial (Qadim)." That is to say whatever is "Qadim" must be considered to have had a lawful origin or at any rate must be treated as not contrary to Sheri Law. Certain things which are on the face of them unlawful, as the example of a public nuisance given in Article 1224, cannot acquire the prescriptive right to be preserved in their ancient state. But it does seem that unless there is some proof that a right which has been anciently exercised is contrary to Sheri Law, that right is regarded as lawful on account of its long existence. Though nothing that had no legal origin could be "Qadim", if a thing is once proved to be "Qadim" then a legal origin is implied. The absence however of proof of a legal origin would not

affect "Qadim", because it is defined as "that, the beginning of which no one knows." For this reason I cannot subscribe to the opinion that this Article (1224) by implication sets up a presumption of legal origin like that in English law, so as to enable the Court to assume that at the time of partition a stipulation was made establishing this right of way in the manner contemplated in Article 1166. If there is proof of "Qadim" there is no need for any presumption of lawful origin—it automatically follows from the proof. Nor, to prove "Qadim" must lawful origin be proved, as "Qadim" only arises when no one knows the origin. If the right in itself is unlawful according to Sheri Law, it cannot become "Qadim" even though the beginning is unknown. Article 4 of the Mejellé says: "With doubt certitude does not fade." Any doubt therefore as to the possibility of there having been no express stipulation as to a right of way when the land was partitioned, and the respective plots 64, 65 and 67 were formed, would be insufficient to prevent the operation of prescription under Article 1224.

If we were to consider that in this case "Qadim" was not established, the question as to a presumption of lawful origin would arise. As I cannot find anything definite in the Mejellé that establishes this presumption, it must be considered to be imported into our law from the English common law. The presumption is that an easement long enjoyed without interference must be considered to have a legal origin. In this case the easement had been enjoyed for a period of over 55 years. According to the evidence, the land to which the servitude belongs and that over which it is exercised were both about 60 or 70 years before in the same ownership. If the right was exercised from the time of partition for that long period it must I think raise the presumption of legal origin, or, in other words, that at the time of partition there was such a stipulation as is required by Article 1166.

In England, by common law, long exercised open enjoyment without interruption of a right raised a presumption that that right had a legal origin. According to Roscoe (Evidence in Civil Action p. 35) "it is a rule of prescription that: 'antiquity of time justifies all titles and supposeth the best beginning the law can give them'." It was stated as follows by Blackburn, J., in *Shepherd* v. *Payne*, 16 C.B. (N.S.) p. 135, 33 L.J. (C.P.) 160—"the rule of evidence has been established, that where there has been, long continued modern user of a right capable of a legal origin the existence of that legal origin should be presumed unless the contrary be proved." Farwell, J., in *AG* v. *Simpson* (1901) 2 Ch. 691 states it as follows: "The

1948
April 9

CHRYSSANTHI DEMETRI
v.
ARESTIS KLEANTHI AND ANOTHER.

principle is that when the Court finds an open and uninterrupted enjoyment of property for a long period unexplained *omnia praesumuntur rite esse acta*, and the Court will if reasonably possible find a lawful origin for the right in question." It was on this presumption that the fiction of a lost grant referred to in *Shemmedi* v. *Shemmedi* C.L.R. XVI, p. 87 was based, and twenty years user was considered sufficient to raise the further presumption that the right had been enjoyed since time immemorial. In view of the fact that prescriptive title to rights of way is given by Article 1224 of the Mejellé to such rights as may be "Qadim" as defined by Article 166 I do not think there is room in our law for the fiction of a lost grant to create such prescriptive rights. Nor do I think that long user could under Turkish law raise any presumption of that state of things having existed from time immemorial, a possibility implied by Belcher, C.J., in *Petri* v. *Christodoulou* ; such a conception seeming to me foreign to Turkish law, and unnecessary in view of the definition of "Qadim." But the presumption of legal origin is on a different footing, as there appears to be no such presumption in the Mejellé, and it is not antagonistic to the general terms of presumptions therein set out, except perhaps in the case of "Qadim" where already established. This presumption therefore may be considered to have been introduced into our law by the Courts of Justice Law, 1935, section 49 (1) (*c*) which brings in the English common law "save in so far as other provision has been or shall be made by any law of the Colony" and the Evidence Law, 1946, section 3 (formerly the Evidence Law, 1935, section 2) which brings in the English law and rules of evidence "save in so far as other provision is made or shall be made in any other law in force for the time being."

The difficulty experienced by the learned Judge in the Court below in holding the appellant's right of way to be "Qadim", on account of the appellant stating that the respective pieces of land of respondent and himself were at one time under one ownership, and the learned District Judge's consequent assumption that the beginning was known, is got over by the presumption of lawful origin ; which, in this case, would be a stipulation at the time of partition in accordance with Article 1166 of the Mejellé. And this would be no mere fiction, but the most probable origin in the circumstances. In any case the District Judge from the evidence could have had no more than a doubt as to the legality of the origin, and by Article 4 of the Mejellé "with doubt certitude does not fade." The appellant proved that the right of way had been enjoyed openly and uninterruptedly for over 55 years and that none

knew the beginning of it. I therefore hold that "Qadim" was established. If the right arose at the time of partition it must be presumed to have had a legal origin by stipulation in accordance with Article 1166 of the Mejellé.

For these reasons I think this appeal should succeed.

This decision is unlikely to have any importance in future, as rights of way and other easements now come under the provisions of section 10 of the Immovable Property (Tenure, Registration and Valuation) Law, 1945, and prescriptive right can be acquired under it by 30 years user.

MELISSAS, J.: The respondents to this appeal sued appellant in the District Court of Limassol to restrain him from passing through respondents' vineyard to reach his own adjacent vineyard. The appellant pleaded that he exercised this right of passage of old as an easement attached to his own vineyard.

On the evidence the trial Court accepted, the two vineyards of the parties were originally part of one larger property belonging to the appellant's grandfather who more than 55 years prior to the trial partitioned it among his three children. The appellant became owner of one portion by inheritance through his father, and the respondents came to own another portion as heirs of Ioannis Kokkinofta who purchased it at auction in 1928 from Elpiniki, a cousin of appellant, with notice of this easement claimed by appellant. From the time of this partition the appellant's father and after his death the appellant were passing through the portion now owned by respondents without objection by respondents' predecessors in title. The respondents inherited this vineyard in 1936, and some time after 1942 they disputed for the first time appellant's right of passage.

The trial Court proceeded to apply the law to these facts. It considered two decisions of this Court dealing with the *ab antiquo* right of passage, namely, *Petri* v. *Christodoulou* (1928), 13 C.L.R. 96, and *Shemmedi* v. *Shemmedi* (1940), 16 C.L.R. 85, and came to the conclusion that the latter case did not disapprove the former, and the trial Court applying the former ruled that no presumption of *ab antiquo* right arose from 55 years' user, and in the absence of an agreement as provided by Article 1166 of the Mejellé it held that the appellant had failed to prove the *ab antiquo* right he claimed.

1948
April 9

CHRYSSANTHI DEMETRI
v.
ARESTIS KLEANTHI AND ANOTHER.

The facts of these earlier cases and of the present case differ materially. In *Petri* v. *Christodoulou* 24 years' user was proved which was held to be " neither in itself user from time immemorial, nor did it raise a presumption of the same state of things having existed since time immemorial." In *Shemmedi* v. *Shemmedi* no defined period of user was proved and the claimant of the *ab antiquo* right failed because he parted with the property to which the alleged right of way was attached 14 years prior to the decision. Each case, therefore, is distinguishable from the present one. What must have embarrassed the trial Judge, however, seems to be the reference in the later case to the corresponding right in the English law. The fundamental question what is the true meaning of *ab antiquo* in the Ottoman legal system has not been determined in either of these two cases. Belcher, C.J., in the earlier case carefully avoids to lay down any proposition as to the minimum lapse of time which can be regarded as " time immemorial ", this expression being, as he says, the usual legal phrase to represent the same idea as the expression *ab antiquo*. Crean, C.J., in the later case considered the *ab antiquo* right of the Ottoman law as practically analogous to a right by prescription in English law and briefly refers obiter to the fiction of lost grant in proof of such right.

The law applicable to this case is the Ottoman law. The Turkish word which is translated by the various translators of the Mejellé and of the Land Code as " *ab antiquo* " or " time immemorial ", is *Qadim* or *Kudeem*. Literally it means " former ", " ancient " (see Baillie's Digest of Moohummudan Law, p. 647, note 2). Its definition in Article 166 of the Mejellé is translated by Tyser as " that, the beginning of which no one knows." No defined antiquity has been attributed to this term by any commentator on the Mejellé or Land Code so far as my researches into this matter have gone. One sidelight on the age content of this term is to be found in Baillie's Digest of Moohummudan Law, p. 647, where the word " Kudma " (plural of Kudeem) occurs in connection with bequests. It is there said that " a bequest to one's Kudma is to all those who have associated with him for 30 years." I believe the authorities designedly abstained from giving a definite duration of user to this term in connection with easements, because the circumstances of the exercise of these rights vary and the question of their antiquity was left to be determined in each particular case on its facts and merits. Again, the word " ancient " would have a different age content in different expressions, as for instance, " ancient monument ", " ancient lights " and " ancient document " would not imply the same ancientness.

I shall now consider the word "Qadim" in its context. It occurs in Article 1224 of the Mejellé with which we are concerned in this case and which gives legal recognition to this right of passage. The definition of this term already cited, namely, "that, the beginning of which no one knows" may bear two interpretations :—

(*a*) absence of knowledge as to the beginning of the time of user, or

(*b*) absence of knowledge as to the origin of the right even though the period of its exercise is ascertainable.

If the first meaning is the correct one it is identical with the English expression "time immemorial" which originally at common law meant that no evidence, verbal or written, could be adduced of any time when the right was not in existence, and the right was pleaded by alleging it to have existed "from time whereof the memory of man runneth not to the contrary." (Best on Evidence, 2nd Ed., p. 364.) I do not consider it necessary for the purposes of my decision to trace the historical development of this prescriptive right in the English law through its various stages of legal memory, living memory, and lost grant, but we may note one essential peculiarity of it which is contrary to the Sheri Law as we shall see later, namely, that where a person has used and enjoyed an easement 20 years and upwards, though it was a wrongful use at first, he thereby gains a good title to it, and in an action for its disturbance it is no answer to show that the plaintiff originally obtained the use and possession of it by usurpation and wrong. (See Gale on Easements, 11th Ed., p. 199, citing *Holcroft* v. *Heel* 1 Bos. & Pull. 400. Compare *Dalton* v. *Angus* (1878) 48 L.J. Q.B. 230–2 affirmed by H.L. (1881) 6 A.C. 740 as to the presumption of lost grant being in some respects rebuttable and in others irrebuttable). In *Halliday* v. *Phillips* (1889, 23 Q.B.D. 48) affirmed by the House of Lords (61 L.J. Q.B. 210) Fry, L.J., said :

"The Courts are under an obligation, which has been insisted upon over and over again, wherever they can, to clothe with legal right long continued and undisputed enjoyment ; and in my judgment that obligation rests upon the Court although enjoyment may be shown to have had *de facto* an invalid or illegal, or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even although there may be an original infirmity in the *de facto* commencement, the Court is bound to presume, if it can, that that illegal origin has been altered by something which has occurred in the course of time." (Adopted by Wright, J., in *London and N. W. Rly* v. *Commissioners of Sewers*, 66 L.J. Q.B. 127).

1948
April 9

CHRYSSANTHI DEMETRIC. ARESTIS KLEANTHI AND ANOTHER.

The original meaning of "time immemorial" in the English common law might have been ascribed to "Qadim" if Article 1224 of the Mejellé ended with the protection of these rights by enjoining their preservation in their ancient state. But Article 1224 goes on to enact in its last part that "that which is contrary to the Sheri Law is not considered to be of time immemorial." Evidently, then, the protection to the right was given in the first part of the Article on the assumption or presumption that it had a lawful origin and was not acquired contrary to the law; but upon proof of an unlawful origin—and this very provision contemplates such proof to be within the bounds of possibility—the protection is withdrawn.

Ali Haidar in his commentaries on the Mejellé, Vol. 4, p. 1036, commenting on this Article explains that "these rights are left to continue in the same way as they were from ancient time..... because the predominant presumption (zanni-galib) is that an *ab antiquo* right is not established by oppression or wrong (zulmen), and in the absence of evidence to the contrary the *ab antiquo* is not disturbed."

This passage from Ali Haidar and the nature of the provisions in Article 1224 make it abundantly clear that this Article creates a rebuttable presumption of lawful origin which is destroyed by proof of an unlawful origin of the easement claimed. Consequently the correct meaning of "Qadim" must be that antiquity or ancientness which obscures the origin of the right and renders proof of its lawful origin difficult. The presumption remedies the difficulty by preserving the right, and if disturbed, by shifting the burden onto the person attacking the right to prove its unlawful origin, after proof of long, undisturbed and unexplained enjoyment has been given by the claimant. It is sufficiently palpable that "Qadim" cannot mean such lapse of time that no evidence can be adduced of any time when the right was not in existence; if that were so the presumption of lawful origin logically should have been irrebuttable, save where the illegality or "excessive damage" is patent as in the case of a public nuisance. The rebuttable presumption of Article 1224 ought to arise from open and peaceable enjoyment over a long period, even though its commencement is ascertainable. Otherwise few such rights could be sustained in a Court of law on being challenged; one could easily destroy any number of these ancient rights by recourse to old registrations in the books of the Land Registry which might show unity of ownership of servient and dominant properties in olden times, and a right of overflow or to discharge water onto another's land

enjoyed in respect of a very ancient house might be defeated if from an inscription on some part of the house the year of its erection could be ascertained. Such a proposition is untenable.

In the present case the right has been exercised by the appellant for nearly two generations continually, and it was acquiesced in by three successive predecessors in title of respondents. The trial Court declined to draw the presumption of lawful origin of the right from this very long, open, and peaceable enjoyment, because the servient and dominant properties belonged to the same person in the distant past. I am of opinion that it came to a wrong determination of the law applicable to the facts of this case.

The respondents did not plead that the exercise by the appellant of this right is causing them excessive damage in order to rebut the presumption of its lawful origin. They claimed £5 damage in all and their evidence disclosed damage amounting to some £2 every year to their vineyard, which is said to be worth between £50 and £100. The trial Court dismissed this claim for damages because respondents failed to prove that they suffered any damage.

It may be noted that this same presumption is now to be found in our Evidence Law, 1946, which repealed and re-enacted the Evidence Law, 1935, and in the absence of special provision governing any particular case, its applicability to cases of long usage, long possession, or long enjoyment, may be considered in the spirit of the common saying that possession is nine points of the law, so expressively expounded by Fry, L.J., in the case above quoted.

For the foregoing reasons I am also of opinion that this appeal should be allowed with costs.

Appeal allowed with costs. Judgment of the Court below set aside and judgment entered for the appellant.