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

MICHAILI TSINKI AND OTHERS
v.
THE KING'S ADVOCATE.

WATER—SINKING WELLS ON ARAZI-MIRIE—NECESSITY OF CONSENT OF GOVERNMENT.

No one is entitled to sink a chain of wells on Arazi-Mirie without the consent of Government.

This was an appeal by the Plaintiffs from a judgment of the District Court of Nicosia.

The arguments of counsel and the facts of the case are set out in the judgment of the Chief Justice.

Theodotou for the Appellants.

The Assistant King's Advocate for the Respondent.

Judgment: THE CHIEF JUSTICE: This is an action brought by 13 Plaintiffs against the Government and by their writ they ask for "a declaration that they are entitled to sink and connect chains of "wells (for the purpose of obtaining water and of conducting water "to their village) on Arazi-Mirié land without having to obtain the "permission of Government so to do."

It appears from the statement made by the King's Advocate that this is a friendly action to try the legal question, whether when persons have obtained the permission of the owners of Arazi-Mirié to sink and connect wells, it is necessary to get the permission of the Government. This seems to have been assented to by Mr. Theodotou for the Plaintiffs.

The only issue settled was an issue of law; namely:—

Are the Plaintiffs entitled to sink and connect chains of wells (for the purpose of obtaining water and of conducting water to their village) on Arazi-Mirié land without having obtained the permission of the Government to do so?

No facts were formally admitted and no witnesses were called.

At the commencement of his argument Mr. Theodotou sought to qualify his claim. He said: "The Plaintiffs only claim to take the "water to irrigate their own lands and to sell any surplus to others to be "used for irrigation. The Plaintiffs make no claim to supply water "for general village purposes. They claim to use the water to irrigate "all sorts of land, mulk, mirié, and mevqoufé."

No amendment of the writ was asked for and the claim in the action is more general than this. But the modification does not appear to make any difference in the rights of the parties.

This action being a test action it is important that the question before the Court should be clearly defined. The only question really before us is the question raised by the claim.

The arguments of Mr. Theodotou on behalf of the Plaintiffs are to the following effect; he said:—

1. The only restrictions to the user of Arazi-Mirié are those contained in Chapter 1 of the Land Code, such as are contained in Arts. 25, 31, and 32 and there is no prohibition to sink wells.
2. Arazi-Mirié is given for cultivation. Sinking wells would be beneficial to the Government by increasing the tithe.

   That sinking wells and making channels did not prevent cultivation because the villagers made a dome (hoopa) over the well and cultivate the top.
3. That the wells would not change the nature or category of the land. He cited Shiha's treatise on immoveable property, Chapter 3, p. 158.
4. Mr. Theodotou argued that the mutessarif has rights *usque ad cœlum* and *usque ad inferos*. He cited for these Arts. 1194, 1280, and 1281 of the Mejellé and Shiha, p. 183.

He also cited the laws about mining 4 Muharrem 1286 and 2 Shaban 1285 and the Wells Law, 1896, which he said abolished the necessity of getting leave, even it if was required before that law.

The Assistant King's Advocate argued:—

That the mutessarif is in the view of the law a lessee and that his rights are those given to him by the Land Code. He cited for this Atouf Bey, p. 62, six lines from the bottom. Khalis Eshref, p. 136, Sec. 185, and p. 138, six lines from the top and line 17.

That those rights are limited to the surface.

As to mines he cited Art. 107 of the Land Code, the Mines Law, II. Destour, p. 320, Sec. 13; Khalis Eshref, p. 604, para. 798.

As to the Wells Law, 1896, he said it referred to owners of property and that it was passed to amend the law contained in Art. 1226 of the Mejellé after the decision of the Kykkou case. (3 C.L.R., p. 105).

In reply Mr. Theodotou pointed out the differences between an ordinary lease and such a lease as a mutessarif of Arazi-Mirié acquires, and relied on Art. 14 of the Mejellé as giving his clients an implied right to make a channel through their lands.

Before dealing with the arguments put forward by the learned advocates I will try to give shortly the history and origin of Arazi-Mirié and the laws relating to it. I will then consider the general relation

which exists between the mutessarif of Arazi-Mirié and the Government, the rights of the mutessarif in general, and in particular whether he has or not the right to sink wells.

It appears from Art. 3 of the Land Code that the lands which are called Arazi-Mirié were lands, of which the owners of timars and ziamets were formerly considered the owners, and which were possessed (tessaruf) by their permission and appointment. Who and what these owners of timars and ziamets were is explained in Atouf Bey's treatise on the Land Code, p. 30, and in the treatise of Khalis Eshref.

The timar and ziamet was a grant of land made to sipahis with an obligation to perform military service. The lands which entered into the composition of the timar and ziamet seem to have been of different tenure. (Belin, p. 198, Sec. 303). The timar or ziamet was a district in which might be found ushrié, kharajié, mevqoufé, mirié lands, and lands which were mevat and mubah.

It is difficult to ascertain exactly what the sipahis took for themselves, it was something similar to what is now taken by the Government. They seem also to have had khassa lands made takhsis in their favour (Land Code, Art. 129). The sipahis seem to have been compensated and pensioned off (Belin, p. 263) when timars and ziamets were abolished. The lands included in a timar or ziamet were occupied by grant from the sipahis.

I cannot say in what form the grant was made in the early days. At the time of their suppression it is probable that all the lands held by delivery from the owners of timars and ziamets were Arazi-Mirié. Because kharajié land when it lapsed to the State was on re-grant made Arazi-Mirié as appears from the fetva of Abou Seoud set out hereafter.

It is somewhat difficult to ascertain when Arazi-Mirié first came into existence.

Arazi-Mirié may be defined by saying that they are arazi which are leased to persons and corporations with no time limit, in consideration either (1) of a muejele (rent reserved), in cash or produce, and no muajele (rent in advance), or (2) for both a muajele and a muejele in cash or produce. It is also called arazi memleket, arazi Beit-ul-Mal, arazi havz, and arazi sultanié (Khalis Eshref, p. 74, Art. 78).

Khalis Eshref in the introduction to his book on the Land Code, says:—

" Things acquired by conquest were divided into five parts, one part
" was kept for the Beit-ul-Mal and the other four parts were distributed
" amongst the conquerors.

"The fifth part given to the Beit-ul-Mal was again divided into "five parts, one to the wives of the Prophet and to himself to be "spent on the affairs of Islam, the second fifth to the relations of "the Prophet, a third fifth to the people who are too poor to pay "zekiat and orphans, another fifth for the destitute poor and another "for the maintenance of people away from home. This division is "approved by the Qoran, the Sunnet, and the Ijma."

The learned writer says further:—

"Land also which was conquered was considered part of the booty "and besides moveables and other things was divided in the same "way. But land which was conquered was not always divided "among the conquerors, in some cases the raqabé was kept in order "that it might belong to the Beit-ul-Mal.

"In this matter there is a difference of opinion between the four "Imams which is due to the historical reading of the Qoran handed "down by their followers. But the Hanefi Imams in every case "approve of the following view:—

"The Imam who conquers a country, if he wishes, divides between "the conquerors, the properties of the people of that country, and "if he wishes he leaves the non-Moslems where they are and he imposes "on them a kharaj (tax) and a jizyé (personal tax), or he exiles the "inhabitants, or without dividing the land or exiling the people, "he treats the land as belonging to the Beit-ul-Mal."

It appears that at some date later than the beginning of the Moslem conquests, which date it is very difficult to determine, the Sultans reserved a certain quantity of land as public domain, principally to provide for the increasing expense of wars, and that this was the origin of Arazi-Mirié (Padel & Steeg, p. 18. Belin Arts. 299 and following articles).

This then was one source of Arazi-Mirié or arazi memleket (State land). Another source seems to have been by conversion of arazi kharajié.

Abou Seoud who was Sheikh-ul-Islam at the time of Suleiman the Great (A.H. 926) says:—"There is another kind of land which "is neither ushrié nor kharajié, they call it arz-i-memleket" (State land).

"These were originally kharajié which have been given to their "possessors as mulk. But on the death of the possessors, great "difficulties often appeared, if not a complete impossibility, when "it became necessary amongst a great many heirs to calculate and "ascertain the share of the kharaj which fell to each. It was for "this reason that the raqabé was taken by the beit-ul-mal and the

" possession of the land was given to the rayas by way of loan " (Padel & Steeg, p. 20).

Probably also arazi ushrié on escheat became Arazi-Mirié as it does now under Art. 2 of the Land Code.

Arazi mevat, when improved, may also be granted as Arazi-Mirié (see Mejellé, Art. 1272). There was a difference of opinion as to this. Abou Hanifé was of opinion that, if a person cultivated mevat lands without the permission of the Chief, he did not become proprietor; that, as the lands were plunder, no one could assume a property in them without the consent of the Imam.

Abou Hanifé's two disciples were of opinion that permission was not necessary: that whoever cultivates waste lands does thereby acquire the property in them (Hedaya, Vol. IV., Book 45, p. 610 by Grady).

The Mejellé has followed the doctrine of Abou Hanifé. The Sultan can grant these lands as mulk or Arazi-Mirié. (Mejellé, Art. 1272).

These seem to be the principal sources of Arazi-Mirié. Arazi-Mirié also includes the lands granted by the qoru aghas (forest masters) and arazi mirié-i-mevqoufé includes the lands called khassa which were made takhsis to Sultans, Viziers, owners of timars and ziamets and others and also land called bashtina which was land made takhsis to persons called voinigh who were soldiers. (Land Code, Art. 129).

It is said that all the lands in Cyprus were left in the hands of non-Moslems (Chiha, p. 9). The lands were therefore originally kharajié and have all been converted now into Arazi-Mirié.

It is necessary in order to avoid any confusion to bear in mind the difference between the lands which are capable of being given with the huquq tessaruf (rights of user) contemplated by the Land Code, and the lands which are actually so given. All lands which can be granted by the Sultan must in one sense be arazi sultanié, but the lands to which the Land Code applies are lands which have been granted, lands the raqabé of which belongs to the Beit-ul-Mal.

The definition in Art. 3 of the Land Code would cover arazi mevat which has been improved and land which has become mahloul before it has been granted.

The definition given above from Khalis Eshref and the meaning given to the term Arazi-Mirié throughout the Land Code, is land of which the tessaruf has been granted.

As to the history of the law regulating dealings with Arazi-Mirié the following is taken from the treatise of Khalis Eshref:—

"The history of the law relating to land may be divided into two "epochs:

"The first epoch was from the beginning of the Ottoman Government "to the date of the publication of the Tenzimat Khairié, that is to "say five and a half centuries up to the year 1255.

"The second epoch is from the date of the publication of the "Tenzimat Khairié up to the present time, that is to say, a period "of 59 years.

"During the first epoch the sacred fiqh was adopted directly as the "basis of the Laws and Procedures in respect of arazi and these Laws "and Procedures were in force in the Sher' Courts.

"At the beginning of the first epoch actions with regard to the "mode of possession and other matters of arazi in the Imperial "Dominions were determined upon by the sher' and the sacred fetvas "taken from the books of fiqh and there was not any special law with "regard to arazi.

"Subsequently Sultan Suleiman Qanouni (about A.H. 926) enacted "several laws and amongst them a Land Law based on the Sher' "(Sacred Law).

"During the second epoch laws were passed abolishing timars "and ziamets. Subsequently in the year 1274 the Land Code was "published and gradually Nizam Courts were recognised as the places "for the trial of actions in respect of arazi.

"During the second epoch according to the necessities of the time "it was allowed to enact laws and ordinances and according to the "maxim 'it cannot be denied that with change of time the rules "(akham) change' several laws and ordinances were enacted by which "the timar and ziamet were abolished and gradually the transactions "in respect of arazi were put on a different footing. And several "years after the publication of the Tenzimat Khairié the owners by "tapou and owners by intiqal (succession) were extended by one "degree more and in fine in the year 1274 the present Land Code, "which is at present acted upon, was published, and to this certain "articles were inserted and gradually Nizam Courts were recognised "as places for the trial of actions in respect of arazi." (Khalis Eshref, p. 32, Secs. 46 and 47).

Prior to the Land Code there appear to have been many Imperial Orders and fetvas but by the concluding article of the Land Code it is enacted: "This Imperial Order shall be in force from the date of its "promulgation, and the provisions, contrary to its contents, of supreme "orders issued anciently or recently up to now concerning Arazi-Mirié

"and the takhsisat category of arazi mevqoufé shall be annulled, "and the fetvas which have been given by the Sheikhs-ul-Islam based "on the said orders shall not be acted upon, and hereafter only "this Imperial Law shall be in force in the Sheikh-ul-Islamate, Govern- "ment Offices, and in all the Courts and Councils. And the old laws "concerning Arazi-Mirié and mevqoufé in the office of the Divani "Humayoun, in the Imperial Defter Khané and in other places shall "not be respected."

Thus all Imperial Decrees concerning Arazi-Mirié and fetvas based on such orders prior to the Land Code are annulled, and from the date of the Land Code only the Imperial Law is to be in force in the Sheikh-ul-Islamate and the Courts.

Of course the Sher' Law on which the orders and fetvas were based was still in force. It would appear that the Sultan might grant lands with huquq-tessaruf of any description he liked. He might if he wished grant the land as mulk. (Mejellé, Art. 1272). There seems to have been some limitation to the Sultan's right to grant Arazi-Mirié as mulk (Omer Hilmi's Treatise on Evqaf, Sec. 128). What the Sultan did not grant would remain the property of the State.

The question here is what are the huquq-i-tessaruf where the grant is made under the Land Code. All grants of tessaruf under the Land Code do not necessarily confer the same rights. The nature of the land granted by Tapou varies. There is agricultural land (Art. 9) meadows (chayir) (Art. 10) forests (Art. 19) yaylaks and kyshlaks (Art. 24) woods (Art. 30) threshing floors and salt pans (Art. 34), and thickets (*see* Art. 3 of the Instructions concerning Tapou officers—Ongley, p. 186).

The rights of the mutessarifs over the different kinds of holdings are not necessarily the same. For example the mutessarif cannot break up meadows without permission (Art. 10). He can convert forests into arable land (Art. 19). Arable land must be cultivated (Art. 9).

The huquq tessaruf as regards woods (Art. 30) threshing floors (Art. 34) and the thicket land which is to be preserved would appear to be necessarily different. It would appear from the articles cited and from Art. 3 of the Land Code that all these are Arazi-Mirié, or subject to the same law as Arazi-Mirié. There would probably be different rights if the land were rice land to what would be given in the case of corn land (Art. 128).

The Plaintiffs claim that in any Arazi-Mirié they can make chains of wells as part of their huquq-i-tessaruf. The claim may be right,

it depends upon the true construction of the law. What was the intention of the Legislature as disclosed by the terms of the law ?

Now in construing the law some assistance may be derived from the fact that this was not a new law but rather a law giving legislative authority to a number of Imperial Orders and fetvas which existed before the Land Law was made or published. These fetvas are annulled but re-enacted and the commentators on the Land Code have in many cases preserved in their commentaries the reasoning on which the fetvas, on which any particular enactment is founded, are based.

There is no special enactment in the Land Code with reference to the sinking of wells in the manner and for the purpose claimed in the action, or at all. To ascertain the rights of the mutessarif I will first consider the general view of his tenure held by the commentators.

Atouf Bey in his Commentary on Art. 9 of the Land Law says: " Leave is given generally to the mutessarif to sow what he wishes, " because it is for the benefit both of the mutessarif and the State . . . " and because it is necessary that it should be made general, by saying " 'for the lessee to sow what he wishes,' or to fix what he shall sow, " and that the object should be clear on the letting of land according " to Art. 404 of the Mejellé, and because, as has been explained in the " third Section, and will be explained in subsequent sections, the " mutessarifs of Arazi-Mirié by reason of their having paid a muajele " at the time of the grant, and by having given a share of the produce, " are hirers." (Atouf Bey, p. 54). (See also p. 63).

Again he says: " The mutessarif may sow more than once because " it is allowed by Art. 525 of the Mejellé." (Atouf Bey, p. 55).

At pages 31 and 32 Atouf Bey says: " The legal technical meaning " of 'Tapou' is 'the ready money taken for the benefit of the State " from someone, to whom Arazi-Mirié is granted, in exchange for " the right of tessaruf such as building, taking the fruits and culti- " vating.' The giving of the land by the State to the person who " asks for it is ijar (letting). The sum called tapou which is received " in ready money from the persons who ask for the land is the ijare- " i-muajele, and the share of the produce taken, 1/5th or 1/10th, or " the ijaré-i-zemin, or bedel-i-ushur, or the fixed sum taken annually " as muqata'a is the ijare-i-muejele."

These passages, and there are others to the same effect, shew that the relation between the mutessarif and the State is that of lessee and lessor. Mr. Theodotou did not deny this, but he argued that it was a lease of a special character, and that the provisions, as to hiring of land, in the Mejellé, did not apply to a lease, which had the permanent character of a tapou sened.

It is true that a mutessarif of Arazi-Mirié is a tenant under a lease, which under the Land Code as enacted in 1274 passed to his children and his children's children and so on for ever provided there was no failure of such descendant.

If the tax is paid at the time fixed, the land cannot be taken from the mutessarif and given to another (Khalis Eshref, Sec. 33) provided that he does not break any condition of the tenure which entails a forfeiture, *e.g.*, omission to cultivate arable land (Land Code, Art. 68).

It appears from Khalis Eshref (Sec. 33) that Arazi-Mirié differs from mulk property in this amongst other respects that the huquq-tessaruf do not include the rights given by the Sher' Law such as the right of pledging, gift, dedication, testamentary rights, and the right to heirs to inherit in case of death and the reason assigned for this by the learned commentator is that the land is let to the person who asks for it. It would seem that the mutessarif cannot alienate by bey, *i.e.*, by sale or barter according to the Sher' Law. Special rights are, however, given to the mutessarif of Arazi-Mirié. He can alienate by feragh and mortgage by feragh-bil-vefa but only with the consent of the official. The land passes from ascendants to descendants by intiqal.

It is also true that by the enactments contained in the Land Code the mutessarif is given express and specific rights which differentiate his position to some extent from that of an ordinary lessee.

The real question to be determined is what are the huquq-i-tessaruf on a grant of Arazi-Mirié.

It would appear that the raqabé and the huquq-i-tessaruf taken together constitute the full *dominium* or *proprietas* as understood in the Roman Law. The *dominium* as was conceived in Roman Law includes the following rights:—

1. *Jus habendi* —the right of having or claiming as one's own.
2. *Jus possidendi*—the right of possessing.
3. *Jus utendi*—the right of using.
4. *Jus fruendi*—the right of taking fruits, and;
5. *Jus abutendi*—the right of alienating or destroying.

Now the right of tessaruf does not include the right of alienating, unless the mutessarif gets permission, it does not include the right of destroying because he cannot even use earth to make bricks without permission. (Land Code, Art. 12). Neither has the mutessarif the *jus habendi*, *i.e.*, of claiming the property as his own, because the raqabé, *i.e.*, the thing itself and the (milkiyyet) mulk interest in the land belong to the State.

The mutessarif has the *jus possidendi* and *jus fruendi*, *i.e.*, the right of possession and the right of taking the fruits, except so far as he is

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bound to give his tithe to the State, but neither of these rights would enable him to make a chain of wells. If the mutessarif can make the chain of wells he proposes to make, it must be because his right of user of the land enables him to do so.

Now the rights of user are very rigidly set out in the Land Code. If it is arable land the mutessarif must cultivate it (Art. 9) failure to do so may lead to forfeiture of his tenancy. Certain forest lands may be converted into arable land (Art. 19).

Land cannot be converted into a garden or vineyard without permission (Art. 28).

The mutessarif cannot build without permission (Art. 31).

One reason why these rights of user are set out is explained in Atouf Bey's Commentary to be, that it is required by Art. 454 of the Mejellé.

Khalis Eshref says it is necessary by the Sher' because the tenure of Arazi-Mirié is like a letting (Khalis Eshref, p. 133, Sec. 121).

It appears from Art. 460 of the Mejellé that if Art. 454 is not complied with the letting is bad.

Now all these requirements of the law were known to the legislator who enacted the Land Code. He knew that the relation between the State and the mutessarif was regarded in law as that of tenant and lessor. The intention of the legislator would no doubt be to create a valid and good tenure, a grant which was good in all respects by the sacred law, and for this purpose to set out clearly what use the mutessarif might make of the land. Certain uses are set out. The intention of the legislator must have been that the mutessarif is entitled to make such use of Arazi-Mirié as is declared in the Land Code and no other. Therefore his *jus utendi* does not give the mutessarif the right to dig wells, and there is no ground on which he can be granted the declaration which he claims.

The laws about Mines and the Wells Law, 1896, do not seem to have any bearing on the question and they certainly do not take from the Government any rights which they possessed previously in respect of the matter under consideration.

I have based my judgment on the principles of the law which governs the nature of the tenure of the mutessarif of Arazi-Mirié, and the principles of the Sher' by which alone the true meaning of the law can be ascertained.

It has not escaped my notice that there are other arguments and other considerations which support the conclusion at which I have arrived.

I agree with the judgment of the learned President of the District Court that a right to do what is claimed by the Plaintiffs might ruin the whole as Arazi-Mirié. There might be a strip of land owned sufficient only for the wells, which would be utterly destroyed if the chain of wells were made through it. It is not unlikely that this would frequently be the case if the Court found that the mutessarifs were entitled to do what is claimed. In such a case Art. 533 of the Mejellé would seem to be conclusive.

If there is any building involved in the chain of wells as the wells are not necessary for the user of the land it would appear that even the Tapou Memour could not grant leave to make them (Land Code, Art. 32).

It may be thought that this interpretation of the law will work hardship on the possessors of Arazi-Mirié lands. But the law is quite clear.

The authorities cited for the Plaintiffs support the view we have taken. Moreover any other interpretation might cause grievous harm to the community.

In a country like Cyprus, where there is so often a dearth of water, it would be a great misfortune to the community if a few people could get control of the main source of the summer water without any obligation to supply the needs of the community or any restriction in the price they might charge or any regulation to prevent that lamentable waste which is sometimes seen when individuals or communities have an uncontrolled right over water.

FISHER, J., concurred.

Appeal dismissed without costs.

The case of *Mehmed Nihad Salih v. Effendizade Osman Noureddin* reported in pages 63-64 of the original edition is no longer of any importance.