within the time specified, which, as the interval chosen may be of indefinite latitude, might be very difficult for him to do."

I expressly omit from consideration and except from this portion of my judgment such cases as *Onley* v. *Gee*. The decision as to the validity of the charge in that case and of the conviction thereon has no bearing on this application. I confine myself to saying that to charge a defendant with an offence which imposes on him the hardship of accounting for no less a period of time than four and a half years is unreasonable and oppressive, and so far as I am aware without authoritative sanction.

Conviction quashed.

[STRONGE, C.J., AND FUAD, J.]

PERICLIS GEORGHIOU, *Plaintiff-Respondent,*

v.

1. PAROUSIA MINA
3. EFTHYMIA KYPRI } *Defendant-Appellants.*

(*Civil Appeal No.* 3548.)

Water — Owned as mulk — Right of other persons to take such water for purpose of sale.

A claim of right to take water for the purpose of sale from water, the mulk property of another, is unsustainable.

This was an appeal by defendants 1 and 3 from a judgment of the Larnaca District Court (Dervish, D.J.) dated 3rd January, 1936. The plaintiff-respondent claimed to be by registration the owner of certain running water at Alethriko village and sought an injunction restraining the defendants from taking water therefrom for purposes of sale in Larnaca. The appellants alleged that the only water to which the respondent was entitled was the overflow from a tank in Alethriko village after the wants of the inhabitants and public had been supplied, and they claimed a right to take water from the spring at Alethriko village as had, they alleged, been done by the inhabitants of that village and the public at large from time immemorial. The appellants also counterclaimed that the respondent's registration be amended, if necessary, so as to limit the rights of the respondent to the overflow from the said tank. The trial judge granted the injunction asked for against defendants 1, 2 and 3 without costs. The judgment was silent as to the counterclaim. Defendants 1, 2 and 3 appealed and there was a cross appeal by the plaintiff to vary the judgment by dismissing the counterclaim and allowing plaintiff the costs of the trial.

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PERIKLIS GEORGHIOU
v.
PAROUSIA MINA AND EFTHYMIA KYPRI.

Nicolaides for appellants:

The plaintiff's claim to this water is not made in right of any lands possessed by him, but is a claim to the exclusive ownership of the water by itself. Onus was on the plaintiff to prove such ownership. *Haji Loizo Haji Stassi* v. *Ahmed Vehim*, 1 C.L.R. at p. 103; *Ibrahim* v. *Nicola*, 5 C.L.R. at p. 91. Mejellé Art. 1239. Submit that by plaintiff's cochan the only water he owns is that which overflows from the tank. Mejellé Arts. 1234, 1235, 1251 and 1266—1268. Plaintiff has not proved any right to the lands between which the stream flows: *Haji Ahmed* v. *Abdul Kadir Hassan*, 7 C.L.R., p. 47. I do not rely on *ab antiquo* user at all. The right claimed is that of any person in the island to take the water to drink and Art. 1267 of the Mejellé justifies the taking of water to sell for drinking. There is no right of appeal as to costs.

Themistocles (with him *Aradipiotis*) for respondent:

At the trial the case for appellants was based on an *ab antiquo* right to take the water for sale. Here the case they put forward is that of overflowing water which anybody has a right to take under the Mejellé. As to costs, submit learned judge at trial did not exercise his discretion judicially. That plaintiff's acquiescence in defendants' wrong doing for over ten years tended to mislead defendants to continue their wrongful user is not a ground for deprivation of costs. The Court's duty in directing payment of costs is prescribed by *H. Ekaterina H. Timothi* v. *Polycarpo H. Timothi*, 6 C.L.R., p. 45. Halsbury (1st Ed.) Vol. 23, p. 179. Plaintiff here is guilty of no misconduct.

The judgment of the Court delivered by the Chief Justice was as follows:—

STRONGE, C.J.: In this case the L.R.O. certificate and the evidence of the L.R.O. Clerk taken in conjunction therewith establish the fact that the plaintiff is the owner of the whole of this water as mulk property.

It was, consequently, incumbent upon the appellants to prove to the satisfaction of the trial Court that they had a legal right to do the acts complained of by the respondent. The respondent admits a right on the part of appellants as well as of the other inhabitants of Alethriko village to take water from his running water for their own domestic or household purposes such as drinking, washing *et cetera*.

The appellants, however, now contend that they and anybody else, no matter from what locality, have a right under the law to take water for drinking purposes which,

according to their submission, includes the taking and selling of the water anywhere for drinking purposes. This contention, it is to be observed, is wholly different from that advanced by them at the trial where they based their right to take and sell the water in question upon an *ab antiquo* user by the inhabitants of Alethriko village alone to deal with the water in this manner. This latter contention has been expressly abandoned by their advocate in arguing this appeal. The sole question, therefore, which we have to consider, is whether under any law in force in the Colony any person can claim and successfully maintain a right to take from water which is the subject of mulk ownership, water for the purposes of sale. In our opinion, no such right exists. The sections of the Mejellé to which we were referred by Mr. Nicolaides have no application, in our judgment, to cases where the water involved is the subject of mulk ownership. They clearly deal only with cases in which the water involved is " moubah ", *i.e.* free or common; and they show how property in water of this description can be acquired. Even if certain sections of the Mejellé may possibly be held to be applicable to privately owned mulk water and to authorize a person to drink and water his animals thereat and to take water therefrom in a vessel to his dwelling or garden, these sections cannot, in our judgment, be interpreted as authorizing or contemplating the taking of such privately owned mulk water and selling it.

As to the counterclaim: In our opinion no alteration of the judgment is necessary. The counterclaim asked for rectification of the register. No such rectification was ordered by the learned trial judge and this is in effect a dismissal of the counterclaim. With reference to the cross appeal touching the respondent's costs at the trial, the view we take is that the grounds given by the learned trial judge were not a sufficient or proper exercise of his discretion, and we therefore vary his judgment on this point by allowing the respondent his costs in the Court below.

Plaintiff to have his costs of this appeal measured at £3. 3*s*. plus his out-of-pocket costs.

Appeal dismissed. Cross appeal allowed to extent of varying judgment so as to allow respondent his costs at the trial.