[SMITH, ACTING C.J. AND TEMPLER, ACTING J.]

SMITH, ACTING C.J. & TEMPLER, ACTING J. 1890. March 22.

HJ. LOIZO HJ. STASSI AND OTHERS *Plaintiffs*,

v.

AHMET VEHIM AND OTHERS *Defendants*.

WATER RIGHTS—PUBLIC RIVER—WATER USED FOR IRRIGATION—RIGHTS OF JOINT OWNERS—PARTITION—MEJELLE, ARTICLES 1238, 1265, 1248, 1269, 1121, 1122, 1114, 1115, 1175, 1176.

The water of a public river as defined by Article 1238 of the Mejellé was conducted into a channel and thence to the lands of the village of Akadja. The water of this channel had been customarily divided between the Christian and Moslem inhabitants of the village in a certain and definite way.

The plaintiffs. the Christian inhabitants of the village, brought an action claiming that the water should now be divided in proportion to the extent of land held by them and the defendants, the Moslem inhabitants of the village.

HELD: That when the water of the river entered the channel it became the joint property of the Christian and Moslem inhabitants of the village of Akadja, or such of them as held lands ab antiquo irrigated by the water of this channel: that the plaintiffs might be entitled to have a partition of the enjoyment of the right of user of the water, but that there was no sufficient evidence to show that a partition made in proportion to the extent of lands held by the Christian and Moslems respectively would be a fair and equitable division.

APPEAL from the District Court of Nicosia.

The facts and arguments sufficiently appear from the judgment of the Supreme Court.

Lascelles for the appellants.

Pascal Constantinides for the respondents.

Judgment: This is an appeal from a judgment of the District Court of Nicosia regulating the rights of the Christian and Moslem inhabitants of the village of Akadja, respectively, to the user of certain water for irrigation purposes. *June 7.*

The facts of the case are very simple and may be stated in a very few words. Near the village of Meniko the water of the Akadja river or "Maroulina" is conducted to the lands of the villages of Akadja and Meniko for irrigation purposes, the water being equally divided between the inhabitants of the two villages: that is to say the villagers of Meniko taking the water for four days and nights, and the villagers of Akadja taking it for four days and nights.

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It is not quite clear from the file of proceedings whether there is one channel only or two separate ones. It is alleged before us that there are two channels, but it is not material for the purposes of this case whether there are two channels or one. Amongst themselves, the villagers of Akadja have ab antiquo divided the water in the following manner, viz.: the Christians have taken it for three days and nights and the Moslems for one day and night.

The plaintiffs in the present action, the Christian inhabitants of the village of Akadja, claim that the water should be divided in proportion to the irrigated lands held by them and the Moslems respectively, and that the latter should be restrained from taking the full twenty-four hours of water they have been in the habit of doing.

It was alleged on their behalf at the settlement of issue, that the Christians had acquired by purchase from the Moslems the greater part of the lands formerly held by them, that the right to this water was a right attached to the land and consequently passed to them with the lands they had purchased, and a previous case heard before in the District Court between some of the present plaintiffs and defendants was referred to as establishing this assertion.

For the defendants it was contended that this water had ab antiquo been divided as above mentioned, and that this ancient division ought to be respected, and an Ilam dated 1183, was referred to as establishing that the division had been made long anterior to that date. The decision establishing the contention of the plaintiffs, that the right to use the water was a right attaching to the land, was not admitted, it being practically denied that this right was attached to the land. It was also contended on behalf of the defendants that they had had an uninterrupted right to the use of this water for over ten years, and thus acquired a prescriptive right to the water.

For the plaintiffs in reply, the right of prescription was denied, and it was contended that this water was river water, and that the right to use such water was a right by law attached to the land not to any person, and that the wording of the Ilam would strengthen the plaintiffs' contention in this respect.

The following issues were thereupon fixed:

1. Does the right of irrigation by this water belong to the land and so pass with the land?

2. Plaintiffs to prove their allegation as to the amount of land watered by this water held by them and by the defendants.

3. What effect has the Ilam of the defendants on this claim?

4. Does the right of prescription relied on by the defendants apply to this case?

With regard to these issues only one of them, viz. No. 2, seems to raise any question of fact between the parties. And with regard to this, the parties in the course of the case agreed to a statement of the amount of lands irrigated by the water in dispute held respectively by the Christians and the Moslems.

It is to be observed that no question was raised at this time as to what the ab antiquo custom of dividing this water had been: nor does such a question appear to have been at any time raised during the course of the action in the District Court, though it is manifest from a perusal of the file of the proceedings that the defendants were maintaining that the water had always been divided simply between Turks and Christians without any reference to the quantity of land they respectively held. In arguing the case for the plaintiffs on appeal, however, Mr. Pascal alleged that from time immemorial the water had been divided between Christians and Turks in proportion to the land they held, and that until about three years ago, whenever a Christian acquired irrigated land from a Moslem by purchase, he acquired also the right to water formerly used by the Moslem vendor, and that it is only since the last three years that the Moslems have been insisting on taking a full twenty-four hours of water.

No such contention was made in the District Court, nor was there any evidence put before the Court, to show that the water had ab antiquo been divided on this principle. On the contrary, the plaintiffs did not allege any ancient custom of division at all, but appear to have relied on their allegation that this water is river water, and that the right to make use of such water is a right attached by law to the land, and not a personal right. If the ab antiquo custom of dividing this water be as stated by Mr. Pascal, it is a very remarkable circumstance that it was not mentioned at the hearing before the District Court, where the defendants were maintaining that the water had always been divided simply between Moslems and Christians, without regard to the quantity of land they held. Mr. Pascal's contention with regard to the custom, appears to us to be unsubstantiated by any evidence.

At the hearing of the action a considerable argument took place as to what the nature of the property of the inhabitants of Akadja in this water was, the plaintiffs

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maintaining, as above stated, that the water was river water, and the right to use it for irrigation purposes was attached to the lands irrigated by it, and the defendants maintaining that, when once the water entered the channel, which was the common property of the inhabitants of Akadja, it became their absolute property, and, as the Ilam produced by them showed, had ab antiquo been divided in a specific manner and that that division should continue.

Two witnesses were called on each side. The evidence of the plaintiff's witnesses was to the effect that within the last forty years the Christians had purchased from the Moslems over 400 donums of land, whilst only about 5 or 6 donums had been acquired by Moslems from Christians. Owing perhaps to the view the defendants took of their legal position there was but little cross examination on this point; nor was the evidence material to the case in the view taken by the Court, that the water runs with the land. If the water runs with the land it matters not how or when the land was bought or sold, but it would be sufficient to ascertain what land was entitled to be irrigated from this water, and what amount of water was entitled to be taken for its irrigation.

The evidence of the defendants' witnesses was largely directed to the mode in which the Moslems divided their twenty-four hours of water inter se, and therefore does not appear to be very material, except as tending to elucidate the view taken by them of their property in this water.

One of them, Ahmet Kiamil, however, gives evidence of some importance as to what the customary division of the water has been. He states that lands have been purchased by Moslems from the Christians, and by the Christians from the Moslems, and that on such purchases the lands have not continued to be irrigated with the water which the vendor had been entitled to make use of, but have been irrigated with the water to a share of which the vendee was entitled. For example, if a Christian had purchased land from a Moslem that land would, after the purchase, be irrigated within the three days and nights during which the Christians have the use of the water, and not continue to be watered during the one day and night during which its Moslem owner used to irrigate; in other words, that the right to the water has not been considered to be attached to the land. With the exception of this evidence and of the Ilam put in by the defendants, there does not appear to us to have been any evidence bearing on the questions at issue in this case.

The District Court considered that the Ilam in no way carried out the defendants' contentions and decided that "the water runs with the land" and that "the plaintiffs are entitled to the relief sought in this action," and on a statement being put in and agreed to by both parties to the action, showing the amount of irrigated lands held at the present time by the Turks and Christians respectively, the Court drew up a judgment ordering a division of the water between the Turks and the Christians in proportion to the quantities of land held by them respectively, the Christians being declared to be entitled to eighty hours out of the ninety-six and the Turks to the remaining sixteen. No decision appears to have been given on the issue as to prescription. No mention was made of this defence at the hearing, nor indeed does it appear to have been mentioned after the settlement of issue.

Against this decision the defendants appealed. It was contended again on their behalf that the ab antiquo custom of dividing this water, as established by the Ilam, should be respected, whilst for the respondents it was maintained that this was river water, and that the right to make use of it for irrigation purposes was a right attached to the lands irrigated by it, that the ancient custom was, for the water to be divided between Christians and Turks in proportion to the amount of irrigated land held by each respectively, and that the Ilam of the defendants bears out the plaintiffs' contentions as to the right to the use of the water being a right attached to the land.

As considerable misapprehension seems to have prevailed, both at the hearing in the District Court and certainly on the parts of the respondents to the appeal in the Supreme Court, as to the effect of this Ilam, we will in the first place deal with it and consider what is its effect.

It is clear from a perusal of the note of the President of the District Court, that the Court considered that this Ilam made a division of the water between the Turks and Christians.

The note runs: "The Ilam is read. It in no way carries out the contention of the defendants."

"The Moslems are ordered to have one day and night for watering their land by turns. For doing nothing else. For watering their land if they have any."

"A perfectly good division at the time it was made, and if the land when it changed hands took also its right to water, there could have been no need for this action, but as this did not happen *there is the same necessity for a*

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new division now as there was then. The Ilam would be binding if the conditions were constant, but *the conditions have varied,* so that the Ilam is not binding."

We have had a careful translation of the Ilam made, and it seems to us that its effect has been entirely misunderstood by the Court below. The Ilam is a judgment of the Sheri Court in an action in which certain Christians of the village of Akadja were the plaintiffs, and certain Turks of the same village were the defendants.

The Ilam sets forth that the plaintiffs alleged that water flowing from the siphon of the Korkossa mill, situated above Meniko, belongs to that village for four days and nights, and to the village of Akadja for four days and nights, that ab antiquo the Christians of Akadja take this water for three days and nights to water their lands by turns, and that the Turks take the water for one day and night to water their lands by turns, that the plaintiffs complained that the defendants not being satisfied with their quantity of water, had cut the plaintiffs supply of water and watered their own lands and so injured the plaintiffs, and asked that the defendants should be restrained.

The Ilam continues. "The defendants admitted that the Christians had the right to take the water for three days and nights out of four, and this being established, the Sheri Court ordered the defendants not to interfere in future with the water of the plaintiffs."

It is not contested that this Ilam relates to the water now in dispute, and it is abundantly clear that this Ilam did not make, as the District Court considered, any new division of the water between the Turks and Christians. The Christians were, at that date, 1183, setting up an ab antiquo custom of dividing the water, alleging that the Turks were infringing that custom and asking that they should be restrained; and on the admission of the Turks that the Christians were entitled to three days and nights of the water, the Court ordered that the Turks should not interfere with the rights of the Christians to this water.

The note of the President of the District Court says that this was a perfectly good division at the time it was made, and that the Ilam would be binding if the conditions were constant, but the conditions have varied, so the Ilam is not binding.

There is nothing in the Ilam which shows that this ab antiquo division of the water was made in proportion to the lands held by Turks and Christians respectively. There was no evidence whatever before the District Court to show

what the proportion of land held by Turks and Christians, respectively, at the date of that Ilam was, nor was there any evidence whatever that that proportion is different at the present day to what it then was. The total quantity of land irrigated by this water in 1183, may have been very much less than it is now; lands may have been broken up and irrigated by this water by one party or the other, and purchases and sales taken place between them; but as, owing to the nature of the case, it is impossible to discover what amount of lands were irrigated by Christians and Turks respectively, in 1183, it seems to us that the Court below were not justified in finding that the "conditions have varied" and "that therefore the Ilam is not binding."

So far as the Ilam is concerned, it appears to us to bear out exactly the contentions of the defendants that the ab antiquo division of this water has been, for the Christians to take three days and nights and for the Turks to take one day and night. As far as the evidence before the Court goes, there does not appear to be any more need now than there was in 1183, to upset the ab antiquo division of this water.

We come now to the finding of the District Court that "this water runs with the land." With regard to this, we may mention that we have obtained the file of proceedings in the former case between some of the parties to this action, which the plaintiffs in the present case said established the right they now contend for. It appears that, at the hearing of that case the advocate for the then defendants said he would admit that the right to use this water was attached to the land, and that thereupon the action was dropped in order that the present action, joining all the Turkish land-owners having lands irrigated by the water, might be brought. No judgment was given in the action and, of course, the proceedings that took place are not in any way decisive of the matter, and it is not perhaps material that we should mention the case at all, except that it was referred to in the course of the proceedings in the District Court as an authority for the proposition that "this water runs with the land."

The District Court having decided that this water runs with the land, held that the plaintiffs are entitled to the relief sought by them in this action, that is to say, that this water shall be divided between the Turks and Christians in proportion to the amount of irrigated land held by them respectively.

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It seems to us that even if the proposition that the right to use this water is a right attaching to the land irrigated by it, be well founded, it does not by any means follow that the water should be divided, as directed by the judgment, in proportion to the amount of land respectively held by Turks and Christians.

What is the meaning of the finding that "this water runs with the land?" It must mean that the owners of lands irrigated by this water, have, by virtue of their ownership, the right to use this water, or some portion of it, for irrigation purposes. Strictly speaking, only those lands which were irrigated at the time of the making of this channel, would have the right, unless similar rights have been acquired subsequently by the owners of other land in some way or other. It is of course absolutely impossible, considering the antiquity of this channel, to obtain evidence of the lands that were originally irrigated by this water, and, until the contrary be shown, it will be necessary to assume that the lands irrigated to-day have always been so irrigated. But there is no evidence whatever that by virtue of his ownership, any owner of such irrigated lands at Akadja has become entitled to any particular quantity of water, as, for instance, so many hours of water, nor any evidence that the plaintiffs or any of them are in possession of any lands to which any such rights are attached. The only thing that can be said is, that by virtue of their ownership of lands irrigated by the water of this channel, the plaintiffs are entitled to take water for the irrigation of such lands, but there is nothing to show that the plaintiffs are entitled to take this water during the twenty-four hours during which the defendants have customarily had the enjoyment of the water, any more than there is anything to show that the defendants by virtue of their ownership are entitled to take the water during the seventy-two hours during which the plaintiffs have customarily enjoyed the water. In the absence of evidence that the owner of any particular piece of land is entitled to take any particular quantity of water for the irrigation of that piece of land, the only right the owners of lands entitled to take water for irrigation purposes from this channel, possess, is to take some indefinite quantity of water for irrigation purposes; and there was no evidence whatever before the District Court to show that any land possessed by any one of the plaintiffs, which has ab antiquo been irrigated from this channel, cannot now be irrigated from it.

To hold that, because the right to use this water is a right attached to the land, therefore this water should be divided in proportion to the amount of land now held by Turks

and Christians respectively, might operate to deprive the owner of land of some portion of the irrigation rights that had always been attached to the land he holds. It is possible, as was pointed out by the appellants' counsel, that, if the Turks are only to have sixteen hours of water instead of twenty-four, the owner of lands situate at some distance from the channel, may not be able to irrigate his fields at all, or may be able to do so only partially ; that is to say, if the right attached to the land, some portion of that right may be abrogated.

There is no evidence to show whether such a result would follow or not, but it is a perfectly possible result of a division carried out as directed by the judgment of the District Court.

It does not appear to us therefore that the finding of the District Court, that the water runs with the land justifies the judgment that has been given, and we proceed to consider first what the nature of the property is in this water ; and secondly what are the respective rights of the parties with regard to it as regulated by the Mejellé. First, what is the nature of the property the parties have in this water ?

We have already stated what the facts with regard to this water are. It is admitted that this water is water diverted from the Akadja river into the channel leading it to the lands of the village of Akadja. This channel appears to be of considerable antiquity, and it is not possible to obtain any evidence as to the persons by whom it was made. As, however, it is admitted that the water flowing in it is the joint property of the inhabitants of Akadja, or such of them as have lands ab antiquo irrigated from it, we must assume that the channel is the property of the persons who have the right to take the water.

We further assume that the Akadja river, from which this water is taken, is a public river as defined by Section 1238 of the Mejellé. " Public rivers are defined to be those that are not the property of any individuals, *i.e.*, that do not flow in channels which are the private property (mulk) of a body of individuals." There was no evidence with regard to this river bed before the Court, but it is not alleged that the river is the private property of any individual, and we think we are entitled to assume that the river is a public river. By Article 1265 every person is entitled to make use of the water of a public river to irrigate his lands, and may make channels for that purpose on condition that he causes no injury to other persons ; but when once he has constructed his channel and the river water enters it, he seems to us to have reduced that water into his own

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possession and to have so become the owner of it. Article 1248 defines the methods in which property in things can be acquired, and the third of these methods is defined to be "the taking possession of a thing that is the property of nobody." When this water enters the channel the property of the Akadja people (we can omit all mention of the interest of the Meniko people, if they have any interest in this particular channel, *as their rights are not in dispute to-day*) it appears to us that the water becomes the property of the inhabitants of Akadja jointly, or of such of them as have lands which ab antiquo have been irrigated by the water of the channel. Mr. Pascal, for the respondents, contended that this being originally the water of a river, the fact that it was conducted from the river into this channel made no difference, and the same rights could be exercised over it as though it were still in the river bed. If this contention were correct, then any one who has lands that are irrigable from this *channel*, could make use of the water to irrigate his lands whether he were an inhabitant of Meniko or Akadja or not, but it is admitted on both sides that the sole right to use this water is vested in the inhabitants of these two villages.

It appears then to us that this water is the joint property of the Moslem and Christian inhabitants or such of them as have lands that have ab antiquo been irrigated by the water of this channel. We say such of them as have lands that have ab antiquo been irrigated by the water from this channel, because it appears to us that the law regards this as a right not attaching to an individual simply, but attached to him in virtue of his ownership of lands that have been irrigated by this channel.

Article 1269 of the Mejellé seems to show that this is the correct view of the law.

The literal translation of Article 1269 from the Turkish text runs as follows: "A person who has a share in a water-course held in partnership cannot open from it a river, that is to say, a channel or ditch, without the consent of the others (*i.e.*, other partners). He cannot change his ab antiquo turn of taking the water. *He cannot utilize his turn for irrigating other land he may possess, not having a right to be irrigated from that river*," etc. There appears to be an error both in the Greek and French translations of this last passage, both of which run "he cannot transfer his right to the owner of land not having the right to irrigate from this channel." The Turkish text is, however, quite clear, and states specifically that one of the co-owners cannot make use of the water to water *any other land of his own* which

has not the right to be irrigated. This seems to us to show clearly that the law considers this right to be one that is not personal to the individual, but one that is enjoyed only in respect of the ownership of certain land, because if this is a merely personal right attaching to the individual, it seems to us that it could not in the least matter how he utilized his turns, but that he might irrigate any land he chose with it, but the law says distinctly that he cannot use the water for any other land but that having the right to be irrigated. But, as we have stated above, it does not seem to us to follow, that on that account alone, the water should now be divided in proportion to the amount of land held by Turks and Christians respectively. We have already stated our reasons for coming to that conclusion, and need not recapitulate them here.

As the fact that these rights are enjoyed by plaintiffs and defendants by virtue of their ownership of the lands irrigated by the water of this channel, does not appear of itself to give the plaintiffs the right to have this water divided in proportion to the amount of lands held by them and the defendants respectively, have they the right to have such a division made on any grounds? This leads us to the second question we have to consider, viz.: what are the respective rights of the parties as regulated by the Mejellé with respect to such property as this? We have stated our view that this water when it enters this channel becomes the joint property of the plaintiffs and the defendants. What then are the rights of the co-owners of such a property as this? Amongst these rights is that of having the common property partitioned or divided. Different kinds of partition are provided for in the chapter of the Mejellé dealing with this subject; the partition may be voluntary (Section 1121), or made by the Court on the demand of one of the co-owners (Section 1122), it may be an absolute partition when the nature of the common property (Section 1114), admits of it, of which kind of partition there are two classes (Section 1115), or it may be a partition only of the enjoyment of the common property (Sections 1175, 1176).

It does not appear to us that this water is susceptible of either kind of absolute partition defined by Section 1115 of the Mejellé; it is impossible to divide it by any measure of capacity or weight, and we are, therefore, of opinion that, according to the law, only the enjoyment of this water is susceptible of division.

This being the case, are the plaintiffs entitled to the division they claim, and which has been awarded them by the judgment of the District Court? We have already

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stated that this judgment does not appear to us to be warranted by the finding, that the right to use the water for irrigation purposes is not a strictly personal right, but is only enjoyed by virtue of the ownership of the land irrigated by it, and no evidence whatever was adduced before the Court to show that such a partition as was directed would be a fair partition of the enjoyment of this water. The nature of the locality where the lands to be irrigated are situated, and the distance of such lands from the channel, are all matters that would have to be taken into account in making any division of this water. On none of these points was there any evidence before the Court, and though the partition ordered by the judgment seems at first sight to be fair and reasonable, it is easy to see that it may work the hardship pointed out by the appellants' counsel at the hearing of the appeal.

There has been in this case a voluntary partition, made between the plaintiffs and defendants, which appears to have subsisted without dispute for a large number of years and we think that an arrangement which has apparently worked so well for such a time is one that should not be lightly interfered with.

A voluntary partition may no doubt be set aside (Section 1188), but we cannot in this case upon the evidence before us decide that any other partition of the enjoyment of this water should be made. It would be an extremely difficult matter for a Court to make a partition in such a case as the present, which would do justice to the rights of all parties concerned, and it appears to us that if such a partition could be made, to do full justice to all persons entitled to use this water, it could only be made after a careful local investigation. As we have already pointed out, there is in this case no evidence that any of the plaintiffs, as owners of lands ab antiquo irrigated from this channel, are unable from any cause to exercise their rights of watering their lands from this channel, and we see no reason to interfere with the voluntary partition that the parties or their ancestors have made of the enjoyment of this water. If the plaintiffs are entitled to claim a judicial partition of the enjoyment of this water, they must put evidence before this Court, upon which the Court can decide what would be a fair partition of the enjoyment of this water.

This they have not done, and it seems to us to be quite impossible for the Court, upon the evidence before it, to make any such partition. There are one or two matters we wish to mention though they are not necessary to our decision.

If the view we have taken of the law applicable to this case be correct, there is nothing to prevent the plaintiffs from asking on a future occasion for a judicial division of the enjoyment of this water. Because they have not established in the present case that they are entitled to a division of the enjoyment of this water in proportion to the amount of lands held by them and the defendants respectively, they would not, in our opinion, be debarred from asking for a partition on some future occasion. Even if the Ilam of the Sheri Court could be considered as a judicial partition of the enjoyment of this water, which it does not appear to be, as no partition was asked for by the plaintiffs in that action, we are inclined to think that the judicial division of the enjoyment of a common property, such as that in dispute in the present action, might be set aside if the altered circumstances of a case, showed that it had become inequitable or inapplicable.

One other point in connection with this very difficult case we desire to mention for the consideration of the parties, though not necessary for the purpose of our decision. We think it may be questionable how far the provisions of the law contained in the Mejellé are now acted upon in regard to such rights as those at issue in this case.

It appears to us that there may possibly be a question as to whether the provisions of the law may not have fallen into desuètude, and whether local customs of dealing with water, used for irrigation purposes, may not to a certain extent have abrogated the law. It is our impression that the partition of running water for irrigation purposes is frequently treated as though it were an absolute division of the water itself, and not of the enjoyment of the water; and the water treated as the absolute property of the individual or individuals entitled to the enjoyment of it, or that the voluntary partition of the enjoyment of the water is treated as an absolute division, even in the absence of a judicial partition, so as to vest in the parties to the partition absolute and separate rights to the enjoyment of the water, which cannot afterwards be set aside. If that be a correct view of the local custom, it would appear that there has been a partition of this water between the Christian and Moslem inhabitants of Akadja, or such of them as have lands irrigated by this water, and that the water so divided between them is the absolute property of such Christians and Moslems respectively. Mr. Pascal says that if this be the case, then this water is mulk, that it should be registered, and a kochan given for it. The water so divided may become mulk, but it does not follow that it need be registered. It is not every kind of mulk property that requires registration, and after enquiry

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we have been unable to find any law or regulation which requires the registration of water rights. It is true that water rights are registered in the books of the Land Registry Office, but apparently there is no authority requiring the Land Registry Officials to register these rights, or the persons possessing them to have them registered.

It is difficult to see, indeed, how in the present case these rights could be registered, assuming that this water, and not the enjoyment of it, is to be treated as though it were absolutely divided between the Christian and Moslem owners respectively. No individual whether Christian or Moslem has any definite share in the water; his share in the water may be augmented or diminished day by day, according as the number of proprietors of irrigated land is increased or lessened, and thus no individual has any share of water of which he can dispose. These however are points not necessary to be discussed for the purposes of this judgment. We have no evidence before us as to what the local custom of dealing with these water rights is, and we do not give any decision as to whether the law contained in the Mejellé has been to any extent abrogated or altered by such custom.

It is only necessary for us to decide to-day that the plaintiffs have not established their right to have such a division made of the enjoyment of this water as they claim in their writ of summons, and therefore this appeal is allowed and the plaintiffs' claim dismissed with costs.

Appeal allowed.