BOVILL, C.J. & SMITH J.

1892.

June 25.

[BOVILL, C.J. AND SMITH, J.]

AHMET HOULOUSSI AS MOUHASSEBEDJI OF EVKAF *Plaintiff,*

v.

OURANIOS FIORI *Defendant.*

WATERCOURSE—WATER FLOWING ON SURFACE OF THE LAND—AB ANTIQUO USER—DIVERSION OF WATER FROM ITS CHANNEL BY UNDERGROUND WORKS—INJUNCTION.

The water of a spring flowing over the surface of the land had, from time immemorial, flowed in a definite course to a channel, and formed part of a vakouf water. The defendant, who was the registered owner of a portion of the water of the spring, executed certain underground works on his own land, which had the effect of diverting the water of the spring from the channel in which it had always flowed, and thus obtained the benefit of the whole water of the spring.

HELD (affirming the judgment of the District Court): That the plaintiff was entitled to an injunction restraining the defendant for making use of so much of the water as was in excess of the quantity for which he was registered as the owner.

APPEAL from the District Court of Kyrenia.

The action was brought to restrain the interference of the defendant with a certain stream of water, issuing from a spring situate at the village of Lapithos, and which the plaintiff alleged formed part of the Hyder Pashazade Mehmet Bey vakouf.

The defendant alleged that the water belonged to him, and that he was the registered owner of it, and by consent of the parties the action was tried on an issue as to whether the defendant had any title to the water.

The defendant produced a kochan, which had been issued on a village certificate, and which showed that he was registered as the owner of one measure of water. The water issued from a spring situate outside the boundaries of defendant's land, and he brought evidence to show that he had constantly made use of the water, and contended that he was the owner of it, and that the works he had carried out, and which were complained of by the plaintiff, had only increased the flow of water. He admitted that before he carried out these works the surplus water of the channel used to run down into a vakouf channel.

For the plaintiff a considerable body of evidence was produced, which established that from time immemorial the water of this spring had flowed in a definite channel, from the spot where the water broke out upon the surface to another channel, which admittedly was a vakouf channel; that the defendant had constantly endeavoured to make use of the water for irrigating his land, and had been prevented by the plaintiff's agents; that eighteen months previous to the institution of the action, by driving a tunnel into the hill side, he had entirely diverted the water of the spring from its accustomed channel, and thus prevented it from falling into the vakouf channel as it had formerly done: and that by the action of the defendant the vakouf water had been lessened to the extent of four or five measures.

The District Court found that the water formed part of the vakouf water, and gave judgment restraining the defendant from using any water in excess of the one measure for which he had obtained registration.

The defendant appealed.

The appellant in person contended that the water belonged to him.

Lascelles, for the respondent:

The defendant is only entitled to the measure of water for which he is registered. He is a joint owner with the Evkaf, and is not entitled to divert the whole of the water to his own use. Even if there is no strict evidence that the water is vakouf, it is water flowing on the surface of the land, which from time immemorial has flowed in a definite way and that use must be respected.

Judgment: In this action the plaintiff claims that defendant may be restrained from further interference with certain water known as Isfingar. *July* 11.

From the evidence before the Court, it appears that a channel of water known as Isfingar water is vakouf property. Upon, or in the immediate proximity of, land for which defendant is registered as owner, was a spring, the water of which broke out on the surface of the soil, crossed over a portion of defendant's land and from there ran down into the channel above referred to.

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Plaintiff contends that the spring is one of the sources of the Isfingar water, and that defendant and his predecessors in title have for many years endeavoured to use this water, but have been prevented from doing so.

Defendant admits that any surplus water not used by him in irrigating the land belonging to him, over which the stream flows, has customarily flowed into the Isfingar channel. He contends that he, and his predecessors in title to this piece of land, have always used so much of this water as they had need for. Some years ago defendant purchased the land from one Lambro, and on that purchase he became registered as the owner of the land with one measure of water.

Prior to this sale there does not appear to have been any registration, and this registration was effected on a village certificate.

It is admitted that defendant has recently constructed certain works, the effect of which has been to divert the course of the water, so as to prevent any of it from flowing in its ancient and accustomed course to the Isfingar channel.

There is a considerable amount of evidence that, since the defendant has made these works the water in the Isfingar channel has been diminished by as much as about four or five measures.

The District Court has held that the spring was one of the sources of the vakouf water and that defendant by his works has interfered with it; but, as he is registered as the owner of a measure of water, they have thought it right only to restrain him from using more than one measure.

Defendant appeals against this judgment, and contends that he has a right to do what he will in his own land, and that if by any works he likes to construct on his own land he can obtain water, he is entitled to use it, and he apparently considers that if he brings the water to the surface at any spot, not actually identical with that where the water naturally broke out on the surface, it cannot be regarded as the same water. Defendant, notwithstanding his admission that the water has customarily run into the Isfingar channel says that it does not belong to the vakouf, and on these grounds he says that the judgment is wrong.

We consider that the judgment of the Court below is practically right. It appears clear that from time immemorial the water of the spring in question has formed part of the water used by and belonging to the vakouf, whether it was or was not part of the water originally constituted vakouf water. The plaintiff says that this water originally all came to the Isfingar channel, and there is some evidence in support of his contention; but he raises no objection to the decision of the Court below, allowing defendant to use a measure of water, and we may for present purposes proceed on the assumption that the defendant, if he had any right to use the water flowing from the spring, was, at the best, joint owner of this water with the representative of the vakouf.

The evidence clearly establishes the fact that this is the largest right that defendant can claim in the water rising from this spring.

Under these circumstances he has constructed certain underground works in the immediate vicinity of the spring, which have had the effect of tapping the water, and bringing it out on to the surface at another spot where defendant can make a use of it more advantageous to himself. It is quite clear that the water he thus brings to the surface is identically the same as that which has from time immemorial broken out at the spring, and thence run down to the vakouf channel; and we are of opinion that the acts of the defendant constitute an interference with the accustomed use of the water, which the plaintiff s entitled to be protected against, and must, therefore, confirm the judgment of the Court below and dismiss this appeal with costs.

Appeal dismissed.