BOVILL, C.J. & SMITH, J. 1892. — *June* 28. —

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

EVAGGELI ANASTASSI AND OTHERS *Plaintiffs*,

v.

YANAKO HADJI GEORGHI *Defendant.*

WELLS—PRESCRIPTIVE RIGHT TO WATER FLOWING UNDER THE SOIL—MEVAT LAND—WELLS DUG BY PERMISSION OF STATE—MEJELLE, ARTICLES 1270, 1281, 1282 AND 1291.

No one acquires a prescriptive or other right to water flowing underground, until he has reduced it into possession by storing it in some tank or receptacle, whence it ceases to flow or filter through the soil.

The plaintiffs had enjoyed the user of water filtering through the soil into wells which had existed ab antiquo. Some of these wells were dug on uncultivable land. The defendant sunk wells on land of which he was the registered possessor, which stopped the flow of water to plaintiffs' wells.

HELD (affirming the decision of the District Court). That the plaintiffs had no cause of action against the defendant.

Article 1282 of the Mejellé applies to sources of water acquired by a person on mevat land, as defined by Article 1270, by permission of the State.

APPEAL of the plaintiffs from the District Court of Kyrenia.

The plaintiffs alleged that they were the owners of a chain of wells situate near to the village of Lapithos, from which they obtained water for the irrigation of their lands: that the defendant had by digging wells upon land in his possession, caused the water which formerly filtered through the soil into the plaintiffs' wells to flow into the wells which he had dug, and thus deprived the plaintiffs of the use and enjoyment of the water of the wells, which they had been accustomed to use for many years, and they claimed that the defendant should be ordered to fill up the wells he had dug. The District Court found that the defendant had, by digging wells on his own (arazi) land, stopped the flow of water to the plaintiffs' wells, and that the defendant has a right so to do, under Article 1291 of the Mejellé, and the plaintiffs' action was dismissed.

The plaintiffs appealed.

Pascal Constantinides for the appellants. Article 1291 applies only to wells sunk on mulk lands, and, therefore, has no application, to the present case. The evidence in this case is that the plaintiffs' wells were sunk in "uncultivable land," *i.e.*, mevat; and plaintiffs are entitled to protection, under Article 1282 of the Mejellé.

Artemis for the respondent. The spot where plaintiffs' wells are dug is not mevat within the definiton given of the word, inasmuch as it is proved, that the voice of a person at the village can be heard at the spot where the wells are situate; and plaintiffs' wells have no protection against the acts of defendant on his own land.

July 6.

Judgment: In this action the plaintiffs appeal against the judgment of the District Court of Kyrenia dismissing their claim, that the defendant shall be ordered to fill up certain wells he has dug, and to desist from the use of a channel passing across plaintiffs' land.

Plaintiffs complain that defendant by digging wells has drawn the water from wells of which they have had long ownership and enjoyment.

Plaintiffs have been accustomed to obtain water from certain wells. The allegations as to the number of these wells, the nature of the land on which these wells are situate and as to the time during which the plaintiffs have had the enjoyment of this water, are somewhat conflicting. For the plaintiffs it was at first alleged, they owned two wells, which were dug in arazi mirié which the plaintiffs are the possessors. The defendant admits the plaintiffs had two wells, but denied they were on land of the plaintiffs, and said they were on his, defendant's, land, and it was then admitted on behalf of plaintiffs that the land was not theirs; but it was alleged that plaintiffs had used the wells for many years past.

The first witness for the plaintiffs says in effect, that plaintiffs have to his knowledge, used the water from their wells for 45 years: he says that "some of the plaintiffs' " wells are dug in the land of "others."

The plaintiff Evaggeli states in evidence:

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"We have had it (the water) from our grandfather's time." He says nothing about the position of his wells, or the nature of the land in which they are.

The plaintiff Kyriako says, "Our wells are on land which "has never been cultivated and cannot be—it is rocky." It (the water) "has run as long as we can remember." "We did not dig any new wells near our old wells. Our "wells are three now." Our old "head well has not been changed."

The witness Athanassi says the water has always run as long as he can remember, and apparently referring to the site of the wells he says, "The land is all rocks and not cultivable."

The witness Petro says, "The plaintiffs' water" (apparently meaning wells) "is not in a place that can be cultivated."

On the other side the defendant Yanko states in evidence, "Plaintiffs' wells are two old wells—afterwards they "opened new wells."

"One year before I began to dig wells they had dug "some. The new wells are a little above the old ones." "The place where plaintiffs' wells are can be cultivated." "Plantiffs' head well is on Andrea's land—not plaintiffs'." There are rocks, but we plough "all round them and so "do they."

This constitutes the entire evidence on the subject above referred to, and on this evidence the District Court has dismissed the plaintiffs' claim. As we understand, the Court considered that the law affords no protection to the plaintiffs, and there was, therefore, no reason why the defendant should be restrained from obtaining water on land belonging to him, even though he drained the plaintiffs' wells in doing so.

Plaintiffs' advocate has contended before us, that the plaintiffs' wells are ancient wells dug in waste lands: that these wells form a source, and that the plaintiffs are entitled to the benefit of the provisions of Article 1282 of the Mejelle. Under this Article they would become the proprietors of a tract of land of a radius of 500 pics from their wells: and as we understand, the plaintiffs' advocate for present

purposes would make no larger demand under this supposed right, than that the defendant should be ordered to fill up his well.

A reference to the passages we have already extracted from the evidence given at the trial will show that in fact, there is no evidence which could enable the Court to decide that these wells of the plaintiffs are dug in waste lands.

Article 1282 of the Mejellé forms one of the articles of that part of the Mejellé, which purports to contain the law regulating the rights acquired by a person who has obtained the permission of the Sovereign to dig wells, make channels, or do certain other acts, on lands of the category known as "Mevat"; and it in effect provides, that when a person has with the permission of the Sovereign acquired a source of water, on lands of the category known a Mevat, then he practically becomes the proprietor of the surrounding land, to a distance of 500 pics from his source.

If we turn to the definition of Mevat contained either in the Mejellé, or in the Code de Propriete Fonciére, we find that one attribute of these lands is that they must be situate so far from a village that the cry of a human voice cannot be heard. This is no doubt a primitive definition, meaning a considerable distance, and certainly if any person is to claim the full benefit of Article 1282, or if the State is to purport to grant him such a benefit, the land over which it is to be granted must necessarily be situate, at a considerable distance from any places, where any private persons own either houses or cultivated lands.

It appears necessary to conclude, that should any source of water acquired on Mevat land with the permission of the State, be situate within less than 500 pics of any spot where cultivated land exists, or of any spot where the cry of a human voice can be heard from the village, the perimeter of 500 pics must in that direction be curtailed proportionately.

There is really not only no reason why the lands referred to as Mevat, should not be taken to be lands falling strictly within the class of land defined in Article 1270: but there is every reason why lands to which that definition does not strictly apply, should be held not to be Mevat.

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In the case before us the evidence renders it perfectly clear that the land on which these wells are situate, whether it be cultivated or not, and whether it be cultivable or not, is situate in immediate proximity to the village of Lapithos. There is no suggestion that the wells were dug by the permission of the Government, and it does not appear to us that the plaintiffs have any ground whatever for claiming the benefits, which are accorded by Article 1282 of the Mejellé.

We do not wish it to be supposed, that we decide that the wells of the plaintiffs' form a source, within the meaning of Article 1282, but we have proceeded on the assumption, that the plaintiffs' contention is correct as to the meaning of what is called a source in the Mejellé.

Outside Articles 1281 and following of the Mejellé, there is nothing in the Turkish Law that specifically protects any person in the enjoyment of water collected underground; and the only question remaining is whether a person who sinks wells, or by any means collects water underground, acquires a right against other persons, either by constructing his works, or by prescription, to compel them to allow the water to flow to the spot, where he has constructed his works, or to prevent them by works constructed outside his property, from drawing off the water he has collected.

Article 1235 of the Mejellé says, that water flowing underground is the property of no man, and from Articles 1248 to 1251 it appears clear, that such water is not regarded as the property of any one, until he has actually stored it in some vessel or tank where it ceases to flow or filter through the soil. Such water then being no man's property until he has actually stored it in some receptacle, it would appear to be a necessary conclusion, that while it is flowing underground no man acquires any prescriptive or other right over it. And that this is a correct statement of the Ottoman Law, is rendered very clear by a reference to other systems of law. The same rule prevailed in Roman Law, and although it has not been clearly laid down until of late years, it is unquestionably the Law of England.

For these reasons we think the judgment of the District Court is right.

That Court in recording its reasons for its judgment has not dealt with the plaintiffs' claim, that defendant may be

restrained from using the channel mentioned in the writ. As to this, the evidence before the Court does not justify the conclusion, that the channel belongs to the plaintiffs, or that they have any such right to the use of it, as to justify their claim, that defendant may be restrained from using it.

We are for these reasons of opinion that the plaintiffs' claim wholly fails.

The judgment of the District Court must be confirmed and this appeal dismissed with costs.

Appeal dismissed.

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GEORGHIOS AGGELIDI *Plaintiff.*

v.

FEHIM BEY TUDJARBASHI *Defendant.*

SHERI COURT—JURISDICTION—INHIBITION OF SPENDTHRIFT—NOTICE OF INHIBITION—MEJELLE, § 958.

The defendant who had been inhibited by an Ilam of the Cadi from the management of his affairs, subsequently purchased goods from the plaintiff, giving a promissory note in payment. Notice of the inhibition had been given by one advertisement of the Ilam of the Cadi in a Greek newspaper published in Nicosia.

HELD: That the Cadi had jurisdiction to make an order inhibiting the defendant from managing his affairs, but that the notice of the inhibition was insufficient, and that, therefore, the plaintiff was entitled to recover the amount of the promissory note.

APPEAL from the District Court of Nicosia.

Action to recover £7 due on a promissory note given by defendant, in payment of goods sold to him by the plaintiff. The note was dated 28th August, 1891, and fell due on the 7th September, 1891.

The defendant pleaded that he was not liable to pay the note, inasmuch as he had been inhibited from entering into any transactions by the Cadi, under the provisions of Section 958 of the Mejellé, and that the interdiction had been duly notified by advertisement published in a newspaper.