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

RAGHIB BEY HAFUZ HASSAN *Plaintiff,*

v.

GERASIMO, ABBOT OF KYKKO *Defendant.*

Dec. 28.

WELLS DUG ON ARAZI-MEVAT, ARAZI-MIRIE AND MULK LANDS—PERMISSION OF THE SULTAN AND STATE—"HARIM"—PROPERTY IN UNDERGROUND WATER—DAMAGES—"MOUBAH"—REDUCTION OF "MOUBAH" INTO POSSESSION—LAND CODE, ARTICLE 68—MEJELLE, ARTICLES 20, 125, 886, 1249, 1251, 1257, 1261, 1262, 1265, 1267, 1269, 1270, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1291, 1660 AND 1662—MIRAAT-UL-MEJELLE—MULTEKAA.

PRACTICE—POWER OF APPEAL COURT—"SUCH FURTHER OR OTHER ORDER AS THE NATURE OF THE CASE MAY REQUIRE"—GENERAL WORDS—SPECIFIC WORDS—CONSTRUCTION—FILE OF PROCEEDINGS—WAIVER—RULE 21 OF ORDER XXI. AND RULE 2 OF ORDER XXV., RULES OF COURT, 1886—CYPRUS COURTS OF JUSTICE ORDER, 1882, CLAUSE 166.

The word "harim," as used in the Mejellé, means the extent of land surrounding a well, spring or channel (kanat) granted to the person, who by permission of the Sultan digs a well or opens a spring or constructs a channel on mevat land, conveyed with the grant of the right to dig such well, spring or channel, not for the purpose of affording a protection to the water, but for the purpose of affording the grantee the free right of enjoyment of the property in the well, spring or channel conferred upon him by the authorisation of the Sultan to dig it on mevat land.

Water flowing underground is the property of no one, and can only be reduced into possession by a complete stoppage of the flowing thereof.

No action for damages will lie for the subtraction of water percolating underground through the soil.

SEMBLE: Wells cannot be dug on arazi-mirié lands without the permission of the State.

Evaggeli Anastassi and others v. Yanako Hadji Georghi, C.L.R., Vol. II., p. 64, upheld.

Hadji Loizo Hadji Stassi and others v. Ahmet Vehim, C.L.R., Vol. I., p. 91, distinguished.

The notes of the evidence of certain witnesses having been taken partly by the President and partly by the Registrar of the District Court, there being no suggestion that the notes so taken did not correctly represent the evidence given by the witnesses, the Supreme Court ordered the judgment to be set aside and the action to be remitted to the District Court for the evidence of those witnesses to be retaken. No objection was taken by either party to this order and the evidence of the witnesses was retaken in the District Court.

That the order of the Supreme Court was rightly made under Order XXI., Rule 21, and that even if the making of such order were not warranted by the wording of that rule, the parties having acted upon it without seeking to have it set aside must be held to have waived all objection to it.

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1895. *March* 26.

APPEAL from the District Court of Nicosia.

Templer, Q.A., (*Macaskie* with him) for the appellant.

Pascal Constantinides (*Diran Augustin* with him) for the respondent.

The facts and arguments sufficiently appear from the judgment.

Judgment: This is an appeal from the judgment of the District Court of Nicosia dismissing the plaintiff's action.

The claim originally made by the writ of summons, which was dated the 7th December, 1892, was for an order directing the defendant "to fill up the wells which he had dug unlawfully within the perimeter (harim) of the plaintiff's wells, by which water had *ab antiquo* run to the plaintiff's farm at Strovilo, inasmuch as excessive damage would unavoidably be caused to the plaintiff's property."

The claim on the writ appears to have been subsequently amended on two occasions. On the second occasion the claim as finally amended runs as follows: "That an order to issue against the defendant in accordance with the judgment of the Temyiz Court dated the 19th Rebuel Achir, 1287, directing defendant to fill up wells illegally dug by him within the harim (circumference) of the wells through which the water runs *ab antiquo* to plaintiff's farm at Strovilo, and further to order the defendant to fill up the wells unlawfully dug by him on certain lands at Lakatamia of or about 30 donums in extent having sides (1) Kior Mehmet Eff., (2) Ayio Nikita Church, (3) Hj. Yanni's wells, and (4) river and wells of monastery, such wells as sunk by defendant being some within and some not within the harim of plaintiff's wells and thereby causing damage to plaintiff, and plaintiff further claims costs of action."

At the settlement of issue it was alleged for the plaintiff that the defendant had sunk wells on "Government land" and on "private land": that all the wells so opened on private land were within 500 piks of the plaintiff's wells: that some of the wells on Government land were sunk on land on which the permission to sink wells had been expressly sold and granted to the plaintiff by the Government. It was further alleged that some of the wells were on land on which a Court had prohibited the defendant from opening wells 30 years ago. It appears to us that by the expression "Government land" was meant arazi-mevat, and by "private land" was meant arazi-miriè.

For the defendant it was alleged that the wells were sunk on lands on which he had a legal right to sink them, that he had sunk no wells on "Government land" unless the

river bed be considered to be "Government land": that with regard to the permission to sink wells, relied on by the plaintiff, it is invalid: firstly because within the boundaries mentioned in it the lands of other persons exist, and that permission could not be given by the Government to the plaintiff to sink wells on these lands: secondly because it was given by a Mudir who could not legally give it: and thirdly because it was in terms a permission to sink wells in the river bed, and that the river bed is not mevat and such permission could not, therefore, be given. It was also alleged that the permission had been granted to the plaintiff 30 years ago, and contended that as he had not made use of it, he had thereby lost his rights under it.

With regard to the judgment of the Court mentioned by the plaintiff, it was contended for the defendant that it had nothing to do with the present case. It was further alleged that none of the plaintiff's wells had been sunk on mevat land by permission of the Sultan, and that consequently he had no right to claim the perimeter of 500 piks. There is a further allegation on behalf of the defendant, that within the boundaries mentioned in the permit above referred to, "he" has not sunk any wells; but we do not understand whether the word "he" refers to the plaintiff or defendant, probably the latter. The defendant further denied that any damage had been caused to the plaintiff.

On these allegations the following issues were fixed and agreed to by both parties as representing the questions at issue between them:—

1st. Does the judgment of the Temyiz Court affect the wells recently dug by the defendant?

2nd. Are any wells of the plaintiff on mevat lands?

3rd. Has the plaintiff any wells sunk in the river bed to which the permit refers?

4th. Has the defendant a right to dig wells on land mentioned in the permit?

5th. Have the wells recently dug by the defendant caused damage to the old wells or the new wells of plaintiff?

On these issues the case proceeded to trial and on the 20th January, 1894, the District Court (Izzet Effendi dissenting) gave judgment for the defendant.

The plaintiff appealed against this judgment, his appeal coming on for hearing on the 9th April, 1894. A preliminary objection was made on behalf of the appellant, that portions of the notes of the evidence of the witnesses had not been taken down in the handwriting of the President of the Court, as required by Section 166 of the Cyprus Courts

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of Justice Order, 1882, and that there was, therefore, no file of proceedings before the Supreme Court. We came to the conclusion that the provisions of Section 166 of the Cyprus Courts of Justice Order, were imperative and not directory, that it was not open to the parties to waive them, and we directed the judgment to be set aside and the action to be remitted to the District Court for the evidence of those witnesses only to be retaken the notes of whose evidence appeared to be in the handwriting of the Registrar. In giving judgment the Court said: "We consider that "the enquiry ought, so far as possible, to be confined "to the evidence of these witnesses, though of course it "may be that on their examination some further facts "may be elicited, which one party or the other should be "allowed to meet with the evidence of some witness who "was not called before. Unless this be absolutely neces- "sary, however, in the interests of justice, we are of opinion "that it should not be allowed, and that so far as is possible "the further hearing should be merely for the purpose of "obtaining the proper record of what the witnesses pre- "viously examined have already stated."

The order of the Court was made on April 14th and on the 11th July the action came on again for hearing in the District Court pursuant to the order. At the outset of the hearing it was proposed by one of the learned counsel for the plaintiff, according to the Judge's note, "that the "evidence of the witnesses be read over to them: that the "part written by the Registrar should be written by the "President, each witness to be asked if that is his evidence "and, if necessary, other questions to be allowed."

The adoption of this course was assented to by the defendant's counsel, and the evidence of those witnesses which had previously been taken down by the Registrar was now taken down by the President of the Court.

A few new questions were put to some of the witnesses, and at the conclusion of the hearing the Court reserved judgment, and on the 13th July judgment was delivered dismissing the plaintiff's claim, Izzet Effendi again dissenting.

Against this judgment the present appeal is made, [illegible] we have gone somewhat at length into the proce[illegible] which led up to it on account of the objections rai[illegible] this judgment on the part of the appellant. These ob[illegible] were that the order of the Supreme Court of the [illegible] was *ultra vires*, and one that could not be mad[illegible] the Rules of Court, 1886; and further that the [illegible] had not complied with it in retaking the e[illegible] of the witnesses in the way it had been taken.

The first objection was based upon Rule 21 of Order XXI. of the Rules of Court of 1886, which runs as follows: "The "Court by which any appeal is heard, shall have power to "draw inferences of fact, and to give any judgment and "make any order, which it shall appear to the Court, on "a perusal of the file of proceedings, ought to have been "given or made, and to make such further or other order, "as the nature of the case may require. If the Supreme "Court shall be of opinion upon hearing an appeal from "any final judgment that the action or any matter in "dispute in the action should be reheard, the Court may "order that the judgment or any part thereof be set aside, "and that the action or any matter in dispute therein be re-"heard," etc. It is argued that when the order of the 14th April was made there was no file of proceedings before the Court, and further that the general powers conferred on any Court by the first sentence of the rule are limited, in the case of the Supreme Court, by the specific words contained in the succeeding sentence. With regard to the first of these arguments, it appeared to us, if it be necessary to decide the point, as it appears to us still, that when the order of the 14th April was made there was a file of proceedings before the Court; but that inasmuch as owing to the fact of the President of the Court being physically unable through indisposition to take down himself portions of the evidence of some of the witnesses, and that these portions appeared in the handwriting of the Registrar of the Court, the file of proceedings was technically incomplete.

We say "if it be necessary to decide the point," because the words in the rule "and to make such further or other order as the nature of the case may require," do not appear to be controlled by the words "on a perusal of the file of proceedings."

The rule provides that any Court by which any appeal is heard shall have power, 1st, to draw inferences of fact, 2nd, to give any judgment or make any order which it shall appear to the Court on a perusal of the file of proceedings ought to have been given or made, and 3rd, to make such further or other order as the nature of the case may require. It was not necessary for us to peruse the file of proceedings before making the order, and, as a matter of fact, we did not peruse them. It was alleged by the appellant's counsel, and admitted by the respondent's, that portions of the notes of the evidence were in the handwriting of the Registrar, and we looked at the file of proceedings and observed that portions were not in the handwritng of the President, and it is obvious that no perusal of the notes was necessary or would have been of any advantage for the decision of the point raised.

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The expression "file of proceedings" is defined by Order XXV., Rule 2, of the Rules of Court of 1886, whereby certain documents which the rules direct to be fastened together, are termed the file of proceedings. We do not think that if, for instance, such a document as a form of application for a witness summons, or to re-enter an action for rehearing, were omitted to be filed, it could be said that there was no file of proceedings, but that the file of proceedings was technically incomplete. The forms of application are directed to be filed chiefly to secure the payment of the fee in stamps, and for audit purposes. In the present case, though the great bulk of the evidence of the witnesses was taken down as required by the Order in Council in the handwriting of the President, certain portions were not, and it appeared to us, in consequence, that the file of proceedings was technically imperfect. No suggestion was made that in consequence of this technical informality any evidence which either of the parties desired to place before the Court did not appear in the notes, or that any injustice had been occasioned to any of the parties owing to the Registrar having been permitted to write a portion of the notes for the President. It, therefore, appears to us that there was a file of proceedings, though an imperfect one, and that the order of the 14th April, was not *ultra vires* on the first ground alleged.

With regard to the second point raised, viz.: that the general words of Rule 21 of Order XXI., are controlled by the words giving the Supreme Court the power to order a judgment to be set aside and any part of the matter in dispute or the whole action to be reheard, even if we assented to the soundness of the argument addressed to us, we should hold that the plaintiff must be taken to have waived any objection on this ground, having acted upon the order without protest or objection. The order was made on April 14th, and though it is alleged by the plaintiff's counsel that it was sprung upon him by the judgment of the Court, and without his having addressed any argument to us as to the order which should be made on the technical objection he had taken, the rehearing in the District Court did not take place until the 11th July—a period of nearly three months—and it was open to the plaintiff at any time between these dates to have applied to the Supreme Court to alter, amend or vary its order of the 14th April, if for any reason whatever he wished to object to it. Not only did he not do this, but on the rehearing his counsel actually suggested the mode in which the order of the Supreme Court could most conveniently be carried into effect. No objection whatever was raised to the order at the rehearing before the District Court, and it is not until the parties have been put to the expense of the rehearing, and judgment

has again been given against the plaintiff, that the objection is raised that this order of the Supreme Court was *ultra vires*. We are of opinion, therefore, that the order of the 14th April having been thus acted on by the plaintiff without any objection, it is not open to him now to raise the objection he does. Although the decisions of the English Courts are not binding upon us here with regard to points of practice, we find that it has been decided by the Court of Appeal in England, that where portions of an order made without jurisdiction were unappealed against, the Court of Appeal declined to interfere with them.

The order of the Supreme Court of the 14th April could not be appealed against, but it was open to the plaintiff at any time between the 14th April and the 11th July to apply to the Supreme Court to amend, set aside or vary its order, and as he did not do so, but acted upon the order, he cannot now raise the objection he does.

Apart from this, however, we are of opinion that the order was one which was and could properly be made by the Supreme Court. Rule 21 of Order XXI. empowers any Court to which an appeal is made, to make any order which the nature of the case may require. In our opinion it was the intention of this rule to confer very wide discretionary powers upon the Courts for the purpose of enabling them to do justice between the parties; and when the rule goes on to say, that where on the hearing of an appeal, the Court should be of opinion that the whole of the action or any matter in dispute should be reheard, it may set aside the judgment and remit the case for rehearing, it was not intended to limit the power of making any order which the nature of the case may require. We were not of opinion that the action or any matter in dispute required to be reheard, but we were of opinion that the nature of the case required that the evidence of certain witnesses should be retaken so as to make the file of proceedings perfect in form. To do this, it was necessary to set aside the judgment given by the District Court, inasmuch as when the evidence came to be retaken the witnesses might mention new facts, and the judgment of the District Court would appear to be antecedent in date to that on which the evidence of some of the witnesses was given, and so to have been given without taking into consideration all the facts adduced in evidence. The rule of construction that general words must be construed as limited by specific words, appears to be confined to cases where the general words follow the specific ones—not to those where they precede. The rule is so laid down in a standard work of some authority—Maxwell on the Interpretation of Statutes—and appears to be supported by judicial decision.

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The words of the second sentence of Rule 21, specifically give the Supreme Court power to set aside the judgment of a District Court, and to direct a rehearing, either of the whole action or of a specific matter in dispute, where the Court is of opinion that the whole action or any specific part should be reheard; but it does not appear to us that it was the intention of the rules to derogate from the power of the Court to make any order that the nature of the case may require, even though such an order should involve a setting aside of the judgment of a District Court.

The practice of the Supreme Court has been consistently in favour of the view we hold. Cases have been decided in which at the conclusion of the plaintiff's case, a District Court has given judgment for the defendant, and in which, on appeal, it has appeared to the Supreme Court, that a case has been made out which called for some answer from the defendant. In such cases the judgment of the District Court has been set aside, and the action remitted to the District Court to hear the evidence of any witnesses whom the defendant wished to call. If the view of the Rule of Court urged upon us by the appellant's counsel in this case be correct, the only course open to the Supreme Court would have been to remit the action to the District Court for the whole action to be reheard again. It must be borne in mind that there is no jury in Cyprus, and that when an action is remitted for rehearing, it goes back to be heard by the same Judges who heard it in the first instance, and who are perfectly cognizant of the facts which have been already adduced. And where all the facts which a plaintiff has desired to lay before a Court have been heard, it seems to us that neither reason nor justice require that they should be gone through again by a Court fully cognizant of them, merely in order to found a basis as it were for the defendant's witnesses to be heard.

We do not think the intention of the Rules of Court was to render such a proceeding obligatory, and we, therefore, decide that the order of the 14th April was one which was rightly made by the Court.

Lastly, it is urged that the order of the Supreme Court was not carried out by the District Court. With regard to this, we may say that we regarded the point taken by the appellant at the hearing of the appeal on the 9th April as a purely technical one; and our object in making the order of the 14th April was to enable the imperfections in the record of proceedings to be remedied. We considered that this would be effected by those witnesses, portions of whose evidence had been taken down by the Registrar, being re-examined: that their evidence should be confined so far as possible, to that which they had given before, and that

fresh evidence should not be admitted unless new facts were brought to light on the re-examination of these witnesses, which it was advisable to allow either party to meet by calling witnesses who were not examined before. As we have already stated, when the action came on again for hearing on the 11th July, one of the plaintiff's counsel, evidently regarding the notes in the Registrar's handwriting as representing correctly the evidence given by the witnesses, proposed that this evidence should be read over to the witnesses, and that they should be asked if the statements were correct, and that the notes should be written down by the President, and if necessary either party to be at liberty to ask new questions. This was assented to, and was the practice adopted. It practically carries out the object for which the action was remitted to the District Court, viz.: to secure that the whole of the notes of the evidence of the witnesses should be in the handwriting of the President of the Court. It was urged that the plaintiff's application to have a fresh witness called was not acceded to. It appears to us that the District Court was right in its decision not to admit the evidence of this witness. It is clear that the plaintiff must have been aware of his ability to give evidence at the first hearing, inasmuch as he is named in the judgment of the Temyiz Court, and he could have called him on the first hearing had he thought it advisable: and further it does not appear to us that the necessity or advisability of calling this witness arose from any new fact brought to light on the re-examination of the witnesses. The evidence which it was alleged this witness could give, was as to the spot at which the defendant in the action before the Temyiz Court was either sinking or purposing to sink wells: but as the appellant's counsel informed us that it was immaterial for the purposes of his case where the defendant in that action was endeavouring to take water across the river by means of wells, it does not appear to us that the evidence of this witness would have advanced the plaintiff's case. Another point was, that on the rehearing, the plaintiff's counsel desired that certain facts which he had elicited by the cross-examination of one or two witnesses called by the defendant, and others elicited on re-examination of one witness, which appeared in the notes taken by the Registrar, should not again be taken down in the handwriting of the President. With regard to this, it seems to us that the Court acted on what the parties agreed to do at the commencement of the rehearing. If either party was to be allowed to infringe the agreement, it appears to us that the only course open would have been to examine the witnesses afresh, when, no doubt, the parties of the Court would have taken care to see that every material fact that had been deposed to before should again appear

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on the notes. The witnesses in question admitted having made these statements before, and it appears to us that the Court was perfectly justified under the agreement made by the parties at the commencement of the rehearing, in recording afresh all the evidence which originally appeared in the handwriting of the Registrar.

There does not appear to us the least reason to suppose that every fact which the parties at the conclusion of the first hearing in the District Court, either considered material or desired to lay before the Court, is not now before the Court in the handwriting of the President, as required by Section 166 of the Cyprus Courts of Justice Order, 1882. This being so, we should be very loth indeed to yield on any technical grounds to the argument advanced on behalf of the appellant, which would simply have the effect of putting the parties to the grievous expense of having the whole of the evidence of the witnesses reheard again.

We have come to the conclusion that there exist no technical grounds which prevent us giving our decision on the various points which the parties have brought before the Court for a decision.

It was also contended for the appellant that the judgment now appealed against was based only upon the evidence of those witnesses whose evidence was retaken. This we cannot admit. The Court by which the judgment was given was the Court the members of which had heard the case from beginning to end; the notes of the evidence of all the witnesses was before the Court; the Court took time to consider its judgment, and having done so, came to the conclusion that the judgment originally given was correct, and gave judgment to the like effect accordingly.

Having now disposed of the technical objections to the judgment, we proceed to consider the case on its merits.

The circumstances which led to the institution of this action appear to be shortly as follows. The plaintiff is the owner of a line of wells by which water is conducted to his farm at Strovilo. At the time when this action was instituted (the 7th December, 1892), this line of wells, so far as they were connected, appears to have commenced at a spot marked G. on the plan marked Y. The defendant is the owner of an old line of wells, lying for the most part on the opposite side of the river to those of the plaintiff, but crossing the river a long way to the south of the plaintiff's wells, and extending up to a point marked X. on the plan. The acts of the defendant of which the plaintiff complains appear to be the sinking of a number of wells which seem to connect with the defendant's old line of wells at a point P., and thence proceed to a point O. on the river bank. According to this plan there appears to be no well in the

river bed, but the wells appear again on the opposite side of the river and then branch off into two different directions. One line follows more or less the course of the river, connecting with the defendant's old line of wells again at a point marked V., the other line proceeding towards the south-east, and terminating on the brink of an argaki or channel at a point marked T. The plan to which we have referred was made on the 27th July, 1893, upwards of seven months after the institution of the action, and counsel are agreed that at the date of the action, the line of wells following the course of the river and joining the defendant's old line of wells at V. had only been made up to about the piece of land shown on the plan as the land of Hadji Lenou. There is no evidence as to when the line of wells O. R. S. T. was constructed, nor have we been able to discover that any evidence as to this line of wells was given. We can find no evidence as to the distance existing between any one of the wells from O. to T., and any of the plaintiff's old line of wells G. H. If this line of wells existed at the date of the institution of the action, we presume the plaintiff desired to complain of it, inasmuch as he states in evidence that his general contention is that the defendant has no right to construct wells on his side of the river: but there is nothing on the file of proceedings to show whether he does actually complain of it or not.

We may observe here that this case would have been much simplified if a plan had been prepared showing exactly the line of the plaintiff's wells and those of the defendant at the date of the institution of the action. Such a plan so prepared, and agreed on by both parties, would have been of great assistance to the Court in enabling them to understand exactly what the plaintiff complained of.

Instead of this having been done, no less than three plans appear to have been produced, two on behalf of the plaintiff, and one on behalf of the defendant. The first plan put in on behalf of the plaintiff has not been placed before us, and it is consequently difficult to follow the examination in chief of the witness who made it. The plan marked Y. is admitted to be a correct representation of the locality, and we shall for convenience' sake refer to it alone.

The case presented for the plaintiff before the District Court, and which was attempted to be established by evidence was shortly as follows:—

1st. That the wells recently dug by the defendant were dug at or about the same place where it was alleged he or his predecessor had been prevented from digging wells by a judgment of the Temyiz Court given on 19th Rebuel Achir, 1287; 2nd, that the wells were dug within the boundaries mentioned in the permit given to the plaintiff in

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1279 by the Mudir of Dagh; 3rd, that some of plaintiff's wells are on arazi-mevat, or land that was once arazi-mevat, and consequently entitled to the protection prescribed in the chapter of the Mejellé concerning wells, etc., which are dug on mevat lands with the permission of the Sultan; and 4th, that the plaintiff had sustained damage owing to the defendant's acts.

The evidence for the defendant was directed to show that the spot where the wells were sunk, which led to the institution of the action in the Temyiz Court, was entirely different to any place where the wells now in dispute were sunk: that all the wells recently sunk by him were situate on arazi-mirié land possessed by persons who were registered as the owners thereof: that none of the plaintiff's wells were situate on arazi-mevat, and that no damage had been caused to the plaintiff. We have been unable to discover whether it was contended for the plaintiff before the District Court that apart from the question of the protection afforded to wells sunk on arazi-mevat, similar protection was afforded by the law to wells dug on arazi-mirié. We can find no note of such a contention being then raised; and having regard to the fact that the second issue agreed to by the parties was, "Are any wells of plaintiff on mevat land?" and to the reasons for the judgment appended to the file of proceedings, from which it appears that the plaintiff's contention then was that some of his wells were on mevat land, and, therefore, he was entitled to a perimeter of 500 piks for his wells, it appears that the contention raised before us, that if the plaintiff's wells are situate on arazi-mirié he has the protection mentioned in the chapter in the Mejellé headed "concerning the harim of wells dug on mevat land with the permission of the Sultan," was not raised before the District Court.

The District Court found against the plaintiff on all these points, holding that the judgment of the Temyiz Court had nothing to do with the case, that the plaintiff's wells are not sunk on mevat lands, that the defendant has not sunk any wells in the river bed to which the permit relates, and that no damage has accrued to the plaintiff owing to the defendant's acts.

We have carefully perused the whole of the evidence adduced before the Court, and we see no reason to think that the finding of the District Court on any of these points was not justified by the evidence. With regard to the Temyiz Court judgment, it recites that Raghib Bey in his petition, alleged that in order to increase the water supply of his chiftlik, a line of wells was being sunk in a line as far as the bank of the river Pedias, and that for that purpose he had purchased from the Government the uncultivated

lands around the river, and that the Abbot of the Archangelos monastery—which is a dependency of the Kykko monastery—had likewise commenced to sink wells which would cause damage to the water supply of the chiftlik, and that although, in consequence of a dispute that had arisen, both parties had been inhibited by the Liva Mejliss from sinking new wells, yet the Abbot was again attempting to sink new wells, and he prayed that the necessary steps might be taken. The Abbot appeared before the Court, and Raghib Bey requested that he might be prevented from sinking any wells, on the ground that they would fall within the lands purchased by him from the Government above mentioned.

The Abbot pleaded that he was not intending to sink any wells on the lands which the plaintiff alleged he had purchased, but on lands which he, the Abbot, had himself purchased from private persons, and that Raghib Bey had no right to prevent him sinking the wells as they were more than 1,000 piks distant. A local enquiry was held, and the Court came to the conclusion that it was impossible to say whether damage would be caused to Raghib Bey until the wells were actually dug. It then transpired that Raghib Bey's mother was also an interested party to the action, and that Raghib Bey's interest was confined to the lands which he had acquired from the Government, and accordingly a representative was appointed to appear for the lady. A proposal was made on her behalf that she would raise no objection to the digging by the Abbot, if he undertook to fill up the wells if damage did accrue, but this proposal was declined by the Abbot.

The case thereupon proceeded. Another local enquiry was held, the persons holding which came to the conclusion that the sinking of wells by the Abbot would damage the water of the chiftlik. The permit obtained by Raghib Bey, which is the one relied upon in this action, was considered, and details given by the Abbot as to the lands on which he proposed to sink the wells, which were on lands acquired by the monastery, but registered in the name of one Hadji Yanni Hadji Sava, the boundaries of which are mentioned in the judgment. The judgment then proceeds "considering that the document produced (the permit) cannot be regarded as a Defter Khané title deed, that the limits and boundaries mentioned in it are not what they ought to have been, that upon the local examination, held upon the petition of Raghib Bey, it had been shewn that the places in which the Abbot proposed to sink wells were not the same as those mentioned in the petition, and that with regard to the question of injury, the Abbot basing himself upon a fetva, had contended that as the wells he proposed to sink were upwards of 1,000 piks distant from the chiftlik

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wells, Raghib Bey had no right to prevent him sinking them, the Court decided that as the sinking of wells on arazi-mirié with the permission of the Land Registry officer is permissible, and that it had not been shewn that the sinking of wells by the Abbot would injuriously affect the water of the chiftlik, Raghib Bey's mother should not offer any opposition to the sinking of the wells for the present, with the permission of Hadji Yanni the proprietor of the land, and of the Land Registry officer, and that in case of injury resulting, the wells should be filled up again with the permission or consent of the Land Registry officer." The judgment concludes "as the said Abbot has accepted this judgment, the Court further decides, in first instance, subject to appeal, on the necessity of the necessary measures being taken in the matter accordingly."

It appears clear from this judgment that the claim of Raghib Bey and his mother was that the Abbot was attempting to sink wells on the lands described in the permit, and that the Court found as a fact that this was not the case. That with regard to the question of damage, in case of any damage arising, the Abbot's wells should be filled up with the consent of the Land Registry officer.

We do not understand why the claim of the plaintiff in this action was based upon this judgment. If that judgment had ordered the then Abbot not to sink wells within the boundaries mentioned in Raghib Bey's permit, and if it had been proved that the present defendant had sunk wells within those boundaries, the Temyiz Court judgment might have afforded good evidence that the defendant was not entitled to do so. But the judgment itself decides nothing of the kind. Neither do we find in the judgment any expression of opinion on the part of the Temyiz Court, as was contended by the appellant's counsel before us, as to whether the plaintiff's wells then had a harim or not, or what that harim was.

The Abbot on the question of whether damage would or would not be caused, produced a fetva to the effect that as his wells were more than 1,000 piks from the wells of the chiftlik, Raghib Bey had no right to interfere with him in digging them. The Temyiz Court does not appear to have placed much reliance on this fetva, as they proceed to direct that if damage does accrue, the wells are to be filled up with the consent of the Land Registry officer. We should have supposed that the fetva was obviously correct in point of law: but we cannot deduce from it the proposition that because A.'s wells are more than 1,000 piks from B.'s, that, therefore, the latter have a harim of 500 piks or 40 piks. The word "harim" is not mentioned in the judgment, and it does not appear to us that the Court considered the question of harim at all.

The deduction that may be made from the judgment appears to us to be this, viz.: that the Court was of opinion that the Abbot's wells might be filled up with the consent of the Land Registry officer, if they caused damage to the wells of the chiftlik, no matter at what distance they were situate. No reference is made by the Court to the law on which their opinion on this point was based, and we do not think that as a proposition of law it could be supported.

The reference to the consent of the Land Registry officer is significant. It appears to make him the arbiter as to whether the wells of the Abbot should be closed or not, even if damage did accrue to the chiftlik wells. The judgment is silent as to what would be done if, notwithstanding damage was occasioned by the sinking of the Abbot's wells, the Land Registry officer did not consent to the Abbot's wells being filled up.

In the absence of such consent we do not see how the wells could be filled up under the Temyiz Court judgment.

We, therefore, think that the judgment of the Temyiz Court has no bearing on the present case.

The distance of the wells the Abbot was sinking at that time from the chiftlik wells, and the boundaries of the lands on which he was sinking them, place it beyond doubt that, as a matter of fact, they were not being dug anywhere in the neighbourhood of the point O. on the plan Y. Even if they were, the judgment is against the plaintiff, as the Temyiz Court refused to restrain the Abbot from digging wells on the lands mentioned.

With regard to the permit, whether it could be held to have any validity or not, it appears to us to be established that the wells now complained of are dug on lands which are either the property of the monastery or of other persons. The permit is a license to dig wells in the river bed, and it does not appear to us to be established that the defendant has dug wells in the river bed. There is the greatest difficulty in comprehending what the permit refers to. It purports to grant the plaintiff the right to sink wells in the river bed within a space of 30 donums within the boundaries, (1) Ayio Nikita Church, (2) Hadji Yanni's wells, (3) River, (4) Old wells of monastery, and (5) Kior Mehmet Eff. If the wells were to be sunk in the river bed it is hard to understand how the river could be a boundary. Ayio Nikita Church is situate at some distance from the river, and it is difficult to see how it could be a boundary either.

The plaintiff himself never made any effective use of it from the year 1279 down to the present day, as, so far as appears from the evidence, he has no wells sunk in the river bed. It does not appear to us to be necessary to consider the question as to whether such a permit could

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in 1279 have been validly given by a Mudir, or whether it could be an exclusive permit, as in our opinion the plaintiff has failed to establish that the defendant has infringed any right, granted to him by this permit, if it were possible to decide that he has any.

With regard to the question as to whether the plaintiff has proved that he has any wells on mevat land, we are of opinion that he has failed to prove that he has.

The line of wells from G. to H. is clearly not on mevat lands, as it is proved that the wells are dug on land purchased from Kior Mehmet Eff., and, therefore, clearly cannot be on mevat lands.

We cannot gather from the evidence before the Court when the plaintiff's wells which are marked in red on the plan Y. were constructed. It seems clear that at the institution of the action his line of wells commenced at G. The plaintiff states that he had one old well near to Ayio Nikita Church which was destroyed, and it is admitted that it had never been connected with the line of wells running from G. to H. prior to the action, but it was so connected about December, 1893, or about a year after the action was instituted. Neither is it clear under what authority the line of wells marked in red has been constructed. It cannot be under the assumed authority of the permit, as that authorises the sinking of wells in the river bed : and it seems to us that this line of wells is not situate within the land purchased from Kior Mehmet, the boundaries of which are stated to be (1) land of Abdul Kerim, (2) Mehmet Eff., (3) Arkadji and road. The plaintiff states that the road mentioned in the kochan is the first road from the channel, and this road appears to be close to the point G.

If they are within the boundaries mentioned in the kochan then, as we have said, the contention that they are on mevat land cannot, of course, be sustained.

Lastly with respect to the question as to whether the plaintiff had sustained any damage, we are of opinion that the District Court was justified on the evidence before it in the conclusion it came to, that the plaintiff had not proved that he had sustained any damage.

At the request of both parties we visited the locality where the wells, the sinking of which led to the institution of this action, are situate, and inspected the plaintiff's chain of wells, and those of which he complains. It was, of course, impossible to say as a matter of fact whether the wells sunk by the defendant would or could cause damage to the plaintiff's line of wells, though from their situation it did not appear likely that they would do so. We observed, however, some wells in course of construction by the defendant, which appeared to us to be more likely to cause

damage to the plaintiff than those which form the subject of the action. This line of wells is not shown upon the plan and we are not concerned with it in this action.

The plaintiff also appears to have extended his line of wells since the institution of the action until they are in somewhat close proximity to the new line of wells we have above referred to, and possibly he has thus precipitated the damage he apprehended, if any damage in fact has occurred. We, of course, are concerned only with the state of facts which existed at the institution of the action so far as we can discover it.

This practically disposes of the questions raised at the hearing in the District Court. The 4th issue fixed for decision was: Has defendant a right to dig wells on the land mentioned in the permit? But as we are of opinion that it has not been shown that the defendant has, as a matter of fact, sunk any wells on the land mentioned in the permit, it appears to us not material to discuss the abstract question as to whether the defendant has or has not such a right.

We proceed now to consider the arguments addressed to us by the appellant's counsel which do not appear to have been raised in the Court below. The two most important of these are: 1st, that the water trickling through the soil into the plaintiff's wells is property common to all men, "moubah" (مباح): that when it enters the plaintiff's wells it is reduced into possession and he becomes the owner, and that no one can prevent him from appropriating this water: and 2nd, that the right of harim mentioned in the chapter of the Mejellé which commences at Article 1281, appertains to wells, etc.; dug on any description of land other than mulk.

With regard to the first point, it is clear that water running underground is "moubah." Article 1249 lays down that a person taking possession of "moubah" becomes the absolute owner of it. Article 1251 says, that in order to take possession of water it is necessary that the flow of it should be entirely stopped. The article goes on to say "wherefore the water of a well into which the water percolates is not considered as reduced into possession, and if a person without the permission of the owner of the well take and exhaust the water of such a well he is not liable in damages." And further that in the case of a tank into which the water flows in at one end whilst it runs away at the other, the water of the tank is not reduced into possession.

It seems to us that this section entirely puts an end to the argument that the water collected by the plaintiff's

wells and running underground through the channel connecting one well with another, can, in the eye of the law, be regarded as reduced into possession. It was contended that the same principle must be applied to water percolating through the soil, as to water running on the surface, and reference was made to the case of *Hadji Loizo Hadji Stassi and others v. Ahmet Vehim and others*, C.L.R., Vol. I., p. 91, which was said not to be in harmony with the decision of the Supreme Court in the case of *Evaggeli Anastassi and others v. Yanako Hadji Georghi*, C.L.R., Vol. II., p. 64.

We think the considerations to be applied to the water of rivers and streams are quite distinct from those applicable to underground waters. The right to make use of the waters of rivers and streams for the purposes of irrigation are regulated in that chapter of the Mejellé which commences at Article 1262. It is clear from Article 1265 that anyone may make use of the waters of public rivers for the purposes of irrigation, on the condition that he does not injure other persons, *e.g.*, by taking all the water of the river. This must mean that any person is entitled to make such reasonable use of the water for purposes of irrigation as is not inconsistent with the rights of other persons. It is subject to the limitation mentioned in Article 1269 which, as we said, in giving judgment in the case of *Hadji Loizo Hadji Stassi and others v. Ahmet Vehim and others*, seems to show that the right to take this water for the purposes of irrigation is not a personal right, but one that is enjoyed only in respect of the ownership of land. In the judgment of the Court in that case, the Court expressed the opinion that when a person has constructed a channel from a river he has reduced the water into possession. The Court there was dealing with the question solely from the point of view of the user of the water for purposes of irrigation ; and it appears to us that whilst, perhaps, the absolute possession of such water is not acquired, so long at all events as the water continues to flow in the channel, the owner of the channel has a qualified possession. No one else could make use of the water for the purpose of irrigation, though the owner of the channel might be unable to prevent persons drinking or watering their animals at the channel, or dipping in some receptacle for the purpose of taking water out. The rights over the water in such a channel resemble the rights over water of such a natural flowing stream as is mentioned in Article 1267. The rights of irrigation from it can be exercised only by the owners of the stream, though other persons may drink from it. From one point o view it may be considered as still " moubah " ; though, as regards the right of irrigation, it may be considered as the property of those persons who own the bed of the stream.

We much doubt, however, whether the question as to whether the water in the plaintiff's wells has or has not been reduced into possession, is material to decide in the present case. Having regard to the nature of the case and the distance of the defendant's wells, the nearest of which is proved to be 600 feet from those of the plaintiff's old wells commencing at G., it seems to us that it is unlikely they could take water which had once entered the plaintiff's wells or the subterranean channel connecting them ; though it is conceivable that they might attract and take water which, but for their existence would ultimately have filtered through the soil, and so entered the plaintiff's wells. It would be an impossibility to prove that any water which had once entered the plaintiff's wells had been attracted by the defendant's wells, left the plaintiff's wells or channel and filtered through the soil into the defendant's wells. The strong probability is that the sinking of the defendant's wells, if it had any effect at all, would be to prevent water, which otherwise might have done so, entering the plaintiff's wells.

We now proceed to consider the remaining contention raised on behalf of the appellant, viz. : that the chapter in the Mejellé dealing with the harim of wells, etc., is not confined to wells dug upon arazi-mevat, but applies also to wells, etc., dug on arazi-mirié. This is really the main contention raised before us on behalf of the appellant, and it is very remarkable that it does not appear to have been advanced or even hinted at during the hearing of the action in the Court below.

It may, of course, be that the plaintiff considered it useless to raise the question in the District Court, in view of the decision of the Supreme Court, in the case of *Evaggeli Anastassi and others v. Yanako Hadji Georghi* (*ubi. sup.*).

However, it has been argued before us at very great length, and the appellant, of course, is justified in raising it now, though somewhat late in the day, and we proceed to deal with it.

We understand the contention to be this, viz. : that assuming the appellant's chain of wells to have been sunk by permission of the Land Registry officer on arazi-mirié land, and by means of these wells water to have been brought out on to the surface of the land, the appellant has thereby acquired the right to prevent any other person from digging a well or wells within a distance of 500 piks on each side of every one of these wells. The right thus claimed is an extremely large one, and the contentions on which it is based must be closely scrutinised.

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The argument was also put in this way : if a man dig a well on any category of land, other than mulk, he thereby acquires the protection of Article 1281 of the Mejellé, and if he succeeds in bringing out the water to the surface of the soil he then acquires, at all events, the protection mentioned in Article 1282 for the first well of the series, and as we understood, the same protection for each well of the series, though we think it was also argued that the first well of the series might have a harim of 500 piks and the others a harim of 40 only.

It was also argued that the case of *Evaggeli Anastassi and others v. Yanako Hadji Georghi* (C.L.R., Vol. II., p. 64), which decided that Article 1282 of the Mejellé applied to springs of water dug on mevat land by permission of the State, was wrongfully decided by the Supreme Court, and we were pressed to disregard its authority and over-rule it.

We will proceed to discuss the meaning of the law applicable to " harim." Article 1281 says, " the harim of a well is 40 piks on each side." Article 1282 says, " the harim of " (literally) " eyes," that is to say, of springs which have " been brought out at any place and the water of which " flows upon the surface of the ground, is 500 piks on every " side."

It is necessary to consider in the first instance what is the meaning of harim. It has been assumed in the course of the argument that the object of the law in laying down a harim for wells and springs, is to afford protection to the owner of the well or spring, by preventing other persons from diverting the water which might otherwise have trickled into the well or fed the spring : but so far as we have been able to trace the object of the law, by referring to the sources whence it is drawn, it appears to us that the object of the law was, not to afford protection to the water, but to confer upon the person digging the well, or bringing to the surface of the ground the water of a spring, a sufficient space around the well or the spring to enable him to exercise freely the enjoyment of his property.

Thus we find in the Miraat-ul-Mejellé, an Arabic word which gives under each section of the Mejellé the sources whence the law contained in the Mejellé is derived, the following under Article 1281 : " He that digs a well on " *mevat* land by the Imam's permission has its harim as " he brought it (*i.e.*, the mevat) to life . . the harim of " the shallow well, that of which water is taken by the hand " and the camels stoop around it to drink is 40 piks " from each side, according to the prophet's saying who " digs a well has what surrounds it 40 piks from each side " for the drink of the animals because the digger cannot be " profited from his well except by his harim."

Again in the Multekaa (a collection in Arabic of deductions from decisions given by Abu Hanife) in the chapter headed "the bringing to life of mevat lands," we find the following: "If a person digs a well on mevat land the "harim of that mevat belongs to the person who has "brought it to life, provided he has done so with the per- "mission of the Imam . . . . . .

"The "harim of Atn" is 40 piks on all sides. Atn "denotes the ground around a well or reservoir for a camel "to lie down and rest. The word "harim" is annexed "to the word "Atn" by reason of a certain amount of "relation between the two, *i.e.*, for the purposes of indi- "cating similarity: so that if a person digs a well for camels "to lie down around it and be watered with water to be "drawn with his hands from the well, the harim of the "well on all sides belongs to the person digging the well. "This is the true rule. The harim of "Nazih" follows "the rule of Harim-ul-Atn. According to Abu Hanife, "Nazih is a camel used in drawing water from a well. "According to the two Imams, the harim of Nazih is 60 "piks on all sides, because the prophet has said, the "harim of a spring "Ain" shall be 500 piks, the harim "of "Atn" shall be 40 piks, the harim of Nazih shall be "60 piks. The harim of a spring is 500 piks on all sides "because springs are brought up for agricultural purposes "and in this case more space is required. A certain "quantity of ground is required for the collection of water, "a certain quantity of land is required for the "water to flow to the place to be irrigated, and for this "reason a larger area has been assigned to it." There does not appear to be any suggestion in these passages that the harim is intended for the protection of the water, but it appears to be considered to be granted solely for the purpose of enabling the owner of a well or spring to make free use of his property. The phrase "a certain quantity of land is required for the collection of water," does not appear to us to be intended to refer to the collection of water underground, inasmuch as the passage says in the case of the water of a spring brought up, as springs are opened up for agricultural purposes, more space is required for these purposes, *i.e.*, for the collection of water and for space to conduct it to the spot where it is to be used for purposes of irrigation. The consideration of the sources of the law also throws light on what appeared to us to be a puzzling question, viz.: the reason for which in Article 1285 of the Mejellé, the harim of a "Kanat," a channel, the water of which flows upon the surface of the earth, should be fixed at 500 piks. Under Article 1284, if a kanat be underground, the harim is only so much space as is necessary for placing the mud and stones removed from it when it is

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cleansed, and there appeared to be no reason why when the kanat reached the surface, and the water in it consequently needed no greater protection, and certainly not the extremely wide protection of 500 piks on each side, so large a protection should be given to it.

With regard to kanats we find in the Multekaa the following: "There is harim for kanats to such extent as "may be necessary. It has been said that there is no harim "for kanats, if the water thereof does not appear on the "surface. In the opinion of Abu Hanife a kanat is a "subterranean passage of water. . .

"If the water of kanats appears on the surface of the soil "it comes under the same rule that is applicable to a spring "spouting out of the earth, and the harim for this is fixed "at 500 piks."

And in the Miraat-ul-Mejellé we find: "And if the water "of the kanat is visible, it is like a flowing spring, and its "harim is estimated at 500 piks. And it is said that it has "no harim unless its water is visible according to Him "(*i.e.*, Abu Hanife), being in the belly of the ground like "a river."

The kanat in which the water flows on the surface has a harim similar to that of springs, *i.e.*, because the water is used for agricultural purposes, and space is required for the collection of water and for taking it to the spot where it is to be used for irrigation purposes.

The fact that a "kanat" is said to have a harim, when it is on the surface strengthens the conclusion that the harim is not granted for the purpose of affording protection to the water itself. It is manifest that when once water is brought to the surface, a channel might be so constructed as to render it impossible for the water to be drawn from it by sinking wells near to it, and a harim viewed as a protection would be useless. The consideration of the law of harim as applicable to "kanats" is very instructive as throwing light on the law as to the harim of springs. On the assumption that the harim is intended as a protection to the water, it appeared very difficult to understand why under Article 1284, if a kanat were situated underground, it should have only such a harim as would suffice for the purpose of cleansing it, whilst if it were situate on the surface, it had a harim of 500 piks. If, however, the meaning of the harim be that, it is not intended as a protection to the water, but to afford the owner the means of enjoying his property, then the meaning of the distinction becomes clear.

Again Article 1283 defines the harim of what it terms large rivers, that is, those which do not need continual cleansing. It seems to us clear that no harim is required

in the case of what are termed rivers for the purpose of protecting their waters : but obviously only for the purpose of user and enjoyment. By the term "river" in this article, we are of opinion that the law does not intend large rivers in the ordinary acceptation of the word, but canals of natural streams which are the property of some individual acquired by grant, and flowing through mevat lands. Thus Article 1286 says, the harim of rivers is the property of their *owner*.

The author of a very recent commentary on the Mejellé, published only a few months ago, who is described as a lawyer learned in the Sheri, says, with respect to Article 1283, "there has existed some conflict of opinion as to "whether or not there is harim in making a large *river* "*run on mevat land* with the permission of the Sultan. "Some have held that there is no harim unless it be estab- "lished by evidence that there is a harim. Others hold "that there is harim, but differ in opinion as to its extent." "The legislator (*i.e.*, the compilers of the Mejellé), has "adopted the opinion of those who hold that the harim on "each side of a river, is equal to half of its entire breadth."

In the Miraat-ul-Mejellé it is said that, according to Abu Hanife, a person who has a river on another's land has no harim except he can prove it by hodjet ; but according to the other Imams, he has a harim extending to the edge of each bank for walking on and placing the mud of the river on it. With regard to the case of a "river" brought to life on mevat land by the Imam's permission, mention is made of the difference of opinion as to whether any such harim exists and it is said that according to the Imams, other than Abu Hanife, "there is no profit by the river, "except by the harim, because he (*i.e.*, the owner) needs "to walk on it to direct its running course, and it is not the "custom to do this by walking in the middle of the river "itself . . . . and so he has the harim on the same "consideration as the well." Abu Hanife appears to have been of opinion that the river has no harim, because it was possible to enjoy it without harim, but that the harim was necessary to a well, inasmuch "as the water of the well profiteth not except by its flowing and the flowing of the water, but by the harim." The views of those who held that a river had a harim appear to have been adopted in the Mejellé.

The fact that the owner of a river is considered to have a harim when it flows through mevat land, strengthens the conclusion that the meaning of harim is not a right acquired for the protection of water, but land attached by the law to the grant of wells, etc., to enable the owner to make use of his propery.

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Article 1286 also confirms this view of the meaning of harim. This article says that the harim of a well is the property (mulk) of its owner, and that no one else can exercise any act of ownership over it. It mentions in the succeeding paragraph the case of the digging of a well by a stranger within the harim of another; but it appears to us that this is only as it were an appropriate example, and that when the law says, no person can exercise *any* right of ownership, it does not mean that the acts of ownership that strangers may not exercise, are to be limited to the digging of wells. The Miraat-ul-Mejellé enables us to understand why, perhaps, the case of well digging within the harim is specially mentioned. The Mejellé says that a well dug by a stranger within the harim of another is to be closed. From the Miraat-ul-Mejellé we gather that there was a controversy as to whether in such a case the owner of the harim had the right to claim damages, or could only call upon the trespasser to close the well. The Multekaa with reference to this question, says: "If a person digs "a well within the harim of another, the latter can compel "the former to pay the "noksan arz," and the new well "is filled up. But it has been said that the "noksan arz" "is not payable, but the well is simply filled up with earth." It may be that the case is specially mentioned in the Mejellé with a view to show that the latter view is to prevail, and the well simply filled up.

The reference to the "noksan arz" again is instructive, as showing both that the harim is the absolute property of the owner of the well or spring, and also that the digging of a well within the harim of another is not considered from the point of view of causing any damage to the water, but only of the damage done to the surface of the land of another. The term "noksan arz" is defined in Section 886 of the Mejellé, and it is clear that it refers only to a diminution of the surface value of the soil.

If harim means, as we are of opinion from our consideration of the sources of law that it does mean, the extent of land surrounding a well or spring granted to the person who digs the well or opens out the spring with the Sultan's permission, not for the protection of the water but to enable the owner of the well or spring to make use of the property granted to him freely, it seems to us that the inference is irresistible that it is confined to wells or springs dug on mevat lands. In any other case it would be meaningless, and in many cases impossible, that the grant of a right to dig a well should confer upon the owner of the well the right of ownership in the surrounding surface, which might be the property of another person.

Apart from the inference that may thus be drawn, we are of opinion that the wording of the Mejellé shows that

this is the meaning of the law. The law as to harim is contained in a chapter which is headed as follows: "Concerning the harim of wells dug on, of water caused to "flow on, and the planting of trees on arazi-mevat with "the permission of the Sultan." Whether the heading of the chapter be a portion of the law or no, it is an indication of the subject matter with which the chapter is dealing.

The Mejellé is a collection in the form of a code of those principles of the Sheri Law to be applied by the Nizam Courts to what we may term ordinary civil rights and obligations, and when we find the compilers of this Code placing at the heading of the chapter dealing with harim, an intimation that the chapter deals with the harim of wells, etc., dug on mevat land with the permission of the Sultan, there is a very strong inference that they intended the chapter to apply to wells dug on this category of land alone. This inference becomes irresistible when we consider the sources whence this law is derived. Turning to these sources we find in the Multekaa that the law on harim is contained in a chapter headed the "Bringing to life of *mevat land*," and that from one end of the chapter to the other there is no mention of any harim being capable of being acquired on any other category of property.

In the same way the Miraat-ul-Mejellé does not appear to contemplate the acquisition of a harim by the person who digs a well or opens out a spring on any class of land other than mevat, no mention being made of any other category of land. The commentator Ziaeddin, to whose work we have already referred, takes the same view. With reference to Article 1281, he says: "The section of the "law speaks only of the harim of a well, but considering "that this chapter deals with the provisions of the law in "reference to wells, etc., dug on mevat land with the "permission of the Sultan, the words 'of a well' are in-"tended to refer to wells dug on mevat land." Dealing with Article 1286, the commentator says: "The harim "of a well belongs to the person who has sunk and acquired "the absolute possession (temelluk) of such well, no other "person can exercise any right of possession (tessaruf) "over the same, because nobody can exercise any right "of possession (tessaruf) over the property of another "without the permission of the owner of it."

It seems clear that this commentator considers the law as to harim to be confined to the case of wells, etc., dug on mevat land. We may observe that there is no suggestion contained in the commentary that the harim is merely a right to prevent the digging of wells, etc., within the harim of another well; or that it is applicable to wells, etc., dug on arazi-mirié: but the commentator appears to consider it as land, and as the absolute property of the owner of the well.

The translator of the Mejellé into French in a note defining the meaning of the word "harim" says, "harim "is an extent of ground lying around wells, springs, etc., "in *mevat* lands, or trees, and which becomes the property "of the person who has dug the well or discovered the "spring or planted the trees. The word comes from "haram" forbidden, because it is forbidden to any other "person, than the owner, to exercise any act of property "on this piece of land." The same translator in a similar note contained in his Greek translation of the Mejellé, published in 1889, after mentioning the derivation of the word harim, says, that legally it means in general "the "right of benefit or user, and the perimeter of a well which "is allowed for the *free user* of the well is termed "harim." From these notes it would appear that the translator of the law from the Turkish understands the harim to be applicable only in the case of wells, etc., dug on mevat lands, and its object to be to allow of free enjoyment of the well, etc.

The views of Ziaeddin and of the translator are not, of course, conclusive as to what the meaning of the law is; but they are useful as showing what is the meaning attached to it by persons—at all events in the case of Ziaeddin—who may be supposed to be conversant with the law, and the construction placed upon it in the Ottoman Empire.

There could, we think, be no doubt, as to the meaning of the law were it not for the presence at the end of the chapter dealing with the law on harim, of Article 1291. This article says that the well which a person opens on his own "mulk" has no harim. The word "mulk" is defined in Article 125 as everything of which a man is the owner (malik), whether it be in substance or profit. The definition may be rendered perhaps as everything of which a man is the possessor whether it be corporeal or incorporeal. Strictly speaking, a person is not the owner (malik) of arazi-mirié, but has merely the possession (tessaruf): but we find the word "mulk" used in some sections of the Mejellé evidently with a wider meaning than the restricted one implying absolute proprietorship.

Thus, Article 1270 defines arazi-mevat, as places which are not the property "mulk" of any person, and have not been assigned as pasture grounds or forests to any community, etc. It seems clear that the word "mulk" here, must mean something wider than land of which some person has the absolute ownership, or it might be said that this definition of arazi-mevat would include arazi-mirié, which is absurd. Again Article 1257 says, "although the grass which grows naturally upon the mulk" of another is "moubah," yet the owner (sahib) can prevent any person

trespassing upon his property. It can hardly be intended, we think, by the use of the word "mulk" to confine this statement of law to mulk in the strict sense of the word, *i.e.*, to land which is the absolute property of a person, as distinguished from arazi-mirié. Nor do we think that it could be validly argued that because the law says specifically that the grass growing naturally upon mulk is moubah, therefore the grass growing naturally upon arazi-mirié is not "moubah." If it is "moubah" when it grows upon land which is the absolute property of a person, and, therefore, being "moubah" is not the property of that person, *a fortiori* would it be "moubah" when it grows upon land of which a person has only such a qualified ownership as the possessor of arazi-mirié has.

The same meaning, we think, should be given to the word "mulk" in Article 1261, which says that a person who lights a fire in his own property "mulk" can prevent any other person entering upon his property and making use of the fire: but that where a person lights a fire upon land which is the property "mulk" of no one, a third person may make use of it. We do not think that the intention of the law is to authorise a person to enter upon the arazi-mirié of another and make use of a fire lighted thereon; but the word "mulk" is used in a wider sense than the restricted one of land of which some person is the absolute owner. The law cannot have intended to authorise a person to trespass on the arazi-mirié of another for the purpose of making use of a fire lighted thereon. Other examples to the same effect could, no doubt, be adduced. On the other hand there are articles where the word appears to bear the restricted meaning and implies absolute ownership. For example, Article 1660 fixes the period within which actions with regard to "mulk" must be brought, the expression used being mulk-akar (ملك عقار), the word "akar" meaning landed estate.

It is clear that the words "mulk-akar" are not intended in this section to include arazi-mirié; because we find that in Article 1662 arazi-mirié specially mentioned, and a shorter period of prescription fixed for actions relating to it.

It, therefore, seems to us that the word "mulk" does not always bear the same meaning in different articles of the Mejellé, but has been used by the compilers of this Code without any very careful consideration of the exact meaning to be put upon it. We think that the safest rule to adopt in deciding what meaning should be assigned to it in any particular instance is, to give to it its strict signification viz.: denoting what a person possesses, *i.e.*, absolutely possesses, unless such a construction would give to the passage in which it occurs an absurd or unjust meaning.

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The foundation for the proposition of law contained in Article 1291 appears to be the following. It is not mentioned in the Multekaa which, as we have said, contains no suggestion about a harim, as being capable of being acquired on any other land than arazi-mevat, but is given in the Miraat-ul-Mejellé and by the commentator Ziaeddin. A man complained to Abu Hanife that his neighbour had dug a well in his house close to that of the complainant, thereby drawing off the water from the latter's well, asking Abu Hanife to order what the law sanctioned. Abu Hanife advised the complainant to go and dig a cesspit in order that his neighbour's water would thereby get polluted, and that he would then fill up his well, and the water would flow into the complainant's well as before. The writer of the Miraat-ul-Mejellé adds : " Is it not clear from this that " he did not order the well (*i.e.*, the well complained of), " to be filled up." Upon this reported saying of Abu Hanife, Article 1291 of the Mejellé appears to be founded. The opinion of Abu Hanife is, no doubt, based upon the general principle, and one that is clearly laid down in the Mejellé, that water flowing underground is the property of no one. It is to be observed that Abu Hanife does not appear to have made use of the word " harim," though the compilers of the Mejellé in drawing up their statement of the law do. It appears to us that the word " harim " must, if our view of the meaning of the word be correct, either be used in this article in a different sense to that which it bears in Article 1286, or be the enunciation of a self-evident proposition. The compilers of the Mejellé appear to us to have made use of the word " harim " in this section as a convenient means of laying down, in the particular case, the proposition of law that there is no protection given by the law to water flowing underground in mulk lands. It appears to us that this is probably an instance of the inexact and inaccurate use of technical terms by the compilers of the Mejellé, instances of which we have pointed out in the case of the word " mulk." Having regard to the source from whence the law is derived, viz. : the case of a well dug in a house, it appears to us safest to conclude that the construction to be placed upon Article 1291, is that it refers to the case of a well dug upon mulk in the strict construction of the word, that is upon land which is the absolute property of the person digging the well.

But if this be so, it does not appear to us that we can draw the conclusion pressed upon us by the appellant's counsel, viz. : that because the article specifically says, that a well dug upon mulk has no harim, therefore a well dug upon arazi-mirié has. Taking the law in the Mejellé as it stands, it seems that it lays down that a well dug on mevat land has a harim, and that a well dug on mulk has not, and

it would be unsafe in this state of the law to hold that the inference arises that a well dug on arazi-mirié either has or has not a harim, whatever be the meaning assigned to the word. If the word "harim" can properly be used to imply a right of protection to the water, there does not appear to us on principle to be any reason why a well dug on arazi-mirié should have any greater or other protection than a well dug on mulk. The owner of a well dug on mulk may have enjoyed the user of his well for many years, and by means of it have irrigated his garden, which may be his sole means of livehood, yet he cannot prevent the owner of adjacent mulk property from at any time digging a well which may intercept the whole of the water and thus, perhaps, be the means of causing the garden to become valueless, and of ruining its proprietor. This state of things arises from the law that there is no property in water flowing underground, and we fail to see why if the law gives no protection to the owner of a well dug on mulk land, it should be assumed that any greater right is given to the person who sinks a well on arazi-mirié.

It might, perhaps, be argued that the distinction between the two cases is this. Assuming, as was contended by the appellant's counsel, that the leave of the State or of the Land Registry Office officials, as representing the State, is necessary before a person can dig a well on arazi-mirié, the State in giving consent would also impliedly grant a right for the protection of the water flowing under the soil, to this extent, that no other person should have the right of digging a well within 40 piks of the well so dug by permission of the State. Whereas in the case of a well dug upon mulk land, the owner of that well requires no permission, and knows when he digs, that he can acquire no protection for the water of his well.

We do not think, however, that the State by granting permission to one person to dig a well on arazi-mirié could derogate from its right to grant a similar permission to the possessor of an adjoining piece of arazi-mirié: and if the latter, by permission of the State, dug a well within 40 piks of an existing well, we do not see how the owner of the latter could maintain an action, either against the Government, or against the owner of the second well. An action against the latter would be met by the defence that the well was lawfully dug by the permission of the Government, on land of which the person digging was the possessor.

The Government might authorise the possessor of arazi-mirié to do anything he liked with the land, and might, of course, authorise its conversion into mulk, when its owner could dig as many wells as ever he chose upon it, without obtaining any permission at all. We do not, therefore, see

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what action could be maintained against the Government, and we are of opinion that the fact, if it be one, that the possessor of arazi-mirié must obtain the permission of the Government before digging a well on land in his possession, does not afford any argument why the digger of such a well should have any greater right of protection than the digger of a well upon mulk.

But it may be said that, though a well sunk on arazi-mirié with the permission of the Government, may have no protection against a well sunk with such permission by the possessor of adjoining arazi-mirié, yet that there would be such protection against wells dug on arazi-mirié without the permission of the Government. The case might be put in this way. The owner of a well dug with permission might bring an action against a person digging a well on arazi-mirié without permission, and claim that as it was within 40 piks of his well, the defendant should be ordered to close it. It would be argued for the plaintiff that as the defendant had committed an unlawful act in digging a well on arazi-mirié, and thereby decreased the water of his well, the fact that the defendant had committed an unlawful act which occasioned damage to the plaintiff, gave the latter a good cause of action. The answer to this would be that although the defendant had committed an unlawful act, in the sense that he had destroyed some portion of the surface of the land, the possession of which had been granted to him by the State for the purposes of cultivation, and thereby given to the State the right to interfere, yet no act of trespass had been committed as against the plaintiff. The defendant would not have interfered with the plaintiff's land, nor with anything which the law regards as his property, inasmuch as water flowing underground is not the property of anyone. We, therefore, think, that as regards the plaintiff it would be immaterial whether the wells were dug with or without permission.

We may observe that, viewed as protection to water, a harim of 40 piks might be in many cases inefficacious. If a well were sunk which tapped an underground stream, a well subsequently sunk at 41 or 50, or 100 piks might tap the same stream, and diminish or entirely divert the water of the first well just as much as if the subsequent well were sunk within 39 piks of it.

Our opinion, therefore, is, that the law contained in the Mejellé applies to wells, springs, etc., dug on mevat land: that the word "harim" means the extent of land surrounding a well, or spring, or channel (kanat), granted to the person who by permission of the Sultan digs a well, or opens a spring, or constructs a channel on mevat land, conveyed with the grant of the right to dig such a well, or

spring, or channel, not for the purpose of affording a protection to the water, but for the purpose of affording him the free right of enjoyment of the property in the well or spring conferred upon him by the authorisation of the Sultan to dig it on mevat land. Article 1280 clearly establishes that a well dug on mevat land by the Sultan's permission becomes the absolute property "mulk" of the person digging it, and Article 1281 goes on appropriately to lay down what right the owner of such a well acquires when he has dug it.

Our understanding of the law contained in the Mejellé being what we have above indicated, it follows that we are unable to assent to the arguments of the appellant's counsel that there is under that law any such protection as he claims for the water flowing underground into the plaintiff's wells which are situate on arazi-mirié.

His case is rested entirely on the Mejellé, and no other law or authority has been cited to us to show that the harim of a well or spring, whatever may have been its nature and object originally, has come to mean anything different to what we find it to be in the Mejellé, that is to say, that it has come to mean not the absolute property surrounding a well or spring, but only a right to prevent any other person sinking a well or doing any other act of a similar nature, likely to affect the infiltration of the water underground into the well or spring. It may possibly be that this is the popular understanding of the word "harim," but it is not the meaning placed upon it by the law. If by any custom any such right could be acquired by the person who digs a well on arazi-mirié, it is sufficient to say that no evidence of any such custom has been adduced in this case. We have been unable to find any indication in the course of our researches into this matter to show that any such right exists; and it certainly is remarkable that if the word "harim" has come to bear the signification we are pressed by the appellant's counsel to give to it, a commentary published so recently as this year contains not the slightest reference to it, not the slightest hint that it is regarded as a right acquired for the protection of the water. On the contrary, stress is laid upon the principle that water flowing underground is the property of no one, and as the commentator says, "cannot be the subject of litigation."

We must, therefore, hold that the appellant has failed to make out that he is entiled to the protection he claims for his wells situate on arazi-mirié: and it appears to us that the case of *Evaggeli Anastassi and others v. Yanako Hadji Georghi* (C.L.R., Vol. II., p. 64), was rightly decided. There is another difficulty in the appellant's way, even on the assumption that a right of harim such as he contends

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for can be acquired for wells and springs situate on arazi-mirié; and that is this. We are of opinion that the harim acquired by the digging of a spring or a channel is under the law acquired at the spot where the water is brought to the surface. This follows almost as a matter of necessity from the view we take of the nature of the harim; for as the harim is granted not for the purpose of protecting the flow of underground water, but of affording the owner who has dug the spring, etc., the means of making use of the property conferred upon him, he needs the land forming the harim, only at the spot where he brings the water to the surface and can make a beneficial use of it. Viewed as a "kanat" or underground channel, the owner of a chain of wells connected by any underground channel, may have as a harim the space necessary to enable him to cleanse the channel from time to time: but he would not have an extent of ground of 500 piks on every side for the whole chain of wells, assuming of course that such a chain of wells had been dug on arazi-mevat with the permission of the Sultan. If, therefore, we could assume that there was any such right of harim as the appellant contends for in this case, that is to say, a right to prevent other persons digging wells or springs in adjoining arazi-mirié within the distances specified in the Mejellé in the case of wells and springs, respectively, and if we assume that the appellant's chain of wells forms a spring within the meaning of Article 1282 of the Mejellé, it appears to us that the plaintiff could only claim the right of harim of 500 piks at the spot where the water is brought to the surface of the ground. It is not suggested and there is no evidence that any of the wells of which the plaintiff complains, have been dug by the defendant within 500 piks of the spot where the water is brought to the surface, and on this ground also we think the plaintiff's claim would fail.

One other argument addressed to us on behalf of the appellant we may advert to. It was argued that under Article 20 of the Mejellé the Court would interfere to prevent what was likely to cause damage: that the sinking of wells within 500 piks of the plaintiff's chain of wells would be likely to cause damage, and, therefore, the defendant should be restrained from sinking wells within this distance. We are of opinion that the damage referred to in Article 20 does not mean everything which might be prejudicial to a person's interests, but refers to damage legally speaking, that is to say, to anything which would prejudicially affect his legal rights. As water flowing underground is not the property of anyone, it follows that no course of action arises in respect of an interference with the flowing of such underground water, assuming of course that the act of interference itself does not constitute a trespass.

It was also pressed upon us by the appellant's counsel that if the view of the law as to harim advanced by him were not the true one, the property of persons in such chains of wells as that of the plaintiff would be seriously affected, if not entirely destroyed, and reference was made to the fact that since the judgment of the Supreme Court in the case we have before referred to, *Evaggeli Anastassi and others v. Yanako Hadji Georghi* (*ubi sup.*), persons had commenced to dig wells on arazi-mirié, and indeed it was intimated that the action of the defendant in digging the wells complained of in this case had been influenced by that judgment.

We have read that judgment in vain to discover anything contained in it from which it could be inferred that this Court had given any decision on the question, as to whether the possessor of arazi-mirié has the right to dig wells thereon without the permission of the Land Registry Office officials, as representing the State. There is nothing contained in that judgment from which any such inference can be drawn, and though it is unnecessary, perhaps, to say it, we do not intend in this judgment to lay down any such proposition. There is nothing specifically in the law either to authorise or prevent such an act, but it may be that the State has the right to prevent the breaking up of the surface of land, the possession of which is granted for the purpose of cultivation and of cultivation alone, without its assent. In many, if not in most, cases that assent would probably be granted as being beneficial for purposes of cultivation; but the question appears to us to be one between the State and the individual who has destroyed the surface of the land, and that it does not follow, as we have before pointed out, that because a person has sunk a well without the permission of the State, and so drained off the water of the well of his neighbour, which has been sunk with such permission, that the latter would have any right of action, because the water flowing underground being the property of no one, no legal right had been infringed, and no act of trespass, so far as he was concerned, had been committed. The question of whether or no the rights of the State have been infringed is not before us for decision on the present occasion: it was argued for the appellant that the consent of the State was necessary to enable a person lawfully to dig a well on arazi mirié, and by the respondent's counsel, that the necessity of obtaining such consent was not prescribed by any law. Taking the view we do of the present case it is not necessary for us to decide the point; but we think it worth while to advert to it with regard to the argument of the appellant's counsel, that the rights of persons who have for a long period of time enjoyed the water of wells, similar to those of the plaintiff, are likely

to be destroyed, if we hold that the law affords no protection to the water of wells sunk on arazi-mirié. If it be the fact that the consent of the Government or of the Land Registry Office officials, as representing the Government, must be obtained before wells are dug on arazi-mirié land, then it would be only reasonable to suppose that that consent would be given, with regard to the existence of pre-existing wells ; and that in cases where it appeared likely that the wells or springs already in existence would be damaged by the sinking of other wells or the opening of other springs in the immediate vicinity, such consent would be refused. That an absolute protection could in all cases be afforded in this way is, of course, from the nature of the case impossible, for, as we have already pointed out, a well sunk at a very considerable distance from an existing one might conceivably tap an underground stream, the water of which had flowed without interruption into this well : still perhaps, roughly speaking, it may be the case that the greater the distance between two wells, the less likelihood is there of one taking the water which would otherwise flow into the other.

If then, the sinking of a well on arazi-mirié requires the permission of the State, the wholesale destruction of "property" feared by the appellant's counsel may not follow our decision. The considerations to be applied to the question of whether such permission is required or not, appear to be the following : It is admitted that there is nothing specifically bearing on the point in the Land Law, and whilst various acts are forbidden without permission, such as the making of bricks, the erection of buildings, the burying of a corpse, and the planting of trees there is no prohibition as to the digging of a well. The inference to be derived from this would be that, as the law had not specifically forbidden it, the digging of a well is permissible.

On the other hand it is clear that the principle of the law is that the possession of arazi-mirié is granted for the purposes of cultivation, and of cultivation exclusively, in order that the State may derive a tithe from the land. We may leave out of consideration for the present purpose arazi-mirié granted otherwise than for purposes of cultivation, *e.g.*, forests or pasture grounds. This is clearly shown by many articles of the law. Thus, Article 68 of the Land Law distinctly lays down that land left uncultivated, except for one of the reasons mentioned in the article, for three consecutive years, becomes subject to Tapu. The building erected, the trees planted or the corpse buried without permission, may all be removed by the Government for the same reason, viz. : that the cultivation of the land is rendered impossible, and the tithe would be lost to the State. The

principle appears to be then that the whole surface is to be cultivated and that no part of it can be destroyed so as to render it incapable of cultivation. If a person may dig one well what is to prevent him digging 20 or 30, or destroying the entire surface of the land he possesses, and thus destroying entirely the condition on which the possession of the land was conceded to him? It may be said that he is not likely to do this; but the question is not whether he is likely to do it, but whether he has the legal right to do it. There is another consideration also that presents itself to us, and that is this: What is the nature of the property in a well? A well sunk on mevat land with the Sultan's permission, is the mulk property of the person sinking it, and it appears to us that a well sunk on arazi-mirié would also be mulk. It would appear to have lost its character of arazi-mirié as from the nature of the case it is impossible to cultivate it, the surface has gone, and it has become merely a receptacle to hold water; and if it is no longer arazi-mirié, it appears to us to have of necessity become mulk. But no one can without permission change the category of arazi-mirié into mulk, and hence it would follow that a well cannot be sunk on arazi-mirié without permission of the State. Notwithstanding the silence of the law on the subject, we incline to the opinion that, on general principles, wells cannot be sunk on arazi-mirié without permission. The question was discussed before us, but not exhaustively. It is not necessary for our decision in the present case, and we have perhaps gone out of our way in discussing the considerations that appear to us to be applicable to it. It may, of course, be that other considerations which were not argued before us, and which are not now present to our minds, might be called to our attention and lead us to change the view we now hold, and it must not, therefore, be understood that we are giving a decision upon the point. The general importance of the subject and the argument of the appellant's counsel as to the possibly disastrous results of holding that the law in the Mejellé on harim does not apply to wells dug on arazi-mirié, have alone led us to mention that there are possibly other means of securing the owners of existing wells from the injury apprehended, even if the law in the Mejellé does not apply.

For the reasons we have specified, we hold that the judgment was right and this appeal must be dismissed with costs.

Appeal dismissed with costs.