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

SMITH, C.J. & MIDDLETON, J. 1894.

April 15.

DORMOUSH PASCALIDES AS LESSEE, ETC. *Plaintiff,*

v.

KASSIM ABDUL REZAK AND OTHERS *Defendants.*

LESSEE—INJUNCTION—RIGHT OF LESSEE TO MAINTAIN ACTION FOR —WATER RIGHTS—LIABILITY OF TRESPASSERS FOR DAMAGES —MEASURE OF DAMAGES.

The plaintiff, as lessee of a chiftlik, claimed an injunction to restrain the defendants from interfering with certain water which he alleged to belong to the owners of the chiftlik and to be used for the irrigation of the chiftlik lands alone. The acts of interference complained of were the taking by the several defendants at various times and at various places of water from certain channels for the irrigation of their own lands. He also claimed damages, his crops having dried up in consequence of his inability to irrigate them owing to the defendants' acts. The District Court gave judgment for the plaintiff, and decided that the measure of damages would be found by estimating the extent of land wrongfully irrigated by each defendant, and ordering him to pay to the plaintiff a sum in respect of each donum of land so irrigated varying according to the nature of the crops grown upon such land.

HELD: That the plaintiff as lessee of the chiftlik was entitled to maintain an action for injunction and that the defendants were jointly liable in damages to the plaintiff.

HELD ALSO: That the measure of damages was the difference between the actual value of the crop grown by the plaintiff and its value had he not been prevented from irrigating it by the wrongful acts of the defendants: that as against each defendant the amount of damages would be found by ascertaining the extent of land wrongfully irrigated by him, and assuming that the plaintiff, but for his wrongful act, would have been able to irrigate an equal extent; by then ascertaining the actual value of the crop grown by the plaintiff on such an extent and the estimated value of such a crop had it been irrigated, the difference between these values will be the measure of damages. If crops of different values were being grown by the plaintiff, the calculation to be based on the value of the most valuable crop.

APPEAL from the District Court of Paphos.

The plaintiff, who was the lessee of the Poli chiftlik, brought this action to recover damages alleged to have been sustained by him in the year 1890, owing to the wrongful act of the defendants in stopping the flow of water which the plaintiff claimed belonged to the owners of the chiftlik and was used for irrigating the chiftlik lands.

SMITH, C.J. & MIDDLETON, J.

DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS

1893. *Nov.* 2.

The defendants, who were inhabitants of the villages of Chrysokhou, Goudhi, Myliou and Agourdalia, alleged in their defence that the plaintiff being only lessee of the chiftlik had no right to sue, and that they had not taken water the property of the chiftlik. They also denied the plaintiff's damages and contended that they were not jointly liable for any damage he may have sustained.

Solomo Markides, for the plaintiff.

Sofiali, for the defendants.

The facts of the case sufficiently appear from the judgment of the District Court which was as follows :—

" In this action the plaintiff, as the lessee of the property known as the Poli chiftlik, seeks to recover from the defendants the sum of £137 9*s*. 7½*cp*. as damages occasioned to him during the year 1890, by the defendants taking the water of the chiftlik.

The original defendants were 13 in number and were natives of the villages of Chrysokhou, Goudhi, Myliou and Agourdalia ; eight other defendants, villagers of Chrysokhou and Goudhi, were subsequently added, and during the hearing of the action, the plaintiff obtained leave to amend his writ of summons by adding a claim for an injunction.

At the settlement of the matters in dispute, the following points were ascertained as those in issue : (1) the plaintiff's title to sue as the lessee of the chiftlik ; (2) whether the defendants did in fact take water belonging to the chiftlik ; (3) the amount of damages ; (4) the right of the plaintiff to recover damages jointly from the defendants.

We think that the first point is disposed of by the evidence of the plaintiff himself and that of Hadji Ali Effendi. We have no reason to doubt that the plaintiff was during the year 1890 the lessee of the Poli chiftlik.

Before entering upon a discussion of the second point, it is necessary to give some description of the water which is the subject matter of this action. The river, which has its outlet into the sea near Poli, is intercepted by a dam shortly below the village of Skulli, whence the water is conducted by a channel some 3½ miles in length to the Poli chiftlik. In the strips of land lying between this channel and the river bed, are a number of gardens belonging to villagers of Goudhi, Karamouley and Chrysokhou. It is alleged by the plaintiff that those of the defendants who belong to the villages of Goudhi and Chrysokhou have wrongfully taken from this channel water which is the exclusive property of the chiftlik. Above the Skulli dam the main course of the river proceeds upwards to a point below the village of Myliou, where it branches off into two

streams, one of which is known as "*Jelagi*" and runs from springs in and above the village of Theletra, and the other, the mineral water known as "Ghuy-su" or "Amati," has its source near the village of Yiolou. The position of several other tributary streams and springs referred to in the evidence is shewn on a sketch made by the Court after a local inspection.

Between the Skulli dam and the monastery of Ayios Anargyros are several mills, which are served by channels leading from dams in the river, and returning to the river. The claim against the Myliou and Agourdalia defendants is in respect of water alleged to have been taken from those mill channels, some of which, it should be said, are partly fed by water arising from adjacent springs flowing directly into the mill channels. So far as this action is concerned, the plaintiff's claim to the water extends upwards as far as the garden of the defendant Tomazo Yanni, which is situated shortly above the village of Myliou. But the contention of the plaintiff appears to be that the whole of the water flowing down the valley is the exclusive property of the chiftlik. The claim is thus a very extensive one, embracing many water sources and comprising the water system of an entire valley some eight or nine miles in length. It is further a claim not merely to limit the upper riparian owners to such a use of the water as is not inconsistent with the rights of the chiftlik, but to prohibit them entirely from taking and using the river water for the purpose of irrigation.

Now the only documents of title that have been produced are a certified extract from the record of the Vakfié of Chorlorlu Ali Pasha, obtained from the Evkaf office at Nicosia, and a Mazbata of the Daavi Court, dated the 10th January, 1291.

In considering the effect of these documents and of the verbal evidence, we shall deal first with those defendants who took the water below the Skulli dam, and, secondly, with those who are alleged to have taken it above the Skulli dam.

Now the words of the Vakfié record as translated to us are as follows: "and again the said Arazi having a right "of irrigation from a channel and a possessed dam (Bendi "Memluk) with the fixed water running *ab antiquo* and "acquiring right of ownership as subject to its channel."

We can give no other meaning to these words than that the water running into the channel leading from the river to the chiftlik, is the absolute property of the chiftlik. There is no other channel to which these words could refer, and the channel is obviously one made for the direct purpose of irrigating the chiftlik lands.

With regard to the verbal evidence, the defence that the Chrysokhou defendants have set up, that they are entitled to water the trees in consideration of their helping to clear the channel, is, to our minds, more consistent with the theory that the chiftlik is the owner of the water, and has from time to time given water to the Chrysokhou villagers in return for their labour, than with any actual right possessed by the defendants.

If it were necessary to consider the effect of the Mazbata, we should hold that the question whether the Chrysokhou and Goudhi defendants were entitled to the water below the dam was put in issue at the trial before the Daavi Court, and decided adversely to the defendants, and that the present claim is *res judicata* so far as it relates to those of the Chrysokhou and Goudhi defendants who were parties to the Mazbata. We, therefore, come to the conclusion that the water in the channel leading from the Skulli dam to the Poli chiftlik is the exclusive property of the chiftlik, and that the Chrysokhou and Goudhi defendants in taking water from this channel, have infringed on the rights of the chiftlik.

We have now to deal with those defendants who are alleged to have taken water from the mill channels above the Skulli dam, viz.: Agapio Yorghiou, Loizi Ktisti, Tomazo Yanni, all of Myliou, and Kyriako Vassili, of Agourdalia. Of these defendants, three, Agapio Yorghiou, Loizi Ktisti and Kyriako Vassili, deny having irrigated their fields in 1890. We are, however, of opinion that these defendants did in fact irrigate in that year.

The next question is whether the plaintiff has proved his right to prevent these defendants from taking and using the water above the dam. When we come to consider the bearing of the Evkaf record on this part of the case, it is obvious that this record is not the document which H. Ali deposes to having seen at Constantinople, which states that the water "from its sources" is the property of the chiftlik. If there is in existence such a document we can only regret that it has not been produced to us.

The passage in the record which we have quoted above, refers to "a channel" and "a dam" in the singular, and not to "dams and channels," as in the translation put in by the plaintiff.

We can see no grounds for holding that this language refers to all the dams and channels in the course of the river, or to any other dam and channel than those primarily and immediately connected with the chiftlik. We find it difficult to draw from the verbal evidence any certain conclusion as to the extent of the rights of the chiftlik above the channel. Ismail Mehmed, a plaintiff's witness, considers

the water as far as the Theletra gardens to belong to the chiftlik, but admits that the monastery of Ayios Anargyros has watered for 17 years. Mustafa Hussein, also a plaintiff's witness, says the water is the chiftlik's as far as the monastery mill but not further. There is evidence that the Sinai monastery have exercised rights of ownership in the water coming from the "Klavasi" source.

Generally, we think the evidence shews that in years when the water was fairly plentiful, the chiftlik took no active steps to prevent irrigation by the upper riparian owners, but that in seasons of scarcity, like that of 1890, the chiftlik attempted, with varying success, to prevent such irrigation.

It has been urged upon us that the four Myliou and Agourdalia defendants are concluded by the Mazbata of the Daavi Court, to which they are parties, from defending the present action.

The Mazbata is, no doubt, binding upon those who were parties thereto, but only on points clearly put in issue and actually adjudicated upon. As to what was in issue at the trial, the plaintiff has only furnished us with a copy of the Mazbata and of the proceedings before the Temyiz Court on appeal.

The language of the Mazbata, so far as it relates to the rights of the Myliou and Agourdalia villagers, is as follows: "It being avowed and admitted by the inhabitants of "Myliou . . . . . that they had turned away the "water in question from its channel and irrigated fields "on the monastery lands and elsewhere, the Court found "it just" that compensation should be paid.

We have it in evidence that no documents were produced nor witnesses examined: the defendants seem to have admitted nothing but the fact of their having taken the water.

We find it impossible to conclude that the question, whether the chiftlik was entitled to prevent the people of Myliou from irrigating their lands from the mill channels above the Skulli dam, was ever in issue and adjudicated upon.

It may be that the defendants put forward no defence, but the omission of a defendant to set up a defence in a previous action does not estop him from pleading it in a later suit. *Howlett v. Tarte*, S.L.C., Vol. II., p. 707.

The Court, therefore, hold, Sami Effendi *dissentiente*, that the Myliou and Agourdalia defendants are not estopped by the Mazbata of the Daavi Court from defending this action; and they further hold that the plaintiff has failed to prove his exclusive right to the water above the Skulli dam.

SMITH, C.J. & MIDDLETON, J. — DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS.

We wish to point out that the question as to whether the owners or lessees of the Poli chiftlik are entitled to prevent the upper riparian owners from using the water so as to interfere with the ancient rights of the chiftlik, is not before us. The chiftlik has claimed an absolute right to stop any user of the water, and we hold that while the chiftlik has proved its right to prevent any user of the water in the channel leading from the Skulli dam to the chiftlik, the plaintiff has not proved that he has an absolute right to the water above the dam.

With regard to the question of damages. The plaintiff has proved that in the year 1890, by reason of the failure of water, he has suffered a loss of £137 9*s.* 7½*cp.*, and he seeks to charge this jointly on the defendants. We are of opinion that the defendants are not jointly responsible for a series of wrongful acts, which took place at different times, and at different localities, and without any common intention. It is further impossible to ascertain how much of the plaintiff's loss is to be attributed to natural scarcity of the water, how much to malicious cutting of the water, of which there is some evidence, and how much to the irrigation by the Sinai monastery. We think that the only possible course to follow, is that adopted by the Daavi Court, and we shall fix the liability of each defendant according to the amount and the nature of the crops irrigated by him. Taking the valuation put in by the plaintiff, we think the defendants, with the exception of the four from Myliou and Agourdalia against whom the action is dismissed, must pay 125*cp.* for each donum of luvi irrigated by them (being 50 okes to the donum, at 2½*cp.* per oke), 54*cp.* for each donum of sesame (being 18 okes per donum, at 3*cp.* per oke), and 100*cp.* for each donum of garden.

Our judgment, therefore, will be, that the claim of the plaintiff against the defendants Agapio Yorghiou, Loizi Ktisti, Tomazo Yanni and Kyriako Vassili be dismissed with costs, and that the other defendants to the action be restrained from taking and using the water from or in the channel flowing from the Skulli dam to the Poli chiftlik, and that these last-named defendants do pay to the plaintiff the sums set opposite their names in the appended schedule, and that they do jointly pay to the plaintiff his costs of this action."

The defendants (other than those against whom the action had been dismissed, the inhabitants of Myliou and Agourdalia), appealed.

The plaintiff also appealed against that part of the judgment which dismissed the action as against the four defendants mentioned in the judgment of the District Court, and also against the judgment generally as to the amount of damages awarded.

Macaskie and *Artemis*, for those of the defendants who were inhabitants of the villages of Chrysokhou and Goudhi, respectively.

The plaintiff, as lessee, cannot sue for an injunction to restrain the defendants from using the water without joining the owners of the chiftlik as parties. The plaintiff, as lessee, can sue for damages : but the damages have been assessed on a wrong basis. The defendants have been ordered to pay the amount of the value of the crops they grew : but the plaintiff was bound to show what damage he had sustained by the act of each defendant. He did not attempt to do this, and the action should have been dismissed.

Our clients' true defence and the one they instructed their advocate in the Court below to set up was, that they had acquired a right to the water in dispute by *ab antiquo* user. This defence was not properly brought out, and we ask now to be allowed to produce further evidence to prove that the defendants are entitled to the user of the water.

The Court gave judgment on this application as follows :— 1894. *April* 17.

In this case an application was made by Mr. Macaskie on behalf of those defendants, who are residents of Chrysokhou, that the Court would in exercise of its discretion afford him an opportunity of calling witnesses to prove that his clients had an *ab antiquo* right to use the water flowing in what we may, for the purposes of this application, describe as the chiftlik channel, for the purpose of irrigating their gardens.

This application was supported by Mr. Artemis on behalf of those defendants who were inhabitants of the villages of Goudhi and Agourdalia.

The ground on which Mr. Macaskie based his application was, that his clients had instructed their advocate in the Court below to raise the defence of an *ab antiquo* user : and that for some reason unexplained, he did not do so, but set up and relied upon a denial of the acts complained of by the plaintiff, which, it is alleged, he was not instructed to do.

We intimated that we might be willing to hear evidence to support this allegation, but the Queen's Advocate, who appeared for the plaintiff, called our attention to the fact that at one stage of the proceedings the defence of *ab antiquo* user had been raised by the advocate for the defendant inhabitants of Goudhi and Chrysokhou.

Before deciding whether we should allow Mr. Macaskie an opportunity of producing evidence to support his application, we thought it better that we should read through the notes in order to judge for ourselves what the course of the proceedings had been in the Court below.

SMITH, C.J. & MIDDLETON, J.

DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS.

We find that when this action was first instituted, 13 persons were joined as defendants, eight of whom were described as inhabitants of Khrysokhou and Goudhi. At the settlement of the statement of the matters in dispute, the advocate for these defendants, Mr. Sofiali, raised three points by way of defence :—

(1) That the plaintiff must show his right to bring the action ;

(2) A denial that defendants had cut the water during the year 1890 ;

(3) That even if they did cut the water, the defendants were not jointly responsible, but that separate actions must be brought against each.

No mention was made at that time of any *ab antiquo* right to the user of the water.

On the issues then fixed the case went for trial, and the evidence of several witnesses was taken. It then transpired from the evidence of Abdullah Hadji Ahmet that other persons besides the then defendants had made use of the water, and the further hearing of the action was adjourned. The advocate for the plaintiff subsequently applied to join eight other persons as defendants : this application was granted by the Court, which, on the order joining these persons, directed that, " on their being served with amended summons, the issue be retaken in this action and proceed as in Rule 12, Order IX., of the Rules of Court."

This order and the proceedings consequent upon it seem to us to be somewhat curious.

On the 4th November, 1892, another settlement of the statement of the matters in dispute was agreed to. It is not very clear whether this settlement was come to on behalf of all the defendants or whether it was on behalf only of those who had been joined by the order of the Court. Of the defendants so joined, five were of Chrysokhou and three were of the village of Goudhi. Seven of these defendants were on this occasion represented by the same advocate, Mr. Sofiali, who had appeared in the previous proceedings on behalf of those defendants originally sued who were inhabitants of the two villages above mentioned.

Mr. Sofiali again raised the same three points by way of defence as he has done before, and in addition he claimed that if his clients had cut the water, they were entitled to do so on the ground of an *ab antiquo* right.

In settling the issues on this proceeding, the Judge, in addition to the issues he had settled when the action was originally before him for settlement of issue, added a fresh one, " the plaintiff to prove the rights of the chiftlik over the water." We do not understand why this issue was fixed unless it was in consequence of the allegations of

Mr. Sofiali, and if it was intended to raise the question of the alleged *ab antiquo* right of the defendants it does not seem very apt for that purpose. The issue as fixed seems to leave the burden of proof on the plaintiff : and the allegation of Mr. Sofiali was one which his clients ought to prove.

However, these issues as fixed appear to have been accepted by both parties. Mr. Sofiali was apparently satisfied, and no application was at any time made on behalf of the defendants for an amendment of the issues. At the further hearing, two witnesses were called for the defence from the village of Chrysokhou, neither of whom was asked by Mr. Sofiali a single question as to any *ab antiquo* right in the people of Chrysokhou to irrigate their gardens with the water of the chiftlik channel.

None of the defendants themselves who were inhabitants of Goudhi or Chrysokhou were called, unless Mollah Shaban Abdul Rezak, who says he is a defendant, is the person described in the writ of summons as Abdul Rezak. We find, therefore, the advocate for the defence alleging an *ab antiquo* right in his clients to the user of the water : we find that he neither directs a single question in cross-examination of the plaintiff's witnesses to this point, nor calls a single witness to establish such a right. The conclusion that we feel bound to draw from this is, that the defendants' advocate was aware that this defence could not be successfully maintained.

The witness Mollah Shaban Abdul Rezak states explicitly that the right to water the trees is " because we clean the channel : when we don't clean the channel we have no right to water our trees." He also in another part of his evidence says, " when the Mejliss (meaning, we believe, the members of the Daavi Court) came to our village, it was decided we could irrigate fields when sown in partnership with the chiftlik and we could irrigate trees if we cleaned the channel."

We may remark that no mention is made of this fact, if it be one, in the judgment of the Daavi Court. However, this may be, this is not such a right as we understand the defendants, who are inhabitants of Chrysokhou, now seek to have an opportunity of establishing. The evidence of the second witness for the defence is clearly directed to proving that the damage the plaintiff alleges that he sustained in 1890 was not owing to any act of the defendants but to natural causes.

Under these circumstances we do not feel that we should be justified in allowing Mr. Macaskie's clients an opportunity of now raising a defence, which it is clear was within the knowledge of their advocate in the Court below and was not relied upon, or in any way attempted to be established, by him.

SMITH, C.J. & MIDDLETON, J.

DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS.

If we allowed this to be done in the present case we do not know how we should be able in future cases to resist similar applications, and the result would be that unsuccessful parties to actions would be constantly endeavouring to obtain opportunities of getting judgments set aside on the ground that they had other defences in addition to those raised at the hearing of the action. It is no doubt a matter for the discretion of the Courts to allow fresh evidence to be brought; but, on consideration, we see nothing in the circumstances of this case to lead us to the conclusion that the defence now sought to be set up would not have been insisted on in the Court below if it were capable of proof. We, therefore, think it useless to allow Mr. Macaskie to place evidence before us as to his clients' having instructed their advocate in the Court below that their real defence was a claim of *ab antiquo* user; and the appeal must be decided upon the file of proceedings as it stands.

It is clear that it is the duty of defendants to raise every matter by way of defence that they wish to rely upon before the hearing of the action, and, if after an action has been decided adversely to them, the Court on appeal should allow a totally new defence to be set up, it appears to us that there would be no finality in any proceedings. There are cases, no doubt, in which on account of either new matter having been subsequently discovered or of fraud, or of some such ground, a new defence might be allowed to be set up after judgment; but in the present case the defendants must have been aware that they had a right of *ab antiquo* user, if, in fact, they possessed it, and we do not understand that any fraud is suggested.

There is absolutely nothing in the circumstances of this case, which would lead us to the conclusion that the defence of an *ab antiquo* right or user would not have been set up if the defendants really wished to rely upon it, and felt themselves able to prove it.

In the case to which we were referred by Mr. Macaskie the circumstances were different. In that case the defendant, who appeared in person, had summoned no witnesses and applied to the Court for an adjournment in order to have the opportunity of calling them. The District Court refused his application and gave judgment against him. On the hearing of the appeal, we thought an opportunity might have been given him, and, on the terms that he paid all costs incurred up to the date of the hearing of the appeal, we directed that the evidence of his witnesses should be heard.

April 28 *Templer, Q.A.*, for the plaintiff.

The plaintiff, as lessee, can maintain this action, and it is not necessary that the owners should be joined. The injunction he has obtained will, of course, only be of effect so long as he continues lessee.

As to the question of damages, I contend that the plaintiff established by the evidence of experts that he had sustained damage to the amount of £137 through the acts of the defendants. It was open to them to show that his evidence was *incorrect, but they did not do so: and they are all* jointly and severally liable for this amount.

The judgment in favour of those defendants who are inhabitants of Myliou and Agourdalia, was against the weight of evidence. A *prima facie* case was made out by the plaintiff by the production of the Vakoufnamé, the judgment of the Daavi Court and the oral evidence shewing that the chiftlik was entitled to the sole user of the water claimed, and it was incumbent on these defendants to show what rights they had in the water. They proved nothing at all, but contented themselves with a denial that they had used the water, a fact which the Court below found against them. The plaintiff is, therefore, entitled to judgment against them.

Ikonomides, for the respondents, the inhabitants of Myliou and Agourdalia.

The plaintiff failed to prove that he was the owner of the water he claimed, and, therefore, his action against my clients was rightly dismissed. The judgment of the Daavi Court is very indefinite, and is not conclusive of the plaintiff's right. The defendants are not liable jointly for damages. Other persons, besides the present defendants, were proved to have taken water, and on what principle can the defendants be made liable for all damage the plaintiff sustained? The defendants took water at different times and at different places: there was no joint act on their part and they cannot be held to be jointly liable. The plaintiff, as lessee, is not entitled to the injunction asked for, which can only be granted in favour of the owner.

The Queen's Advocate replied.

1894. *May* 18

Judgment: This is an appeal on behalf of those defendants who are inhabitants of the villages of Chrysokhou and Goudhi, from the judgment of the District Court of Paphos, ordering them to pay damages to the plaintiff for having in the year 1890, without right, made use of the water of the Poli chiftlik, and restraining them from any further interference with the water.

There is a cross appeal on behalf of the plaintiff against so much of the judgment as orders the dismissal of the action against three defendants, who are inhabitants of

SMITH, C.J. & MIDDLETON, J.

DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS.

Myliou, and one who is an inhabitant of Agourdalia. The plaintiff further appeals against the whole judgment, contending that the damages ordered to be paid have been assessed upon a wrong basis.

It is not necessary for us to go into any detail with regard to the facts. These have been fully stated in the judgment of the District Court, and to a certain extent in a judgment delivered by ourselves on an application, made on behalf of the defendants of Chrysokhou and Goudhi, that they might be at liberty to adduce further evidence before us.

It appears to us that the points raised by the several parties to this appeal for our decision are shortly as follows :

1st. Has it been established that the plaintiff was lessee of the Poli chiftlik ?

2nd. Has he, as such lessee, the right to claim an injunction ?

3rd. Has the plaintiff established his right to claim an injunction and damages against the defendants ?

4th. Are the defendants jointly liable in damages to the plaintiff ?

5th. If they are not jointly liable, has the plaintiff established the amount of damage he is entitled to recover from each defendant ?

Some of these points are raised and relied upon on behalf of the plaintiff and some on hebalf of some or other of the defendants, but we think it will be convenient to deal with them in the order in which we have mentioned them, without having regard to the particular party or parties on whose behalf they were raised.

In the first place, we think that it has been satisfactorily established by the evidence of the plaintiff and of the witness Hadji Ali Effendi, the agent of the owners, that the plaintiff was the lessee of the Poli chiftlik. There is no evidence to the contrary, and, therefore, we think this point cannot seriously be relied upon. Mr. Macaskie observed that this, being Vakouf property, could not be validly leased for more than three years : but this restriction only applies to Idjaré Vahidé and not to an Idjaretein chiftlik such as the Poli chiftlik is.

The second point is, that the plaintiff, as lessee, has no right to claim an injunction. The argument addressed to us was, that no one but the owners of this chiftlik or some person specially authorised by them could bring an action claiming an injunction. We do not follow the ground on which this argument was based. An injunction is a remedy which it is within the discretion of the Court to grant in any case for the breach of a contract or the infringement of a right in cases where the award of damages

would not be an adequate remedy, or to avoid a multiplicity of suits in cases where the remedy in damages could only be obtained by bringing a succession of actions. It is clear in this case that if the defendants persisted in taking water which was the property of the chiftlik, the award of damages would not be an adequate remedy, and that the lessee of the chiftlik might have to bring action after action to recover these damages, if an injunction could not be granted. It appears to us, therefore, that an injunction is a most appropriate remedy in this case, and we know of nothing which debars the Court from making an order of injunction in favour of a lessee to enure so long as his interest as lessee continues.

The next question is, has the plaintiff established his right to claim an injunction and damages against the defendants ?

With regard to those defendants who are inhabitants of Chrysokhou and Goudhi, and who took the water from the channel below the Skulli dam, which appears to be admittedly the property of the chiftlik, we think that the Court came to the right conclusion on the evidence before it.

With regard to the four defendants who are inhabitants of Myliou and Agourdalia respectively, and against whom the action was dismissed by the District Court, the case is not so clear.

It is contended for the plaintiff with regard to them that he proved by the Vakfieh, by a judgment of the Daavi Court and by the verbal evidence given at the hearing of this action before the District Court, that the water taken by these four defendants is the water of the chiftlik, and that the defendants have no right to the user of it.

For these four defendants it was contended before us that the issue was on the plaintiff to prove that the water belonged to the Poli chiftlik, and that he had failed to establish this fact: that the language of the Vakfieh was indefinite as to what water belonged to the chiftlik, and that the judgment of the Daavi Court was not conclusive against the defendants.

We proceed to examine, in the first place, the contentions of the plaintiff.

With regard to the Vakoufnamé, that portion of it which relates to the water rights of the chiftlik is extremely indefinite, and we should find it impossible to say from a perusal of this document what water rights the chiftlik possesses, at all events above the Skulli dam.

The Queen's Advocate pointed out that, in the judgment of the District Court, stress was laid upon the fact that in the Vakoufnamé the words "dam and channel" were used in the singular, whereas in a translation produced by

the plaintiff, these words appear in the plural, and he contended that the latter translation was correct, and that the use of the words "dams and channels" probably had reference to the dams and channels above the Skulli dam, which conduct the water to various mills, whence it passes again to the river, and so into the chiftlik channel at the Skulli dam. Perceiving that the words in the Turkish were, as a matter of fact, in the singular—"dam and channel"—we called the attention of Mr. Utidjian, by whom the Queen's Advocate's translation was made, to the passage, and we have ascertained that the strict translation of the passage is as follows: "and again the spring "water acquired by mulk channel and dam which has run "*ab antiquo* and acquired the character of mulk through "being subject to its bed and forms the right of irrigation "of the said land."

The word translated "spring" means also "assigned" or "fixed." It is difficult to say what is the proper meaning to be given to the word. Looking to the sources of this water, it seems probable that "spring" would be the correct translation, but it is, of course, possible, that it means the water assigned or fixed by the Sultan's grant. The words "channel and dam" appear to us probably to have reference to the Skulli channel and dam, the channel being alluded to throughout the hearing of the case in the District Court as the chiftlik channel, and the water which entered it, in the words of the Vakoufnamé, would become mulk as following the character of its bed, the channel. However, this may be, we could not, from such indefinite language as is used in this Vakoufnamé, come to the conclusion that the whole of the water of the Chrysokhou river above the Skulli dam was the absolute property of the owners of the Poli chiftlik.

We now come to the Mazbata of the Daavi Court. The District Court came to the conclusion that all four defendants were parties to the action in the Daavi Court, and it appears to us to be satisfactorily established that they were. It does not appear from the judgment of the Daavi Court that any admission was made by them that the water they were then charged with having made use of was the property of the chiftlik: there was an admission that they had taken water, and on that the Court found it just that compensation should be paid, and restrained them from further interference with the water.

This judgment of the Daavi Court was appealed against and confirmed by the Temyiz Court on appeal, on the ground that the appeal was out of time. So far as it goes this judgment is a direct decision enjoining these four defendants from irrigating their lands with water which ultimately would have flowed into the chiftlik channel at the Skulli

dam. It is not at all clear to us on what ground the judgment was given against them, as there was no admission on their part of the plaintiff's right, or any evidence adduced on the plaintiff's behalf to prove his right. Still the judgment was given, and so far as the evidence given at the hearing of this action in the District Court goes, it appears to us that three at least of these defendants have complied with that judgment from the year 1875 to the year 1890.

The verbal evidence adduced on behalf of the plaintiff is not very definite as to what the rights of the chiftlik over the water flowing down the Chrysokhou valley are. Hadji Ali Effendi, who has been for many years the agent of the owners of the chiftlik, admits that he does not know from what point the chiftlik rights begin. He, perhaps, of all others might be expected to have a clear idea of what the rights of the chiftlik with respect to the water are. Other witnesses state what at best appears to be their opinion, as to how far the chiftlik's rights extend; but, there does not appear to be any clear evidence that the chiftlik have ever claimed and exercised the right of taking the whole volume of water flowing down the Chrysokhou valley from any fixed point.

It is not, however, necessary for our purpose to-day that we should decide whether the plaintiff has or has not succeeded in establishing the exact rights of the chiftlik, as we have only to consider whether he has succeeded in establishing that the defendants of Myliou and Agourdalia had no right to irrigate the lands they did in 1890. This, no doubt, depends mainly upon the fact that in 1875 these defendants were restrained from irrigating the same lands, which it is proved that they irrigated in 1890, and that according to the evidence of the plaintiff's witnesses, these defendants had not from 1875 to the year 1890 irrigated these lands.

For these defendants of Myliou and Agourdalia it is contended that the plaintiff has not succeeded in establishing the rights of the chiftlik to the water they are charged with having made use of, and that the judgment of the Daavi Court is not conclusive evidence against them, inasmuch as there was no admission on their part then of the rights of the chiftlik, and no evidence as to what the water is which they were restrained from using in 1875. With regard to this latter point, however, it is established by the evidence of the plaintiff's witnesses and by the admission of one of the defendants, that they were sued in 1875 for taking water from the same channel, and for the purpose of irrigating the same land as they did in 1890. This evidence seems to us to dispose of the point as to there being no evidence as to what the water was, which the defendants were restrained from making use of in 1875.

SMITH, C.J. & MIDDLETON, J.

DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS.

As to the point that the judgment of the Daavi Court is not conclusive evidence against the defendants, we agree; but the fact that this judgment was given, and that the defendants have apparently acquiesced in it from the year 1875 to the year 1890 is certainly evidence, and strong evidence, which calls upon the defendants to show what right they have to the user of the water. We agree also in the view stated in the judgment of the District Court that these defendants would not be precluded from setting up such a defence as was not in issue before the Daavi Court; but it appears to us that three of the defendants have not availed themselves of the opportunity they had. At the settlement of issue the defence raised for them was, as regards Agapio, that he had not used the water in 1890: as regards the other three, the defence was that "they "never cut water of the chiftlik, but that they did irrigate "their fields, and continue to do so from the waters of their "village, known as Kolokoudi and Vrexi, which are two "hours away from the dam from which the chiftlik and "other villages receive water and irrigate." At the trial, however, the defendants Loizo Ktisti and Kyriako Vassili abandoned this defence and contented themselves with seeking to prove that they had not made use of the water at all, a defence which the District Court has found was false.

With regard to Tomazo Yanni, the case appears to be different, as he seems to have adhered to the defence raised for him at the settlement of issue. He does not state, nor does he appear to have been asked in cross-examination, whether, as a matter of fact, he watered his field or garden in 1890: but he makes the following statements:—

"I irrigate with my own water."

"The channel passes through my field and afterwards "to the monastery mill."

"I take the water from the channel which passes my "garden."

"I have always done so."

"I inherited the garden from my father."

"I have always irrigated and my father before me . ."

And in cross-examination he says, "Kolokoudi water "runs into the channel, mixes with the other water and "passes through my garden."

"I cut the water off from the other sources and only "take the Kolokoudi water and the other water runs into "the river, and the mills so lose their water. In order to "irrigate my five or six trees, I have to cut all the other "water out of the mill channel into the river."

It seems that this defendant relied upon and gave evidence of the right that was claimed for him at the settlement of issue; and having regard to the indefiniteness of the evidence as to what the rights of the chiftlik owners to the water are, and to the fact that in the Daavi Court action this defendant did not admit the right of the chiftlik to the water, and that judgment was given against him without any proof of what those rights were, and having regard to the fact that he does not appear to have acquiesced in that judgment, inasmuch as he states that he has always irrigated his field or garden with the water now claimed by the plaintiff, we think that the judgment of the District Court dismissing the action against him, was justified.

With regard to the other three defendants, it appears to us that the fact that they were restrained in 1875 from using the water in dispute in this action, that so far as the evidence goes they acquiesced in that decision from 1875 to 1890, raises a *prima facie* case against them, that this water is the property of the chiftlik, and when we find that having pleaded an *ab antiquo* right to use the water, they abandon this defence at the hearing, and set up only the false defence that they did not use the water, it appears to us that they have done nothing to rebut the *prima facie* case made against them. We, therefore, think that, as regards these three defendants, the judgment of the District Court should be reversed, and that the plaintiff is entitled to an injunction restraining them from using the water for the purpose of irrigating those fields, which they are proved to have irrigated. Further than this our judgment will not go.

There now remains only for consideration the question as to the damages. It is argued for the plaintiff that the defendants are jointly liable for all the damage he sustained through the loss of his crops in the summer of 1890. With regard to this contention, we must point out that there was no evidence of any joint act on the part of the defendants; and it does not appear to us that they can be held to be jointly liable for all the damage the plaintiff sustained.

Each is, no doubt, responsible for the damage occasioned by his own wrongful act; but the difficulty is to ascertain what amount of damage each caused.

There is evidence that the water was scarce in 1890—less than one-half the usual quantity according to the evidence of one of the plaintiff's water-guards—and it also appears from the evidence, that other persons, besides the present defendants, took the water—whether wrongly or rightly we cannot say—and it is impossible to say how much of the plaintiff's damage is really attributable to the defendants' acts.

SMITH, C.J. & MIDDLETON, J.

DORMOUSH PASCALIDES v. KASSIM ABDUL REZAK AND OTHERS.

The principle upon which the District Court has assessed the damages, is to estimate the amount of benefit which each defendant obtained, and make that the measure of the plaintiff's damages. It does not appear to us that this is the correct principle on which the damages should be assessed. It is not easy to say, in a case like the present, how the damage caused by each defendant should be calculated, but we think that the fairest way of calculating the damages, would be to ascertain approximately how much land was irrigated by each defendant, and to assume that, had he not irrigated this quantity of land, the plaintiff would have been enabled to irrigate an equal quantity. Then by calculating the value of what the plaintiff's crops was actually on such an extent of land, and the value that would have been obtained had it been irrigated, the measure of damages will approximately be found. The plaintiff would, no doubt, have different summer crops upon his land, which may have been of different values, but as against wrong-doers we think that the damages should be assessed on the basis of the most valuable crop grown by the plaintiff. They have only themselves to thank that the amount of damages cannot be accurately estimated. Whether this will work out roughly to about the same amounts as those awarded by the District Court we cannot say; if it does, it will be well, to save the expense of the further investigation which will be necessary, for the parties to consent to take the amounts awarded by the judgment of the District Court.

With regard to the three defendants, Agapio, Loizo Ktisti and Kyriako Vassili, a further enquiry as to damages will be necessary, unless they come to an arrangement with the plaintiff.

Our judgment, therefore, will be that the judgment of the District Court will be affirmed in so far as it orders that those defendants, who are inhabitants of Chrysokhou and Goudhi, be restrained from further interference with the water running in the channel leading from the Skulli dam to the chiftlik lands: and in so far as it directs that the action against Tomazo Yanni be dismissed: that the judgment be reversed in so far as it dismisses the action with costs against Agapio, Loizo Ktisti and Kyriako Vassili, and that judgment be entered restraining them from further interference with the water in so far as they use it for the purposes of irrigating the fields proved to have been irrigated by them: and also in so far as it orders the specific sums mentioned as damages to be paid to the plaintiff. We shall direct the action to be remitted to the District Court for the assessment of damages against all the defendants, except Tomazo Yanni, upon the principle we have laid

down. With regard to the costs, the plaintiff must pay Tomazo Yanni's costs of this appeal, and the other defendants must pay jointly the plaintiff's costs of appeal.

Since this judgment was prepared, an application has been made to the Court to add as a plaintiff in the action Yanni Maltezo, who, prior to the judgment of the District Court being delivered, became lessee of the entire chiftlik, with the exception of a small portion which remained in the hands of the plaintiff Dormoush. We directed his name to be added, and so far as the injunction is concerned, the order will be in favour of both plaintiffs: the damages, when ascertained, will be paid to the plaintiff Dormoush only.

Judgment varied.

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

HADJI PETRI ECONOMOU *Plaintiff,*

v.

CHRISTOFI CONSTANDI AND ANOTHER *Defendants.*

BANKRUPTCY—DEBT NOT PROVED BEFORE SYNDICS—CREDITOR'S RIGHT TO SUE BANKRUPTS—FRAUDULENT BANKRUPTCY—OTTOMAN COMMERCIAL CODE, SECTIONS 210, 223, 245 AND 247.

To an action brought on a promissory note, the defendants pleaded that, subsequently to the making of the note, they were adjudged to be bankrupts, and that the plaintiff, not having proved his debt before the syndics, was not entitled to maintain the action.

The bankruptcy was a fraudulent one.

HELD (reversing the decision of the Court below): That the facts alleged by the defendants disclosed no defence to the action, and that the plaintiff was entitled to sue on the note.

APPEAL from the District Court of Nicosia.

The action was brought by the plaintiff before a Village Judge to recover the sum of 287 piastres due on a bond.

The defendants admitted the making of the bond, but alleged that since the making of the bond, they had become bankrupt; and that the plaintiff, not having proved his debt in the bankruptcy, was precluded from now maintaining this action.

The Village Judge gave judgment for the defendants, and the plaintiff appealed to the District Court.

The District Court having affirmed the decision of the Village Judge, the plaintiff again appealed.