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

SMITH, C.J. & MIDDLETON, J. 1895.

May 1.

THE HEIRS OF MEHMET EMIN HADJI ISMAIL AGHA, DECEASED, AND OTHERS *Plaintiffs,*

v.

KALLONIKI HADJI ANTONI AND OTHERS *Defendants.*

PRACTICE—PARTIES TO AN ACTION—WATER RIGHTS—VAKOUF CHIFTLIK—PARTITION—DAMAGES—ORDER III., RULE 3—ORDER IX., RULES 6 AND 11—ORDER XXI. RULE 21 OF THE RULES OF COURT, 1886.

Under the Rules of Court, 1886, a party to an action, means either a plaintiff or defendant named in the writ.

Where, therefore, some persons interested as plaintiffs were not named in the writ, and the Court, under Order IX., Rule 6, authorised certain of the plaintiffs named in the writ to prosecute on behalf of those not named:

HELD: That those persons not named in the writ were not "parties to the same action in the same interest" so as to empower the Court to make an order that those parties named in the writ should represent them.

HELD ALSO: That the District Court and Supreme Court had power to order those persons not named to be added as plaintiffs.

APPEAL from the District Court of Limassol.

J. Kyriakides for the appellants.

Pascal Constantinides for the respondents.

The facts and arguments sufficiently appear from the judgment.

Judgment: The plaintiffs in this action are the owners of that portion of the vakouf chiftlik, known as "Louri Vasiliko," which is situate within the village boundaries of Yermasoyia, and also certain villagers of Moutayaka and Yermasoyia who sued on behalf of their fellow villagers generally: the defendants are certain villagers of Phinikaria Akrounda, Dhierona and Eptagonia. *Nov.* 8.

The action was brought under the following circumstances:—

The Vasiliko Louri chiftlik is an idjaretein vakouf chiftlik situate partly within the boundaries of Yermasoyia and partly within the boundaries of Phinikaria. It originally belonged to certain Turkish owners. In or prior to 1251, certain shares in the chiftlik, amounting to one-half thereof, became mahlul, and were sold to Hadji Arghiro Elia of Yermasoyia and Gavriel Papa Michail of Phinikaria. The

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document received by these two men on this purchase, signed by the Mutevelli of Evkaf, states that the shares they were purchasing "equal to one-half of the lands, water, "mill, trees and other appurtenances of the said chiftlik "shall be taken possession of and held in equal shares by "the said Hadji Arghiro and Gavriel," etc.

There is no evidence as to what if any division of the property so purchased was made by the purchasers at the time of their purchase, or that any division was made between them, or either of them, and the owners of the remaining half of the chiftlik.

At the date of the present action it appears that so far as regards the lands, that portion of the chiftlik situate at Phinikaria is in the possession of villagers of Phinikaria, and that portion situate at Yermasoyia is in the possession of villagers of Yermasoyia. It appears to be admitted that the portion of the chiftlik lands acquired on the purchase in 1251, situate within the village of Phinikaria, is considerably less in extent than the portion purchased in 1251 which lies within the village of Yermasoyia.

The water referred to in the document received by Hadji Arghiro and Gavriel in 1251, is undoubtedly the water of the river which rising in the neighbourhood of the hill known as "Papoutsa," flows past, amongst other villages, both Phinikaria and Yermasoyia to the sea. Situate in this river, near the village of Phinikaria is a dam known as the "Avle dam." In the summer of the year 1892, the water flowing in the river appears to have been less in quantity than in an average year, and from a certain date in May until September, the whole of the water was divided at Avle dam and none allowed to flow down to Yermasoyia.

On the 12th September, 1892, the plaintiffs brought the present action claiming that their rights to irrigate from this river should be defined, that the defendants should be restrained by injunction from interfering with those rights, and also claiming damages to their crops and mills arising from the act of the defendants in totally diverting the water since the 22nd May.

At the settlement of issue it was alleged for the plaintiffs, that the water had *ab antiquo* been divided in the following manner, viz.: the villagers of Yermasoyia were entitled to take for 24 hours commencing on Saturday morning, the villagers of Moutayaka for 24 hours commencing on Sunday morning, and the chiftlik for the remaining five days of the week. They further alleged that the water during this five days had been taken for two and a half days by the owners of that portion of the chiftlik situate at Phinikaria, and for the remaining two and a half days by the owners of that

part of the chiftlik which was situate at Yermasoyia. They also alleged that from the 22nd May to the date of the action the defendants had taken all the water.

The defendants admitted that the water was vakouf, but claimed that the Phinikaria people were entitled to take as much of the water as they chose, and that from time immemorial the Phinikaria people have taken the water to their gardens, after the vakouf lands held by them had been irrigated. They appear to have admitted taking the water as alleged by the plaintiffs, and stated that had they not done so, it would not have reached Yermasoyia, but would have been lost in the river.

Certain technical points were raised for the defendants which we shall refer to hereafter, as they were again raised on the hearing of the appeal.

No statement of the matters in dispute appears to have been settled by the Judge on the allegations of the parties.

At the hearing, witnesses were called on behalf of the plaintiffs to prove the division of the water as alleged, the interference of the defendants and the damages the plaintiffs had sustained. The witnesses do not appear to bear out that portion of the plaintiffs' allegation referred to above, as to the division of the water during the five days, during which the chiftlik was entitled to it; as the only two of them who appear to have been asked about it say that there was no division.

Documentary evidence consisting of certain Ilams of the Sheri Court, vakfnamés, a firman, and intekalié kochans were put in, on behalf of the plaintiffs. A copy of one of the Ilams produced was objected to by the defendants as being a forgery, and, as no steps were taken to establish its authenticity, we have left it out of our consideration. The other Ilams, which were given in actions brought by the owners of the chiftlik situate at Yermasoyia, and certain inhabitants of Yermasoyia against certain inhabitants of Kalokhorio and Akrounda, who, the plaintiffs alleged were taking water from the river for the irrigation of lands they had no right to irrigate, go to confirm the allegation of the plaintiffs, as to the division of the water between the inhabitants of Moutayaka, Yermasoyia and the owners of the Vasiliko Louri chiftlik.

For the defendants, witnesses were called to testify to the fact that the inhabitants of Phinikaria were entitled to take as much of the river water as they chose, and that the possessors of land below were only entitled to the surplus.

It is not very clear whether the surplus spoken of by these witnesses, was the surplus, after the vakouf lands of Phinikaria have been irrigated, or whether the witnesses meant, that the Phinikaria people have a right to irrigate other

lands as well. Some of them stated that they had irrigated arazi land, and from what was alleged on behalf of the defendants at the settlement of issue, and from the argument addressed to us by their advocate on the hearing of the appeal, we understand, that the contention is, that the possessors of other land than vakouf capable of being irrigated from the Avle dam have the right of irrigation.

As regards those of the defendants who are inhabitants of Dhierona, Eptagonia and Akrounda, it appears to us that they are sued in respect of their action in stopping the water at Avle dam, there being no evidence of an interference with the water of the river elsewhere, with the exception of two or three of the defendants (of whom two are inhabitants of Phinikaria), who are stated to have taken the water at a spot called " Kokino Kremnos " but there is no evidence as to where this spot is. It is most probable that the water so taken, was used by these defendants, after it had entered the Avle dam ; at all events there is no mention made of the diversion of the water of the river at any point other than. the Avle dam.

At the conclusion of the case, the District Court gave judgment for the plaintiffs, holding that the chiftlik as a whole had a right to the water of the river for five days in the week, that the villagers of Yermasoyia and Moutayaka had *ab antiquo* acquired a right to the water for 24 hours each, and that it was " proved apart from the quantity of " land at Phinikaria and Yermasoyia belonging to the " chiftlik, that the water was divided equally between them " (the Phinikaria and Yermasoyia chiftlik owners), that is " to say, two and a half days each."

The District Court furthermore found, that the defendants had not any further right in the water beyond the two and a half days to which such of them as were owners of chiftlik lands were entitled, that all the defendants stopped and took the water jointly from the Avle dam, and that they were all equally responsible ; and assessed the damages resulting from their trespass at the sum of £45 5*s*., entering judgment accordingly against the defendants for this sum and costs.

From this judgment the defendants appealed, and upon the hearing of the arguments before us it was contended on their behalf, that many irregularities took place at and before the hearing of the action, and that the judgment should be set aside on the ground : (1) that it was not justified by the evidence, (2) that the division set out was not sufficiently explicit, inasmuch as it did not specify particular days, and (3) that the damages given were incapable of joint assessment, as the action was brought against persons who had, and persons who had not, rights over the water.

To deal with the preliminary objections taken by counsel for the appellants; first, it was alleged that some of the plaintiffs were not entitled to sue on behalf of other persons on the ground that, if they did so, the defence of *res judicata* could not be hereafter raised, we presume against the persons so represented. It would appear that the District Court under Rule 6 of Order IX. of the Rules of Court, 1886, authorised Constanti Hadji Arghiro, upon the consent of his co-heirs in writing to appear for them, and in the same way the village commission of Yermasoyia were permitted to appear for the arazi owners of that village. As regards the villagers of Moutayaka, the case appears to have gone on without any order of the Court, leaving the two villagers whose names are mentioned in the writ as purporting to represent the rest of the villagers.

With regard to this objection, it appears to us, on a consideration of the Rules of Court of 1886, that it is well founded.

Order III., Rule 2, requires the name of every plaintiff to be stated on the writ. Order IX., Rule 6, says: "where "numerous persons *are parties to the same action* in the "same interest, one or more of such persons may be autho- "rised by the Court or a Judge to prosecute or defend such "action on behalf or for the benefit of all persons so in- "terested."

This rule appears to empower the Court, only to permit one or more of numerous parties to an action to prosecute it, or defend it on behalf of all. A party to an action appears to us necessarily to mean either a plaintiff or defendant who has been named in the writ. There is nothing in the Rules of Court, so far as we are aware, which allows one of numerous persons having the same interest in one cause or matter, to sue or be sued on behalf or for the benefit of all the persons interested. Such a rule would, in such cases as the present, be, undoubtedly, a very convenient one; but in it absence, and considering the wording of the Rules of Court as they stand, it appears to us that the names of all the persons interested should have appeared on the writ.

The Court below under the provisions of Order IX., Rule 2, could have directed the names of all persons interested as plaintiffs to be joined, and we have the same power now under the provisions of Order XXI., Rule 21.

We, therefore, shall direct that the co-heirs of Constanti Hadji Arghiro, and his co-owners of the Vasiliko Louri chiftlik, and those inhabitants of Moutayaka and of Yermasoyia, who claim irrigation rights in this water, be joined as plaintiffs. On these names being supplied to us, we will draw up an order adding them as plaintiffs.

The second objection taken by the appellants' advocate was, that the District Court refused to allow inspection of documents before he made his defence, and that for this reason the defendants were unable to make a proper defence.

It appears to us that the only object of such an inspection was to find out the weak points in the plaintiffs' title, and that the District Court were very rightly of opinion, that it was not necessary in order to deny or admit the facts alleged in the plaintiffs' statement of claim, that the defendants should be acquainted with the contents of the documents on which that claim was based. Inspection was as a matter of fact afterwards obtained, and appellants' advocate had a full opportunity of making himself acquainted with the documents in the possession of plaintiffs' advocate.

It was further objected by the appellants' advocate that the Judge, who settled the matters in dispute, misunderstood him when he noted that he (the advocate) had said the Phinikaria people had "won a right." As a matter of fact, it was argued before us that all the Phinikaria people but one were owners of chiftlik land.

It is not very easy to understand why the appellants' advocate pressed his objection to this statement appearing on the Judges' note upon us. The water was admitted to be vakouf, and we understand that at the time when the statement was alleged to have been made, the defendants were setting up a right to water the trees and gardens of Phinikaria after the chiftlik lands had been irrigated. This we understand to mean that after vakouf property had been irrigated, other property not vakouf was entitled to be irrigated. The water being vakouf, it is difficult to see how the right to water other property than vakouf property could have been claimed, unless it had been "won" or acquired in some lawful manner, such as by sale, grant or prescription.

If the defendants admit that they are entitled to use the water only for the irrigation of vakouf property, the statement appearing on the Judges' note is immaterial, and, in any event, it does not seem much to affect the decision to be given in the present case.

It was also objected that no issues were settled, and this appears to have been the case, but it seems that this objection was not taken in the District Court, and the defendants' advocate went to trial without raising it. It appears to us that he must have thought certain implied issues were in question and it is too late in the day now to raise this point.

It is also complained that the District Court refused to order an inspection or that a plan should be made, but it was perfectly competent for the defendants to have had a plan

prepared and put in evidence, if they had chosen so to do, and we are not aware that any Court is under any compulsion to make an inspection if it does not consider it advisable.

As regards the objection that some of the plaintiffs were under age, it does not appear that any of the plaintiffs named in the writ were minors : but what is meant, we think, is that some of the persons who, as was supposed were represented by the persons named as the plaintiffs in the writ, were minors. If it be the fact that any of the persons interested as plaintiffs are under age, the matter can be set right by our order joining them as plaintiffs. They can there be joined as suing by some person as their next friend.

These are practically all the preliminary objections raised by the appellants' advocate, and we now come to the substantial arguments in the case.

With regard to the argument that the decision of the Court below was not warranted by the evidence, it appears to us that there was ample evidence on which the Court was justified in finding, that for five days the water of this river was the property of the chiftlik to be used for the irrigation of the vakouf lands, and for the working of the vakouf mills—and we see no reason to interfere with the decision come to on this point.

It was urged upon us that this chiftlik, having originally been in the possession of one person as owner, he would, naturally, in years when the water was scarce, have irrigated the lands of the chiftlik situate at Phinikaria first, before attempting to irrigate the portions of the chiftlik situate at Yermasoyia, and hence those owners of chiftlik land at Phinikaria would now have the right of taking so much of the water as would suffice for the irrigation of these lands, and of allowing the surplus only to flow down to Yermasoyia.

With regard to this, we may observe that there is no evidence before us as to what the owner of this vakouf chiftlik did, and, consequently, no evidence that any portion of the lands of the chiftlik have acquired a right to be watered, before, or in preference to, any other portion. When the chiftlik was in the hands of the original possessor, he could, of course, irrigate any portion he pleased, and it may be, for anything we know to the contrary, that he irrigated the Yermasoyia portion first. We can hardly believe that on the sale of the half of the chiftlik in 1251, the descendants of the original owner, who then owned the other half, would have been willing to acquiesce in the taking by the owners of the small portion of the chiftlik lying at Phinikaria, of so much of the water as they chose, without reference to the requirements of that larger portion of the chiftlik situate

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at Yermasoyia, a proceeding which might have resulted in the descendants of the original owner being deprived of water altogether; at all events in years, when the water was scarce, as in 1892. It is a curious circumstance that after 1251, when the chiftlik fell into the hands of different owners having differing interests, no arrangement as to the user of the water seems to have been made between them. We do not feel bound, therefore, to assent to draw the deduction the appellants' counsel asks us to from the situation of the chiftlik lands held by the plaintiffs and defendants, respectively.

The next argument we have to deal with is, that the judgment of the District Court does not regulate the rights of the parties, inasmuch as it does not define the days on which the owners of the chiftlik lands of Yermasoyia are to take the water, and on which the Phinikaria owners are to take the water. With regard to this, we may observe that there appears to be no evidence on the part of the plaintiffs of any division between the owners of the Yermasoyia portion of the chiftlik and the owners of the Phinikaria portion. The former admitted at the settlement of issue that the latter were entitled to two and a half days, although the amount of the chiftlik land they held was much smaller than that owned by those of the plaintiffs, who are owners of vakouf lands.

Why they are willing to admit that the Phinikaria owners of chiftlik land, though holding less land than themselves, are entitled to greater irrigation rights it is not easy to see, unless it be for the reason which was given by the appellants' counsel for the still greater rights he claimed for the Phinikaria owners, viz.: that subsequently to the purchase in 1251, they got considerably less than an equal share in the undivided half of the chiftlik that was then sold.

It is, of course, possible that the chiftlik land at Phinikaria was of a better quality than that at Yermasoyia, and that hence arose the inequality of the division, or there may have been other reasons for it. The evidence as to the division is practically nil, and we really know nothing about it or when it was made. The only fact that appears to be clear is that the portion purchased in 1251 by the Phinikaria man is held to-day by people of Phinikaria, and the portion purchased by the Yermasoyia man by inhabitants of Yermasoyia.

However, the plaintiffs being willing, that the Phinikaria chiftlik owners should have two and a half days user of the water, we see no reason to interfere with the decision of the District Court on the point. We agree, however, with the appellants' counsel in thinking that the days should be specified, and we consider that the two and a half days to be

allotted to the plaintiffs who are owners of chiftlik lands, should be those days that can most conveniently be allotted. The most convenient days would appear to us to be those, during which the water is nearest to the chiftlik lands of Yermasoyia, and we shall, therefore, amend the judgment of the District Court by directing that the owners of chiftlik lands at Yermasoyia are entitled to the user of the water for two and a half days, commencing from each Monday morning when the right of the user of the water by the inhabitants of Moutayaka comes to an end. If by the expression morning is meant sunrise, the inhabitants of Moutayaka would take the water from sunrise on Sunday to sunrise on Monday: the owners of chiftlik lands and mills at Yermasoyia from sunrise on Monday to noon on Wednesday, and the owners of chiftlik lands at Phinikaria from noon on Wednesday to sunrise on Saturday. If by the expression morning is meant the period commencing after midnight, then the inhabitants of Moutayaka would take the water from midnight on Saturday until midnight on Sunday, the chiftlik owners of Yermasoyia from midnight on Sunday until noon on Wednesday, and the chiftlik owners of Phinikaria from noon on Wednesday until midnight on Friday. Such a division would give the same number of hours per week to the chiftlik owners of Yermasoyia as to the owners of Phinikaria, and would thus, perhaps, be the fairest. We do not, however, wish to interfere with the times during which the villagers of Yermasoyia and Moutayaka have been accustomed to take the water, without their assent, and we will, therefore, not draw up a formal judgment in this appeal until we know what are the hours between which they have been accustomed to take the water on Saturday and Sunday, respectively, and whether in the event of those hours having been from sunrise to sunrise they are willing to consent to an alteration. If in the latter event they are not willing to consent to an alteration of the hours, it seems to us, that as between the Phinikaria owners of chiftlik lands and the Yermasoyia owners of chiftlik lands the first division we have suggested would be the most convenient, though the Phinikaria owners would under it get a greater number of hours than the Yermasoyia owners, owing to the fact that under that division they would have the user for three nights whilst the Yermasoyia owners would have the user only for two. We could, of course, decree an equal division by hours by assigning to the Yermasoyia owners a period from sunrise on Monday to 5 p.m. on Wednesday, but it may be that this would not be a beneficial arrangement as regards the Phinikaria owners inasmuch as they would get fewer hours of daylight in which to irrigate.

We will, however, as we have said, await further information before drawing up the order of division.

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With regard to the damages, we see no reason to interfere with the decision of the District Court, either as to the amount or as to the question that the defendants are jointly liable for having jointly stopped the flow of water entirely from the 22nd May, 1892. It is true as the appellants' counsel argued that no specific days were assigned to the owners of chiftlik property at Phinikaria and Yermasoyia, respectively : the periods, however, during which the villagers of Moutayaka and Yermasoyia had the right of user of the water were fixed and known ; and as regards the chiftlik owners at Yermasoyia, though the period during which they were entitled to the water was not defined, it is quite clear to us that the defendants had not the right to take the whole of the water.

It was urged upon us that if the defendants had not taken all the water, it would not have sufficed to reach the plaintiff's lands at Yermasoyia and Moutayaka. We do not see that this is established by the evidence, which appears to be directed chiefly to show what amount of water was required to work the Kounderos mill. Even if the water were insufficient to turn the mill (a fact which does not appear to us to be clearly established), it does not follow that the plaintiffs could not have irrigated their lands. At all events it appears to us, that it was a matter that the defendants were not entitled to decide for themselves. They clearly had no right to the whole of the water, and whether the plaintiffs or all of them could have made a beneficial use or not, of their share of the water, the defendants had no right to take it without the consent of the plaintiffs. The plaintiffs made attempts to obtain the user of the water so that they, at all events thought that they could make a beneficial user of it.

The practical result of our judgment is, therefore, to confirm the decision of the District Court, adding to it only a direction as to the specific days during which the owners of the chiftlik lands at Yermasoyia and Phinikaria, respectively, are entitled to the user of the water.

If the defendants had desired to have the two and a half days assigned by the District Court to the owners of chiftlik land at Phinikaria defined, we think that they might have effected this by an application to the District Court to amend its judgment, and this appeal would have been unnecessary.

As they have practically failed on the appeal they must pay the respondents' costs. The cost of obtaining the order joining all interested parties as plaintiffs must be borne by the plaintiffs themselves.

Appeal dismissed. Judgment of the District Court varied.