HUTCHINSON, C.J. & MIDDLETON, J. 1901 March 22

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

SOPHRONIOS LOUKA AND OTHERS FOR THEMSELVES AND AS REPRESENTATIVES OF THE VILLAGES OF GALATA AND OROS SINA, *Plaintiffs*,

v.

HAJI PAPA SIMEON NICOLA AND OTHERS, *Defendants*.

WATER—AB ANTIQUO RIGHTS—ABSENCE OF PROOF OF ANCIENT CUSTOMS OR AGREEMENT—RIVULET JOINTLY USED BY SEVERAL VILLAGES—PRINCIPLE OF DISTRIBUTION—THE OTTOMAN LAND CODE, ART. 124—THE HEDAYA, 2ND ED., BOOK XLV., SEC. 2.

Within certain limited hours a group of villages possessed the right by means of separate channels to take the water of a rivulet for watering their lands. Villagers of two of the lower situated villages sued the villagers of the uppermost village for appropriating an excessive share of the water in a year of scarcity. Evidence was given on both sides to shew the ancient customs of distribution which each side contended for, with the times limited, but neither succeeded in proving the existence of any custom.

HELD (*reversing the decision of the District Court*): *that the principle which must govern the distribution of the water is that each village must take by its channel only so much of the water of the rivulet as is proportionate to the area of irrigable land belonging to the village.*

APPEAL from the District Court of Nicosia.

Pascal Constantinides (with him *Economides* and *Servsly* for the Appellants.

Lascelles, K.A. (with him *Artemis* and *Theodotou* for the Respondents.

April 23 *Judgment*: This is an appeal from the judgment of the District Court of Nicosia dated 10th January, 1900, dismissing the Plaintiffs' claim.

The Plaintiffs' claim is to restrain the Defendants from interfering with the right of the inhabitants of Galata and Oros Sina to water from the river Karkoti by unlawfully cutting and conducting by the channel Franziko a larger quantity than they are entitled to, thus preventing the Plaintiffs from taking that which they used to take from olden times; and for damages.

The Defendants denied that they had taken any excess of water, and denied the damages. And the issues settled for trial were, " 1, have the Defendants interfered with the Plaintiffs' rights? and 2, damages."

The Plaintiffs sue both for themselves and as representatives of Galata and Sina Oros. The Defendants are inhabitants of Kakopetria.

During certain fixed hours in each week the people of the three villages named are entitled at the same time to use the river water for the irrigation of their lands. During the remaining hours other villages are entitled to the water. The mode of taking the water is explained in the judgment of the District Court as follows: " This water is taken " from the river by means of a series of dams which are mostly washed " away in the winter, but re-made for the summer in June each year. " These dams turn, each of them, so much of the river water as is " stopped by each dam, into channels running directly through the " middle of the irrigable lands, and carrying the water by that route " back into the river again below.

" During the hours in which the parties are all entitled to be irri- " gating their lands at once, a moveable water dam called a " Koftusa " " is inserted in each of these channels and prevents it from running on " down to rejoin the river; at the same time side-channels are opened " leading from the main channels into the lands to be irrigated, and by " this means the water is distributed over the land.

" When these hours come to an end, the Koftusas are removed, and " the water runs on down through the channels, rejoining the river, and " is used lower down by another set of dams and villages in Evrychou, " Tembria and Korakou."

There are six dams which take the water to which the Plaintiffs and the Defendants are entitled. The uppermost of these is Franziko dam, which turns the water into the channel by which the Defendants' lands are watered. What the Plaintiffs have tried to prove is that by ancient custom the channel served by each dam takes an amount of the water proportionate to the area of land to be irrigated by that channel, and that the proportions are: two-eighths for Franziko, two-eighths for Sina Oros, and one-eighth for each of the other four channels.

The District Court in its judgment said: " It is claimed by the " Plaintiffs that, by well-established custom *ab antiquo*, the owners of " the lands watered by means of each dam are entitled to use a fixed " proportion of the water in the river and no more.

" The Plaintiffs further claim in this case that, in the summer of " 1897, the Defendants, some of whose lands are irrigated by the water " taken by Franziko dam, the topmost of this series, took more than " the proportion of water to which they were entitled, thereby depriving " the Plaintiffs of water to which the Plaintiffs were entitled, and

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" causing them considerable damage; and the Plaintiffs allege that the " proportion fixed by custom for Defendants is one-fourth of all the " water coming down the river to Franziko dam."

And then after discussing the evidence, the Court went on as follows:

" The conclusions to which we have come are as follows: as regards " the evidence as to the amount of lands watered by each of these series " of dams we do not consider that such a proportion as alleged has been " proved to exist among them, though we consider that the proportions " tend roughly in that direction.

" As regards the custom relied upon by the Plaintiffs that Franziko " dam is entitled to take one-fourth only of the water coming down to " it, we consider that the old system of allowing so many hours of the " river water to this series of dams to be taken at the same time, was " based on the idea that that water would suffice to water all these lands; " in an ordinary year it does so, but in dry seasons, not provided for in " the system, there have been quarrels, but none of them has led to the " establishment of any system by custom or agreement.

" Finding therefore that the Defendants have not done anything con- " trary to the established system, by raising their dam or altering its " construction to the detriment of the Plaintiffs, we give judgment dis- " missing the action with costs."

We agree with the District Court that the ancient custom alleged by the Plaintiffs was not proved.

But we do not think that that finding concludes the matter. The complaint is that the Defendants in the summer of 1897, took more of the water than they were entitled to take, " thus preventing the Plaintiffs from taking that which they used to take from olden times," and the issued to be tried was, " have the Defendants interfered with the Plaintiffs' rights?" And although the custom for which the Plaintiffs contended has not been proved, it does not follow that the Plaintiffs have no rights with which the Defendants have interfered.

The villages to which the Plaintiffs and the Defendants belong are entitled to the water of the river for a certain number of hours in each week for irrigation purposes. In ordinary years there is enough water for all of them and no difficulty arises. The Plaintiffs' first witness said, " in an ordinary year when there is plenty of water we don't object " to the Defendants taking more than one-fourth;" and the Plaintiff Sophronios said, " in good years there is more water than required and " no one troubles about the amounts." But in an exceptionally dry season there is not enough; that was the case in 1869, 1872, 1892 and

1897; and in those years there were quarrels. There is contradictory evidence as to how the matter was arranged in those years. The contention of the Defendants is that their channel remains always the same, and that they are entitled to take all the water that goes into their channel, the construction of their dam remaining the same. The Plaintiffs' first witness said, " Franziko dam will hold all the water " when it is scarce." The Defendant Haji Papa Simeon said, " we take " what the channel can carry;" " in a bad year if our channel is full " little water would be left to go down;" " if with our dam made law- " fully three-fourths ran in, we should leave it so." The Defendant Christodulo said, " every dam takes what water it can hold." A witness for the defence, Haji Stavrino Solomo of Kakopetria, who was waterman and looked after Franziko dam from 1850 to 1865, said, " our right is " that we shall take what our channel will hold;" " in a bad year we " must let half go down; we cannot irrigate ourselves and let the " rest go dry;" and another witness said, " we have no right to take " more than our channel full, and that by stones and branches," *i.e.*, with their dam made in the usual way with stones and branches. And Achillea Kyriakou of Kakopetria says, " we do not measure the water: " we take what the channel takes; and we are entitled to an avlaki more " than all the people below."

From all the evidence it appears that the Defendants claim, as we have stated, that they have a right to take all the water which their dam, made in the usual way, will turn into their channel and which their channel will take; and that if in this way their channel takes three-fourths of the water they have a right to take that three-fourths; and it would follow that if, as might happen in a very exceptional year, their channel took practically the whole of the water, they would be entitled to take the whole. They did not make it clear whether they founded this claim on the Ilams which were put in evidence by the Plaintiffs, or on custom, or on agreement. But there was no proof of their claim in any of those ways.

We have then the fact that this water belongs to the different villages for irrigation purposes; and we have no ancient custom, no agreement, no decision of any executive or judicial authority, defining the proportions in which they are entitled to it. What then are the rights of the different owners in such a case when the water is not enough for them all? Are the owners of the uppermost channel entitled to all that their channel takes, even though the lower channels get little or nothing? or is there any presumption of law that all the different owners are entitled to any definite share in the water?

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The only law bearing on this question to which reference was made in the argument was Art. 124 of the Ottoman Land Code, which says: "In disputes about the right of drinking and irrigating water and water channels, consideration is paid only to the *ab antiquo* rights." But this does not help us in a case like this where "the *ab antiquo* rights" are not proved.

In Sec. 3 of Book 45 of the Hedaya we find this principle laid down: "If a rivulet be jointly held by several persons, and they dispute concerning their particular proportions of right of water, a distribution "must be made according to the extent of land which they severally "possess; for as the object of right to water is to moisten their lands, "it is consequently fit that each receive in proportion to his territory." We are not sure how far the rules laid down in the Hedaya are binding in a case in which we have to administer Ottoman Law. The Hedaya or "guide" is a work which has long had a very high reputation in India: it consists of extracts from the most approved works of the early writers on Mohammedan Law, and was composed in the latter half of the 12th century. It is referred to and its ruling on one point is mentioned with approval in the Report prefixed to the Mejellé. It follows mainly the Doctrines of the Hanife School, which the Ottoman Turks also follow. The version of it which we have is an English translation made by order of Warren Hastings, the Governor-General of Bengal. It has been a text book for the examination of the students who are seeking to be called to the English Bar with a view of practising in India. And we find that it is referred to in judgments of the Privy Council as an authority on Mohammedan Law. In the absence of any other principle to guide us, we think that it is right for us to adopt and act upon the principle which it lays down for the ascertainment of the rights of the several persons entitled to the water of a river; and we do so the more readily because the principle seems to us to be a very fair and reasonable one. Accordingly in this case, there being no other rule established either by ancient custom or by agreement or in any other way, we hold that the persons entitled to the water about which this dispute has arisen are entitled to share in it according to the extent of their lands which are irrigated from the six channels referred to in these proceedings.

There was evidence brought out for the defence that a number of springs add a certain amount of water to the Karkoti river between the Franziko dam and the dams by which the Defendants take the water; and it is admitted by several of the Plaintiffs' witnesses that some water is so added, although the amount of it is very loosely estimated and (a most important point), the amount so added in dry seasons, such as that of 1897, is not ascertained even approximately. One witness said

that in 1897 those sources were dry and gave no water; and another said that each of these springs waters a particular piece of land. We do not think that the evidence shews that they are of sufficient importance to affect the question with which we have to deal.

Having now decided the principle upon which, in our judgment, the shares of the persons entitled to this water ought to be fixed, the next thing is to ascertain what is the extent of the lands irrigated from each of the six channels.

After going carefully through all the statements of the witnesses on this point we find that, taking the average of all the statements, there are altogether watered from all the six dams about 510 donums, of which about one-third is under the Franziko dam. The statements are nearly all of them only rough estimates; and we cannot fix from them the exact acreage watered from each dam. They are sufficient however to prove that in the season of 1897, the Franziko channel was taking more than its proper share of the water: for whereas the land irrigated from it is only about one-third of the whole land irrigated by all the six channels, it was taking in 1897, according to seven of the Plaintiffs' witnesses, three-fifths of the whole of the water or, according to two other witnesses, half to two-thirds, and even the Defendant Haji Papa Simeon admitted that it was taking two-fifths, while one of the Defendants' witnesses (H. Diaco) said that sometimes they had half of it in their channel.

In our opinion therefore the Defendants took in 1897 more of the water than they were entitled to take, and they ought to be restrained from taking more than their due share.

We find it impossible with the evidence we have to fix the amount of damage which the Plaintiffs sustained by the wrongful acts of the Defendants in 1897; for one cannot tell how much of the loss to the Plaintiffs' crops that year was due to that cause. Michael Christodulo, one of the Plaintiffs, says that they had an assessor to estimate their damage and that the damage to all the land was estimated at about £10 10s.; the Plaintiff Sophronios says that assessors estimated the damage, but does not give the amount; and the Mukhtar of Evrykhou, who " assessed the damage under Mani, Sina Oros, Ganos and Basiliko " dams by want of water and crops drying up," estimated the amount at £14 7s.;—but that includes damage to some fields of Kakopetria people, who had lands there; and there is no attempt to shew what the loss would have been if the Defendants had only taken their proper shares of the water. We can therefore only give nominal damages.

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The judgment appealed against ought to be set aside, and an order should be made restraining the Defendants from interfering with the right of the Plaintiffs to water from the river Karkoti by taking from it more water than they are entitled to take, and that the Defendants pay to the Plaintiffs £1 damages for having in the year 1897 taken from the said river more water than the Defendants were entitled to take, and the costs of the action and of this appeal.

Appeal allowed with costs.