CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

ON APPEAL.

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

HUTCHINSON, C.J. & TYSER, J. 1905

PAPA PHILIPPO HAJI MICHAEL AND OTHERS, *Plaintiffs*,

v.

CHRISTODOULO GEORGIADES AND ANOTHER, *Defendants*.

May 26

WATER—PUBLIC RIVER, RIGHTS OF PUBLIC—USER AB ANTIQUO—PRESCRIPTIVE RIGHTS—PLEADING—MEJELLE, ARTICLES 1238, 1239, 1254, 1255, 1266, AND 1675—LAND CODE, ARTICLE 124—INJUNCTION.

A public river is a river which is not possessed by any person. The right of using a public river is as set out in the Mejellé. Where a question arises between two or more persons as to the right of user for irrigation, the way in which the lands of the parties have been irrigated from time immemorial will alone be considered.

No one can acquire by prescription rights over a public river other than those given him by the law.

When any one claims a user of the water of a public river for irrigation in excess of that enjoyed by the general public and based on immemorial mutual dealings between himself and others, he should state at the settlement of issues what are the ab antiquo mutual dealings with reference to irrigation as regards his own lands and those of the other party to the dispute.

The Defendants claimed to have an ab antiquo right to dam the river Yalia from 1st March to 1st November and take the water and use it for any purpose they wished and to sell it.

HELD: *that the claim was one which could not be lawfully acquired by prescription.*

This was an appeal of the Plaintiffs from the judgment of the District Court of Nicosia.

The Plaintiffs, who were inhabitants of the village of Nesou, claimed to restrain the Defendants from taking the whole water of the river Yalia by making a dam across the River at Nesou and turning the water into the Defendants' channel and taking the water and selling it to the Dali people and others.

HUTCHINSON, C.J. & TYSER, J.

PAPA PHILIPPO HAJI MICHAEL v. CHRISTODOULO GEORGIADES

Nov. 3

The Defendants, who were the owners of the Chiftlik, contended that what they did they had done *ab antiquo*. They claimed an *ab antiquo* right to dam the river from the 1st of March to the 1st of November, and to take the water of the river to an extent not exceeding the amount which their channel would take, and to use it for their lands and mill and to do what they like with the water and to sell it.

Artemis and *Epenetos* for the Appellants.

Theodotou, Pascal and *Severis* for the Respondents.

Judgment: In this case the Plaintiffs' claim in the writ is "to restrain the Defendants from taking the whole water of the river Yalia and damaging the Plaintiffs."

The cause of action was more particularly stated at the settlement of issues as follows: "the Defendants have made a dam across the river at Nesou, turning the water into the Defendants' channel," and "the Defendants take the water and sell it to Dali people and others."

Before considering the issues, and in order that it may be understood what issues of fact are raised, we will consider what are the rights given to people by the Law as to the user of the water of a river such as the Yalia is admitted to be.

Rivers are divided into two classes, viz.: rivers which are public and rivers which are memluke (possessed): (Mejellé, Arts. 1238, 1239.)

It appears from the note in Ali Hider's Commentary on the Mejellé to the Art. 1239 that there was at one time a difference of opinion as to what constituted a public river and what was a special (khas) river, but that the law is as now laid down in the Mejellé, viz.: that a river is public which is not possessed (memluke), and that other rivers are memluke.

Ali Hider, citing from an Arabic commentary in his note on Art. 1238 of the Mejellé, says "the proof of these rivers being not memluke is that no one has any possession in any of them."

Now it was admitted in the Court below that the Yalia was a public river, that is to say, a river over which no one has any special property.

As to such rivers, in the citation in Ali Hider's note to Art. 1238 it is stated: "These rivers cannot be appropriated by any one as a possession, and in a thing which is not possessed every one has a benefit."

So also from Art. 1238 of the Mejellé it appears that public rivers are free for the use of all.

The user which the public are allowed to make of these rivers is set out in the Mejellé, Arts. 1254, 1255, 1265 and 1266.

All men can drink from them and water their animals (Art. 1266.)

Every one can irrigate his field from them, and open a canal or water channel to irrigate his field or for the construction of a mill. But it is a condition that he must not damage another (Art. 1265.)

In the note to this Article in the Mira'at Mejellé it is stated as follows:—"No one is forbidden to cut off the river in any way if the act of cutting does not do damage to the public. If it causes damage by making it flow another way and flooding other lands he cannot cut it. And a person can put a mill on the river, because cutting the river for

the mill is like cutting it for irrigation. If this makes the river overflow and injures the rights of the public, or it keeps the water from a big river, or it prevents the passage of ships, it is forbidden."

So also in Ali Hider's note on Art. 1238 speaking about public rivers it is stated, " if there is no injury to the public people can dam them; they can divert the water if no harm is done to the villages or lands, and open water channels."

It follows from the enactments above stated and the commentaries on them that the Defendants were entitled to dam the river Yalia and use the water for irrigation or for a mill provided that they did not damage any others.

As to the acquisition of further rights by *ab antiquo* user there are two enactments to be considered:

(1) Art. 1675 of the Mejellé enacts that " no attention is paid to lapse of time in actions about lands the benefit from which belongs to the public, such as (amongst other things) a river."

Ali Hider states that in this Article the rivers meant are rivers in which a village or several villages are interested.

(2) In Art. 124 of the Land Code it is enacted as follows:—

" In disputes about the right to a share of a stream and of irrigating, and water channels, the mutual dealings which are existing from time immemorial are alone considered."

We are of opinion that these two enactments must be read together and that it was not intended by the later enactment contained in the Mejellé to repeal the enactment in the Land Code; and that the meaning of the two enactments is that no one can acquire by lapse of time rights over a public river beyond those rights which are given him by the law, but when a dispute arises between two or more parties as to the exercise of rights of irrigation, the way in which the lands of the parties have from time immemorial been irrigated will alone be considered.

This rule applies as well to rivers owned in shares as to public rivers. The illustrations given by Atuf Bey are as follows:—

" If for one part of the lands having a fixed share of a running stream, which is owned in shares, there is a right to the share of the running water from sunrise to noon, and for the other part a right from noon to sunset, and a dispute arises, this dealing between them which has existed from time immemorial is observed and the dispute is settled in accordance with it. Therefore the owners of the other share in the stream cannot object to the water running to the fields of the person who has the share from noon to the setting of the sun or change the mutual dealings which have existed from time immemorial."

Again he says " If the inhabitants of one village have lawfully acquired their immemorial right to irrigate their lands from water rising in another village the inhabitants of the other village cannot say, ' we will not permit you to irrigate because the water rises in our village.' "

The above examples seem to refer to rivers which are not public, but the principles deducible from them apply equally to public rivers.

The dealings between the parties which are observed would appear to be such dealings as have existed from time immemorial, and to which

objection might have been taken, as for example where owners of land have given up their right to take water for a certain defined time, or where they have allowed another to take benefit from water from time immemorial when they might have objected.

Mere user without interference with the right of another would not seem to constitute a dealing between the parties within the meaning of the law, nor would such user although existing from time immemorial be decisive in any dispute which might arise.

As long however as a person does not exceed what has been the immemorial manner of dealing between the owners of his land and the owners of other lands in the sense above indicated, with regard to sharing the benefits of a stream for the purposes of irrigation, the others cannot complain that such user causes damage.

Having considered the law we will now consider the issues raised.

The Defendants did not deny the allegation in the writ but defended their action on two grounds.

(1) They said that what they did they had done *ab antiquo*. In the argument of the appeal the advocates for the Defendants stated the *ab antiquo* right which they claimed in the following manner. "The *ab antiquo* right claimed by the Defendants is that from the 1st March they are entitled to take water by damming the river, provided they don't take more than Defendants' channel will take, which takes about one mill's water. That they are entitled to mix the water of Pege and use it for Defendants' lands and Defendants' mill, and to do what the Defendants like with the water. That this right continues from the 1st March to 1st November." And they claimed among other things a right to sell the water.

(2) The Defendants said that they caused no damage to the Plaintiffs.

The Plaintiffs in reply said (1) that there could be no *ab antiquo* rights, because the river was a public river, and (2) that the ancient way in which the Defendants dealt with the river was to use it for irrigating and then return it to the river for the Nesou people to use.

As regards the question of how far *ab antiquo* rights can be acquired over a public river, it has already been shown that although no prescriptive right can be acquired, when there is a dispute about irrigation, the manner in which the water of the river has been dealt with from time immemorial for the purpose of irrigating the lands of the parties to the dispute is alone to be considered. Therefore if the claim of the Defendants was limited to a claim to take water for irrigation and for a mill, they would be entitled to use the water of the river for those purposes in the same way as from time immemorial it had been used by mutual dealings between the owners of the Chiftlik lands and the lands of the inhabitants of Nesou. But there is no law under which the Defendants could acquire an *ab antiquo* right to take and sell water from a public river, nor would the mutual dealings between the owners of different lands with regard to this matter bind their successors in title.

The Defendants' claim to an *ab antiquo* right to take the water of the river Yalia and sell it or do what they like with the water is therefore bad.

As regards the Defendants' claim to the user of the water for irrigation purposes, it really is not a distinct claim on which the Court can adjudicate. It is only part of a claim that the Defendants may take the water and sell it and make such use of it as they like. It must fall with the other part of the claim.

If a party to a dispute wishes to assert an *ab antiquo* right based on reciprocal dealings from time immemorial under Art. 124 of the Land Code, he should set out what is the mutual dealing as to irrigation between himself and the other party to the dispute from time immemorial, or rather what has been the manner of dealing as regards the lands of which he and the other party are owners.

In this case for example the Defendants should have set out the *ab antiquo* arrangement as regards the lands of the village of Nesou and the lands of the Chiftlik, and stated that the Plaintiffs were villagers of Nesou. Any *ab antiquo* manner of dealing with the water for purposes of irrigation which they proved under such a defence would justify any user of the water made which was in accordance with it.

As to damage, we are of opinion that there is sufficient legal damage to entitle the Plaintiffs to the injunction which they claim. The taking of the water for purposes other than those for which they are allowed by the law to use it, coupled with a claim of right to do so, is sufficient for that purpose.

We do not think however that the Plaintiffs have proved any substantial pecuniary damage.

Judgment reversed and appeal allowed with costs of appeal and below.

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

MUSTAFA SHEFKI EFFENDI, *Plaintiff*,

v.

REBIA HANUM AHMED RASHID, *Defendant*.

JURISDICTION—SHER' COURT—LAW VII OF 1894, SEC. 47; LAW X OF 1885, SEC. 80—ADMINISTRATION OF ESTATE OF DECEASED MOSLEM—WILL.

The Qadi, administering the estate of a deceased Moslem, one of whose heirs was absent from Cyprus, found that the Plaintiff was entitled to one-third of the estate under a will of the deceased.

HELD: *that the Qadi had jurisdiction to adjudicate on the validity of the will for the purposes of administering the estate. On an application under Sec. 80 of Law X of 1885, the applicant applied that the Court should give a judgment in the form of a declaration that the Plaintiff was entitled to one-third of the immovable property of the deceased.*

HELD: *that the Court could not upon an application under that Section give such a judgment.*

This was an appeal from a decision of the District Court of Famagusta dismissing an application for execution of an Ilam of a Qadi, made in the administration of the estate of a deceased Moslem, whereby the Qadi found that the applicant was entitled to one-third share of the estate of the deceased by virtue of a will.