TYSER, C.J. & BERTRAM, J. 1910

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

AHMED MISSIRLI ZADE AND OTHERS

v.

MICHAEL TSINKI AND OTHERS.

March 15

WATER—WELLS ON ARAZI-MIRIE—HARIM—RIGHT TO CARRY IMPERMEABLE CHANNEL THROUGH STATUTORY HARIM—"LINE OF WELLS"—WELLS LAW, 1896—NECESSITY OF CONSENT OF GOVERNMENT TO WATERWORKS ON ARAZI-MIRIE—LAND CODE, ART. 31.

The object of the Wells Law, 1896, is to confer upon the owners of wells as against adjoining land other than mulk, a statutory harim, constituting an exclusive drainage area for the purpose of the well.

An impermeable channel carried across the statutory harim, and connecting a series of wells at either side, but not itself containing any well draining the harim, is not part of "a line of wells" within the meaning of the law.

SEMBLE: *No one is entitled to construct waterworks on Arazi-Mirié without the consent of the Government.*

This was an appeal from an interlocutory decision of the District Court of Nicosia.

The Plaintiffs were the owners of a line of wells. The Defendants were inhabitants of the village of Akakia who were engaged in constructing another line of wells with a view to conducting a supply of water to the village.

The village line of wells for a certain portion of its length was alleged to traverse the protected area which attached to the Plaintiffs' wells by virtue of the Wells Law, 1896.

The Plaintiffs accordingly commenced an action to restrain the Defendants from sinking wells in their protected area.

After the case had been heard for some days the Defendants offered, instead of sinking the wells complained of, to construct an impermeable water channel, extending across the protected area, and connecting one series of wells beyond the protected area with the main line of wells proceeding to the village. The land to be traversed by the proposed impermeable channel had been acquired by the Defendants.

To this proposal the Plaintiffs objected that this also infringed their legal rights, and the District Court determined, by consent, to try this point of law first, and having done so held that in law the Defendants were entitled to construct the proposed impermeable channel.

The Plaintiffs appealed.

In the Supreme Court, at the suggestion of the Court, with a view to regularise the situation, both parties agreed that the claim on the writ should be amended by adding a claim that the Defendants be restrained from connecting the two wells outside the protected area of the Plaintiffs by an impermeable subterranean channel.

It was further agreed that the question of law to be decided was as follows:—

Assuming that the impermeable channel is so constructed as not substantially to decrease the flow from the protected area itself are Plaintiffs entitled to object to it, because it conveys water across the protected area, from wells outside the protected area which are fed by water, which but for the impermeable channel would flow into the Plaintiffs' wells.

Bucknill, K. A., Paschales Constantinides, and Artemis for the Appellants. This so-called impermeable channel is really an extended link in a chain of wells. The whole series is really one; it crosses our protected area, and in fact drains the supply of our wells, and by this invasion of our area it does us the very damage which it is the object of the law to prevent.

Theodotou and Neoptolemos Paschales for the Respondents. We have not one chain of wells but two and we are proposing to connect them with a pipe across our own land. Clearly we could do so if we pumped the water through an aqueduct above the soil. Why should we not carry it below the soil? The water we are so conveying is already ours, reduced into possession in our own wells.

At this point the Chief Justice pointed out that the interests of the Government were affected, as the Defendants appeared to contemplate making an unauthorised use of Arazi-Mirié.

Theodotou: Under the Wells Law, 1896, it is clear that the permission of the Government is not necessary either for the sinking of wells, or for the carrying of water across land by a channel. See Sec. 3. The only rights of the Government are those defined by Sec. 5. The point reserved in *Raghib Bey Hafuz Hassan v. Gerassimo Abbot of Kykko* (1894) 3 C.L.R., 105, namely, whether the mutessarif of Arazi-Mirié can sink a well in his land without the permission of the Government need no longer be considered.

It was finally arranged that notice of the facts should be given to the Government and that any decision of the Court should be without prejudice to any rights of the Government which it might wish to exercise.

The Court dismissed the appeal.

Judgment: THE CHIEF JUSTICE: In this case the Plaintiffs seek an injunction to prevent the Defendants making a water channel across the land which under the Law of 1896 is reserved for the protection of wells already existing and belonging to the Plaintiffs.

The Plaintiffs base their claim on Sec. 1 of the Law.

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In my opinion a channel carried across the land to convey water from one side of the protected area to the other side cannot be called a well or line of wells any more than a similar channel conveying water from an old well to any point on the land of the Defendants situated within the protected area could be so-called.

It is moreover agreed that the channel shall be constructed in manner approved by an expert so as not to affect the water supply by the effect of the works on the protected area.

I see no reason for granting the injunction on the ground relied upon. But it does appear to me that the Government or Public are interested in this matter and that it may be desirable that the Government should have an opportunity of being heard before any order is made in this case.

Plaintiffs are mutessarifs of Arazi-Mirié. By the Land Code they are entitled to use their land in a certain way (Land Code, Book I, Chapter I). But it does not seem that it is contemplated that they should construct waterworks either above or below the surface without the leave of the Government. It seems to me to come within the express enactment of Sec. 31 of the Land Code, which provides for the making of buildings on the land and extends, in my opinion, to buildings or constructions below the land.

If a mutessarif of Arazi-Mirié could make waterworks on the Arazi in his possession it might transform the whole nature of the holding. Presumably, as he is the owner of the construction, it would be his mulk property. Probably the land would follow the property and become Arazi with mulk upon it. The Government could get no tithe and no bedel ushur, and although bedel ushur is abolished, this must be considered when we are trying to arrive at the powers of a mutessarif. It might intercept the water and damage land, other than that on which the waterworks were made, for a considerable distance from the waterworks.

It seems to me that such works differ from a well or wells sunk merely to irrigate the land itself. That might be looked upon as an operation of cultivation, although it is not clear that such a well can be made without permission. Here wells have been sunk in one piece of Arazi-Mirié and it is proposed to raise water not for the purpose of cultivating that land but to convey it away from that land by a pipe, not a system of wells for raising water to be used at some considerable distance away, and for purposes unconnected with the cultivation of the land on which it is raised.

The question whether this can be done is so important that I should have wished to hear someone on behalf of the Crown before giving a judgment which would seem to sanction the right to do it.

As however it has been agreed that the injunction shall be refused subject to the Crown giving its assent to the works being made and to save time and expense to the parties we refuse the injunction without prejudice to the rights of the Crown. Of course we do not decide as to the right to lay pipes in any particular place as that is not before us.

Notice must be given to the Government and this judgment is without prejudice to any steps the Crown may wish to take.

BERTRAM, J.: I think it clear in this case that no injunction can issue.

The claim for an injunction is based upon the Wells Law, 1896, and the position before that law was as follows:

Water permeating underground was *moubah* until reduced into possession, and there was nothing to prevent one person by sinking a well from draining the supply of another pre-existing well. The only exception was in the case of wells sunk on mevat land with the permission of the Sovereign. Such wells have annexed to them a harim, not for the purpose of giving them an exclusive drainage area, but to give them the space necessary for the use of the well. Inasmuch as this harim becomes the mulk property of the owner of the well, this incidentally gives the owner an exclusive drainage area, which no one else can infringe, either by sinking a well within the area, nor, so it would seem (inasmuch as the maxim *cujus est solum ejus est usque ad inferos* is a principle of the Sher' law—See Mejellé, Art. 1194), by attacking it from outside by oblique shafts or borings. All this is clearly laid down in the case of *Raghib Bey Hafuz Hassan v. Gerassimo, Abbot of Kykko* (1894) 3 C.L.R., 105.

The effect of the Wells Law, 1896, was for the first time to create a harim in the sense of an exclusive drainage area on all categories of land as against the surrounding owners of all property other than mulk. It restricted the use of private property—or quasi-private property—to this extent, but we are not entitled to extend this restriction.

The real question here is a question of fact. Is the " impermeable water channel " in question a channel connecting two chains or lines of wells, or is the whole system one " line of wells " within the meaning of the law ? This is what in England we should call a " question for the jury."

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Would a reasonable man looking at this system call it one line of wells, or would he call it two lines of wells connected with a pipe ?

In determining this question we must, in my opinion, look at the object of the law. I think that a channel conveying water across a statutory harim is not a line of wells or part of a line of wells within the meaning of the law, unless in its course it contains one or more wells, sunk within the statutory harim and draining its waters.

With regard to the more important question to which the Chief Justice has drawn attention I will only say that, in principle, I concur in his remarks; I should like however to reinforce them by drawing attention to two passages; one in the case above referred to in 3 C.L.R., on p. 137, where the Court said:

" It may be that the State has the right to prevent the breaking " up of the surface of land, the possession of which is granted for the " purpose of cultivation, and of cultivation alone, without its assent." And the other from a previous judgment of the Chief Justice, in *K.A. v. Heirs of Petrides* (1904) 6 C.L.R., 96, where he quotes the following utterance of Khalis Eshref:

" New buildings cannot be erected on Arazi-Mirié without permission " because Arazi-Mirié in the hands of the mutessarif is looked upon as " land let, and by Art. 426 of the Mejellé a person who is entitled to a " fixed benefit under a contract of hire, cannot take a benefit from the " thing hired which is in excess of the benefit for which the agreement " was made."

I express no opinion on the point reserved in Raghib Bey's case, as to whether the sinking of a well upon Arazi-Mirié requires the permission of the Government, nor on the question whether in this matter the Wells Law of 1896 has restricted the rights of the Government, as representing the public. I will only point out that it is not impossible that Sec. 5 of that Law was intended to apply to mulk lands, on which wells can without doubt be sunk without the permission of the Government. These are questions which will have to be considered in any case in which it is maintained that the law restricts the existing rights of the Government.

I agree that the appeal must be dismissed without prejudice to any rights which the Government may possess and which it may desire to exercise.

Appeal dismissed.