HUTCHINSON, C.J. & TYSER, J. 1902 June 3

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

ANNOU HAJI POLYCARPOU, *Plaintiff,*

v.

JULIANI HAJI SOLOMO AND OTHERS, *Defendants.*

ARTIFICIAL WATER CHANNEL—RIGHTS OF CO-OWNERS—MEJELLE, ART. 1269—SPRING WATER—RIGHTS OF USER—LAND CODE, SEC. 124.

When water is running in an artificial channel, it is private property. If there are joint owners, no one can deal with it unless with the consent of all the owners, or in accordance with custom.

The Mejelle, Sec. 1269, applies to artificial water courses.

Where there is ab antiquo user, disputes about the user of spring water are governed by it.

This was an appeal from a judgment by which the District Court of Papho amongst other things refused to grant an injunction to restrain the Defendants from interfering with certain water.

It was against the refusal that the appeal was brought.

The facts were as follows:—

There was a spring of water at a place called Kremastara, the water of which was carried in an artificial channel to a tank.

From the tank the water was taken to water the lands of the Plaintiff, the Defendants and others.

The Plaintiff opened a branch channel from the old channel for the purpose of irrigating some lands of hers which had never before been irrigated by this water and which were situated too high to be watered from the tank.

The Defendants destroyed the new channel, and this was the trespass which the Plaintiff sought to restrain.

The kochans of the Plaintiff and the kochans on which the Defendants relied were for water "from the spring."

There were two issues, the answers to which were material to this appeal:

1. Did the Defendants interfere in the Plaintiff's share in the water from the spring?
2. In what way has the distribution of water of Kremastara spring taken place from time immemorial? Was the water taken straight from the spring, or was it allowed to fall into the tank first and then distributed?

The District Court found, "that the Defendants did interfere with "the Plaintiff's share in the water," and "that the water from Kremas-"tara spring was first allowed to fall into the tank before it was used "by the owners," and, holding (Mr. Karemphylaki, O.J., dissenting),

that the Plaintiff had no right to open a new channel on the principles laid down in Art. 1269 of the Mejelle, refused to grant an injunction.

Pascal (*Artemis* with him) for the Appellant contended that Art. 1269 of the Mejelle only applied to a public river and not to a spring or water channel.

He further contended that the kochan which the Defendants produced for the water was in the name of their Mother and that they had no interest in the water.

Gooding for the Respondent.

Judgment: THE CHIEF JUSTICE: In my opinion it is proved that the different persons who are entitled to use the water of this spring for irrigating their lands are entitled to have it flow from the spring to the tank by the old channel. The water of a public river running in its natural bed is not the private property of any one; and any owner of land along the banks of the river may ordinarily open a channel from it for the purpose of irrigating his land, provided he does not thereby injure other persons. But with water running in an artificial channel it is different: it has become private property: and no one of the joint owners can deal with it otherwise than in accordance with the agreement of all the owners, or in accordance with custom, from which an agreement is inferred. That is the rule laid down in Art. 1269 of the Mejelle with regard to a "*river*" or "*watercourse*" which is held in common by several persons; and I think that whether or not the word "river" is an adequate translation of the Turkish word there, the rule must apply to an artificial water channel such as this.

The kochans, which speak only of water "of the spring" or "from the spring," are not conclusive; for the evidence shows that what the persons named in the kochans are entitled to is not so many hours water *taken direct from the spring*, but so many hours of the water which comes from the spring and flows down the old channel into the tank.

I must mention one point which was referred to but not greatly insisted on by the Appellant, viz.: that the Defendants have no interest at all in this water; that the rights on which they found their defence belong to their mother (who is not a party to the action), and not to them. There was no reference to this in the judgment of the District Court. The evidence for the defence shows that the land and the water rights in respect of which the defence is set up are registered in the name of the Defendants' mother, but that the Defendants are in possession of them with their mother's consent, and therefore whatever rights their mother has with regard to this water the Defendants are entitled to rely on as against the Plaintiff in this action.

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TYSER, J.: I find no reason to differ from the Court below on any finding of fact.

The finding on the 4th issue is that from time immemorial the water has been allowed to flow into the tank and has then been distributed.

The Plaintiff now claims to take the water before it reaches the tank and to use it for irrigating land which cannot be irrigated from the tank. But in disputes about irrigating land consideration is paid only to *ab antiquo* user (Land Code, Sec. 124).

Therefore the Plaintiffs cannot use the water in the way they claim and which is not in accordance with *ab antiquo* user.

Moreover these lands cannot have a right of irrigation from the stream because while following the immemorial user, *i.e.*, when the water flows into the tank, they could not be irrigated.

Therefore by Sec. 1269 of the Mejelle the Plaintiff was not entitled to send his turn into these lands.

The contention of the Plaintiff that Sec. 1269 only applies to rivers and does not apply to such a stream as this is clearly without foundation when the Turkish text is looked at.

Therefore as joint owners the Defendants are entitled to prevent the Plaintiff from so using the water and no injunction should be granted.

The Court therefore was right in refusing the injunction which was the part of the judgment complained of and the appeal must be dismissed with costs.

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

VASSILIO GRIGORI DELLA AND OTHERS, *Plaintiffs*,

v.

SAVA HAJI MICHAELI AND OTHERS, *Defendants*.

ARAZI MIRIE—SUCCESSION—LAW OF 17 MUHARREM, 1284—IRS—INTIQAL—CHILDREN — EVLAD — ILLEGITIMATE CHILDREN — VELID-I-ZINA — PATERNITY MATERNITY—LAW XX. OF 1895.

Under the Law of 17 *Muharrem*, 1284, *children born out of wedlock, have, when their mother is dead, a right to take the place of their mother for the purposes of succession (intiqal) to Arazi-Mirié on the death of their mother's father. The right of children to inherit under the Sher' law does not depend upon their being born in lawful wedlock but on the fact of their paternity or maternity, as the case may be, being established.*