HUTCHINSON, C.J. & TYSER, J.
1904
Dec. 22

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

ANTONAKE PAPA PANAGI AND OTHERS, *Plaintiffs*,

v.

JOANNE JASENIDOU, *Defendant.*

RIVER, UNOWNED—WATER, RIGHT OF USER—PRESCRIPTIVE RIGHT—REDUCTION INTO POSSESSION—MEJELLE, ARTS. 166, 1238, 1254, 1265—NEHR, MEANING OF—ANCIENT TURN.

The Defendant erected a wheel well to irrigate his garden and by sinking wells and underground passages took water for that purpose from his river frontage from water penned back by a dam erected by the Plaintiffs in front of the Plaintiff's land. The Plaintiffs did not prove an exclusive right to use this water, nor did they prove damage by the user by the Defendant of the water. The Defendant had previously taken water for irrigation from a point higher up in the stream.

HELD: *that the Plaintiffs were not entitled to an injunction to restrain the Defendant from using the water.*

That the fact that the Defendant had before taken water from a point higher up in the stream, did not in the absence of proof of usage or agreement, or express law disentitle him to take water from his own frontage on the river.

APPEAL of the Plaintiffs from the judgment of the District Court of Larnaca.

The claim was for an injunction to restrain the Defendant from diverting from a river water to which the Plaintiffs claimed to have an exclusive right for watering their own properties, and that the Defendant might be ordered to close a well and channel which he used for that purpose.

The facts were as follows:—

There is a river at Maroni and at the locality Phytotopos Papa Panagi there is a dam called the "Papa's dam," built about 16 or 17 years before the time of the trial, and used by certain of the Plaintiffs for the irrigation of their gardens. The dam has to be renewed every year.

About two or three donums below the Papa's dam was another dam called the "Mill dam," built in 1868, by means of which gardens of other Plaintiffs are irrigated and the mill of one of the Plaintiffs is worked.

About 12 or 15 donums above the "Papa's dam" is another dam called the "Skaphto dam" by means of which the Defendant irrigated the garden in which he erected a wheel well as hereinafter mentioned.

About a year before this action was brought the Defendant constructed a wheel well in his garden one quarter of a donum from the river, and in May, 1903, he sank two wells in his garden in the direction of the "Papa's dam" and one well on the river bank above the "Papa's dam."

He connected the new wells with his wheel well by a subterranean channel, and made an opening from the subterranean channel into the bed of the river about two paces above the Papa's dam, into the water collected by that dam on his own river frontage; and thus took from

the bed of the river water which would have gone to fill the reservoir formed by the " Papa's dam," and passed into the irrigation channel of the Plaintiffs who irrigated from the " Papa's dam," or flowed down to the " Mill dam " and been available for the persons who used the water collected by that dam.

The garden of the Defendant stands on a higher level than the river bed.

The water in dispute was not the water which flowed down the river bed at times of rain but water rising in certain springs.

Before the Defendant made his wells and subterranean channel neither he nor his predecessor in title had taken water from his frontage on the river, but they had obtained water for irrigation from the " Skaphto dam."

Before the " Mill dam " was built the water used to run into the sea.

The Plaintiffs who claim to take water from Papa's dam are successors in title to Papa Panagi.

Abdurrahman the predecessor in title to Papa Panagi had a dam about one donum away from the " Papa's dam " by means of which he used to water the property of the said Plaintiffs.

Subsequently Abdurrahman discontinued the watering of his field from the river because the level of the river sank and it was impossible for his land to be watered until the river changed its course as hereafter mentioned.

Abdurrahman sold to Papa Panagi 50 or 60 years ago.

About 20 years ago the river changed its course and Abdurrahman's field, which used to be on the left bank of the river, became on the right bank of the river.

Three or four years after this the children of Papa Panagi built the " Papa's dam " to water the said land.

The issues settled were as follows:—

1. Have the Plaintiffs an absolute ownership in the said water and are they entitled to ask that the well dug by the Defendant be closed ?
2. Is the said water the property of Plaintiffs and have they an absolute right *ab antiquo* to it ?
3. Was the Defendant entitled to dig a well and take the water ?
4. Did the Defendant dig in May, 1903, the said well on his field or where ?
5. Was the well dug above or on the dam ?
6. To whom does the ownership of the water belong wherever it passes ?

7. Can other people irrigate from the same water in spite of the Defendant digging the well ?
8. Does the Defendant hinder by right the irrigation of Plaintiffs' garden and of the mill ?

The majority of the District Court found that the water in dispute was not a river, that the Plaintiffs had no right to the water by immemorial user and dismissed the action.

Artemis for the Appellants: The Plaintiffs' claim is contained in the 7th and 8th issues. The other issues are superfluous. The Plaintiffs have a right both as riparian proprietors and as acquired by *ab antiquo* user. *Ab antiquo* user is proved. Defendant cannot take water except from Skaphto dam. If he has a right to take from Papa's dam, he cannot use it so as to damage Plaintiffs. Plaintiffs have exclusive right to take from Papa's dam. He cited Ahmed Khouloussi *v.* Ouranios Fiori, 2 C.L.R., 60; Sophronios Louka *v.* Haji Papa Simeou, 5 C.L.R., 82; Annou Haji Polycarpou *v.* Juliani Haji Solomo, 6 C.L.R., 20; Mejellé, Art. 1662.

Themistocles for the Respondent: Defendant claims the water for irrigating his garden so far as he can without injury to others. Plaintiffs have no exclusive right. No damage.

THE CHIEF JUSTICE: The Court are of opinion that the Plaintiffs have failed to prove that they have an *ab antiquo* right, or that Defendant has no right to take water below Skaphto's dam and it is also of opinion that the Plaintiffs have failed to prove that they have reduced into their possession the water in the Papa's dam.

There is no evidence that the Defendant diverted the whole stream.

Artemis in reply: The rule is that every one has his turn, Mejellé, Art. 1269. Skaphto dam is Defendant's turn. Court can give judgment for a claim not in the writ.

The Court after setting out the facts gave judgment as follows:—

Judgment : At the hearing of the appeal Mr. Artemis argued: (1) that the Defendant having previously taken water from the Skaphto dam could not take water from the river below that dam; (2) that the Plaintiffs had an exclusive right to the water penned back by the Papa's dam; (3) that if the Defendant had a right to take water from the Papa's dam he ought to be restrained because he took such a quantity that he interfered with the rights of the Plaintiffs and caused damage to them, assuming that the Plaintiffs had no *ab antiquo* rights but only the rights given by law to a riparian proprietor. With regard to the third point it does not appear to have been raised in the Court below, neither is there any decision on the question of fact, as to whether the Defendant takes water in excess of the right which the law gives him, nor was any issue settled for the trial of that question.

The decision on Mr. Artemis' third point depends therefore upon a question of fact, which was not raised at the trial to which the evidence at the trial was not directed, and on which there is no decision in the Court below, and for these reasons we are of opinion that it cannot be entertained by this Court on appeal.

As to the first point raised by Mr. Artemis, it need only be said that, since no usage, agreement or law was proved, the rights of the Defendant to take water must be ascertained from the Mejellé and the books of the Fuqh.

The first question is what is the water which the Defendant takes. Now it is a curious fact that, although this was a fact distinctly raised by the Advocates at the issue, no issue was settled for the purpose of determining the question of fact.

The District Court seems to have found that the water in question was not a river, although it was a stream that runs in and flows in a river bed. The President expresses an opinion that the terms " river " and " public river " do not refer to little streams.

This interpretation of the law seems to be based on no authority. So far as we can find all the authorities are opposed to it.

The word " نهر " (nehr) used in the Turkish is the same word as the Arabic " nihr." " Nihr " is defined at p. 614 of Hamilton's Hedaya, 2nd edition, as follows:—" It is a term of very general application, " signifying not only rivers properly so called, but also canals, or any " other species of aqueduct constructed by art."

The first meaning given for " nehr " in Sh. Sami's dictionary is " running water."

In Art. 1284 of the Mejellé, a small " nehr " is said to comprise water channels and canals, and also water pipes and conduits which are underground.

In our opinion the term " nehr " used in Mejellé, Art. 1265, which has been translated " river " in the English and " ποταμὸς " in the Greek translations of the Mejellé, will include this spring water which runs down the bed of the river, and the water in question must be considered a river.

The river is not in a channel which is the mulk property of any person, therefore the water is free for the public to use (mubah) (Mejellé, 1238) in the way prescribed by Secs. 3 and 4 of Chapter IV. of Book X. of the Mejellé.

There is nothing in any article therein which would deprive the Defendant of the right to take the water from the river, because he had previously taken it from a place higher up the river, that is to say, from the Skaphto dam.

In the absence of usage, agreement or express law the Defendant has the right given to him under Article 1265 to irrigate his fields from this water.

As to Mr. Artemis' point that the Plaintiffs have an exclusive right to the water penned back by the dam, it is not clear under what law he claims it.

If he claims it by lapse of time, relying on prescription, even if he has acquired a prescriptive right to keep his dam where it is and pen back the water on the frontage of the Defendant, that cannot give him a right to prevent the Defendant from taking the water.

He has certainly not proved a usage *ab antiquo* as defined by Art. 166 of the Mejellé, nor has he acquired the ownership of the water in the manner prescribed by Sec. 1251 of the Mejellé.

For the above reasons we are of opinion that the appeal fails and the judgment must be confirmed. This judgment will however be without prejudice to any right to bring an action to prevent the Defendant from taking water in such a way as to infringe the rights reserved to the Plaintiffs by Art. 1265 of the Mejellé, since the judgment does not deal with that point or decide anything with regard to it.

The Defendant in taking water to irrigate his fields is subject to a condition that he must not damage another (Mejellé, Art. 1265). He must not interfere with its use by others on the river either above or below him. He has no right to intercept the regular flow of the river, if he thereby interferes with the lawful use of the water by others, and inflicts upon them a sensible injury.

The right of user depends upon the particular circumstances of each case, upon the volume of the stream, and the amount of the injury inflicted thereby upon other persons. It is a question of degree, and it is impossible to define precisely the limits which separate the permitted use of the river from its wrongful application.

The only limit to the user which the law prescribes is that the person using an unowned river for irrigation must not damage another (Mejellé, Art. 1265).

Such a river is included in the class of things called "mubah," *i.e.*, free to be used by the public (Mejellé, Art. 1238) and again by Art. 1254 it is enacted that it is a condition of a person taking benefit from it that he must not cause damage to another.

Whether or no there is injury caused to another is a question of fact which should be stated as an issue and determined as a fact upon proper evidence.

As to this point all that the Court decides is that the Plaintiffs have failed to prove any *ab antiquo* right to use the water to a greater extent than is permitted by law to the public.

Appeal dismissed with costs.