

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

HAJI CONSTANTI HAJI YAKOUMI

v.

HAJI CHRISTOFORO APOSTOLI.

TYSER, C.J.

&
BERTRAM,J.
1909

April 13

WATER—HARIM—RIGHT TO DEPOSIT EARTH ON CLEANING CHANNEL—
EASEMENT—MEJELLE, ARTS. 95, 1290.

The right given by Art. 1290 of the Mejjellé to the owner of a water channel of a harim for the purpose of cleaning the water channel by throwing earth on the banks only exists as against the owner of the property servient to that of the owner of the water channel. It does not justify the throwing of earth on the land of a neighbour not so servient.

This was an appeal from a judgment of the District Court of Famagusta.

The Plaintiff claimed an injunction restraining the Defendant from filling up a channel belonging to the Plaintiff and on Plaintiff's land by throwing mud on it from his own channel.

Defendant denied the alleged trespass, and said that the channel in question had recently been dug out by Plaintiff alongside an old one of the Defendant; that the Defendant in cleaning his own old channel threw the earth on the bank, on which it had always been usual for him to throw it, and that if it fell into the Plaintiff's channel it was not the Defendant's fault.

It appeared that the Defendant's channel ran parallel with Plaintiff's boundary, through the land of one Michaeli Haji Loizo. The predecessor in title of Michaeli Haji Loizo had allowed the father of the Defendant (to whom he was related) to construct the channel through his land for the purpose of irrigating the land of the Defendant.

In recent years Plaintiff had enlarged his channel, and it was said that by so doing he had cut into the bank which had arisen along Defendant's channel.

The majority of the Court was not satisfied that the Plaintiff had cut into the bank, and held that the Defendant, whether purposely or carelessly, in cleaning his channel, had thrown mud into the channel of the Plaintiff, but as the damage caused was trifling they granted the injunction prayed without costs. The President held that the Plaintiff had brought the damage on himself by undermining Defendant's bank, and that the action ought to be dismissed with costs.

The Defendant appealed.

Paschales Constantinides and *Myriantheus* for the Appellant.

Theodotou and *Agathangelos Papadopoulos* for the Respondent.

The Court dismissed the appeal.

Judgment. We see no reason to interfere with the judgment of the majority of the District Court.

TYSER, C.J.
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The Plaintiff claimed at the issue, and it was not denied that the channel, said to have been interfered with, was situated on his own land. In the trial however it was said by certain witnesses that the Plaintiff, by enlarging his channel had cut into Defendant's bank, and that consequently part of Plaintiff's channel was now beyond his boundaries. This however was not alleged at the issue,—the District Court has made no finding of fact upon the point, and we must consequently take it that Plaintiff's channel was situated wholly upon his own land.

If the channel is upon his own land he is entitled not to have it interfered with.

The only way in which the Defendant could have justified his interference would have been by alleging that the Plaintiff had granted him a right of passage through his land, and that the acts complained of were incidental to that right. But this is not alleged. All that is alleged is that the Defendant had a right of passage through the land of Plaintiff's neighbour Michaeli Haji Loizo.

Assuming that the principles of the Mejjellé with regard to easements apply to Arazi Mirie the position seems to be as follows: Defendant's predecessor in title acquired, with the consent of the predecessor in title of Michaeli Haji Loizo, an easement to carry water for the irrigation of his field along the edge of Michaeli Haji Loizo's land. This easement carried with it a right to a "harim," (Mejjellé, Art. 1290)—that is to say, the owner of the channel, when cleaning the channel, had the right to throw the mud on both sides. But this harim could only extend up to the limits of Haji Loizo's land.

A man cannot grant rights to the property of another person. (Mejjellé, Art. 95.) You cannot by conceding a right to pass water along your land, give your grantee a right to put a bank on the land of your neighbour.

It seems that all the members of the District Court were of opinion that the Plaintiff's channel was interfered with but the President held that by enlarging his channel the Plaintiff had cut into the bank. That may be so, but this is quite consistent with the channel being wholly on Plaintiff's land.

As far as the Plaintiff is concerned, there is no reason why he should not, if it suits him to do so, run a channel right along the edge of his own land.

If he does so, it is for the Defendant to take measures to prevent the mud thrown on his bank from falling into the Plaintiff's channel by carting it away or otherwise.

The appeal must be dismissed with costs.

Appeal dismissed.