[VASSILIADES, P., JOSEPHIDES, LOIZOU, JJ.]

YIANNIS ASHIOTIS AND OTHERS,

Appellants-Defendants,

v.

M. WEINER AND OTHERS,

Respondents-Plaintiffs

(Civil Appeal No. 4538)

Water—Water rights—Water courses—Irrigation rights—Rivers—Public rivers—River water used for irrigation—Channels—Ownership of irrigation channels and of water of public river running through such channels—Springs—Spring water—Certificates of registration—User ab antiquo—Injunction—Damages—The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, sections 2, 3(1), 7, 15 and 16—Mejelle, Articles 1262 et seq. 1265, 1269, 1675—Land Code, Article 124.

Evidence—Ownership of irrigation channels and of public river water running therein—Certificates of registration—User.

Injunction—Water rights - Injunction for alleged interference with running water and channels.

Channels—Irrigation channels—River water—See above.

River—Public river—River water for irrigation—Rights—User—No one can acquire by lapse of time rights over a public river beyond those rights which are given him by the law - Mejelle Article 1675—Land Code Article 124—Papa Philippos Haji-Michael and Others v. Georghiades and Another, 7 C.L.R. 1.

Prescription - Rights which cannot be lawfully acquired by prescription - See immediately above.

Ab antiquo user—See above.

User from time immemorial—See above.

Immovable property—Definition—Springs, wells, water and water rights whether held together with, or independently of, any land—Section 2(d) of Cap. 224 (supra).

This is an appeal by the defendants from the judgment of the District Court of Nicosia granting the plaintiffs in the action (now respondents) an injunction restraining the

defendants (appellants) "from interfering with and/or unlawfully trespassing" on certain running water and channels as claimed in the action. Under the same judgment the appellants were, moreover, adjudged to pay £200 damages to the respondents for the alleged interference with the water and channels in question.

The subject of this litigation between the parties is a dispute regarding the use of certain irrigation channels serving lands in the area known as "Margo Chiftlik", all in the vicinity of a water course known as Yialias river. These channels "three or four miles long" run along the boundaries of land-plots now belonging to different persons, including the litigants in the present proceedings. The respondents-plaintiffs claim to have established a registered title to the channels which is to be found, as they contend, in title-deeds under title-certificates of registration Nos. B130 and B131 and 4638. They, moreover, claim to have established a good title to the channels by evidence proving "exclusive *ab antiquo* right and/or exclusive prescriptive right to irrigate their lands and enjoy the use, and benefit of the running waters and channels", as alleged in their statement of claim. The appellants-defendants, on the other hand, dispute this alleged ownership of the channels; and contend that as proprietors of lands adjacent to or in the vicinity of the channels, they are entitled to irrigate such lands with river water (the Yialias river water) conducted through the channels in question same as their predecessors in the ownership of the land have been doing in the past.

To collect the water running in the river-bed when required for the irrigation of lands in the vicinity of the river, temporary dams are constructed at apropriate points across the water course. In this case we are concerned with two of such dams, referred to in the evidence, as "Pano" (upper) and "Kato" (lower) "Demma". They are annually constructed near water springs. And, each dam serves different irrigation channels which were also fed in the past from privately owned sources or wells.

Margo Chiftlik *(supra)* was acquired as one estate early in this century by a London Jewish Organisation referred to as the Jewish Colonisation Association. In the early '30s the said Chiftlik was bought to one Grisewood who

appears to have sold, subsequently, considerable part of the Chiftlik-lands to two new comers, who in their turn, circa 1937, sold those lands to the respondents-plaintiffs. The latter, apparently owing to shortage of water, began selling some of those lands to various persons one of whom was a certain M.H. who in 1957 sold to the appellants-defendants the lands he had bought from the respondents as aforesaid and which are the very lands which the appellants claim that they have the right to irrigate with the said river water conducted through the channels in question.

Neither side in this case bases any claim for the ownership of the channels upon their respective registrations for the adjacent land. The respondents-plaintiffs, as stated, claim exclusive ownership of the channels in question by virtue of their aforesaid three specific registrations which are for the ownership of water or water rights; and not by virtue of their registrations for the ownership of the land adjacent to the channels. The registrations upon which the respondents-plaintiffs' action rests are, as stated above, three *i.e.* under Nos. B130, B131 and 4638. B130 is for running water at "Kato Demma", starting "from the springs in the Yialia river ..... and then conducted by open special channels to the fields of Margo Chiftlik for irrigation. The turns being on every 19 days and nights". B131 is for "running water known as ..... 'Pano Demma' spring water, having its source in the river of Yialia..... and conducted by special channels to the lands of Margo". And registration 4638 is for running water in a chain of wells and for wells.

Water and water rights constitute immovable property and may be registered as such. The relevant part of the definition section 2 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 reads:-

"Immovable property includes

.....

(d) Springs, wells, water and water rights whether held together with, or independently of, any land;

(e) privileges, liberties, easements and any other rights and advantages whatsoever appertaining or reported to appertain to any land;.....

(f) an undivided share in any property herein before set out".

In allowing the appeal and setting aside the judgment of the District Court of Nicosia, the Supreme Court:-

Held: (1) It is well established that the irrigable lands of Margo Chitlik were mostly irrigated in the past, from time immemorial with water from Yialias river (*supra*), collected at the two dams *i.e.* the "Pano" and "Kato" "Demmata" (*supra*), and conducted to such lands by the disputed channels.

(2) It is equally well established that these irrigation channels were made by the owners of the Chiftlik when it was all one large estate, belonging to the same owner; and they were kept up clear and otherwise maintained for the irrigation of such lands, from time immemorial.

(3)(a) The registrations upon which the respondents -plaintiffs' action rests are three *i.e.* under Nos. B130, B131 and 4638. Registrations B130 and B131 are for running water starting from springs (*supra*) and registration 4638 is for running water in a chain of wells.

(b) Water as the subject of such registrations, constitutes immovable property within the difinition of that expression in section 2 of Cap. 224 (*supra*); and its ownership is governed by the provisions of the statute (section 3(1)).

(4)(a) Taking first registration 4638 (*supra*), it appears that this property was originally registered on the application of Colonel Grisewood (*supra*), who had sunk under permit of the 22nd October, 1938, the chain of wells in question (*supra*). The channels may have been owned, at the time, by the same proprietor, and may have been used accordingly; but the ownership of the two properties (running water and wells on the one hand, and the old channels on the other) remained separate.

(b) At the material time, for the purposes of this action, there was no "running water", in fact there was no water at all in this chain of wells, which appear to have run dry for quite some time before the action.

(c) We, therefore, do not think that the respondent-plaintiffs' claim in this action for the ownership of the channels in question can possibly be sustained by virtue of this registration.

(5)(a) Regarding registration B130 *(supra)*: This is for "running water" starting from the "springs in the river of Yialia ..... and then conducted by open special channels to the fields of Margo Chiftlik for irrigation. The turns being on every 19 days and nights".

(b) This registration is obviously for water "held..... independently of any land" within section 2(*d*) of Cap. 224 *(supra)*; and is in the name of ten different persons, showing their respective interest or share in the water in the form of hours; and several of the owners have nothing whatever to do with the claim in this action; and are only connected with the disputed channels, if at all, by the description of the property given as above in the registration.

(*c*) It is, however, the case for the respondents-plaintiffs that this registration covers also the ownership of the disputed channels "because they start from the respective water sites".

(*d*) Registration B131 is, also, for "running water", "known as Pano Demma spring water, having its source in the river of Yialia....".

(6)(*a*) There can be no doubt that the irrigation channels in dispute have existed from time immemorial. They were obviously dug out originally in the lands of the large estate known as Margo Chiftlik, for the purposes of irrigation of the owner's lands by water from the public river of Yialias.

(*b*) From time immemorial such river-water was collected in the two dams in question ('Pano' and 'Kato' Demmata), reconstructed every year in the river-bed, to serve the channels in question. Each dam was so constructed annually near the site of a spring, the water from which flowed into the channels together with the river water, when such water came down the river course.

(*c*) It was not suggested in the Statement of Claim that the disputed channels were made, or were kept up, cleared and maintained, during all these years for the water of the two springs. Any such allegation or suggestion would be clearly untenable.

(*d*) In any case at the material time in this action and for quite some time before it, there was no water in the

said springs which had run dry for considerable time before the cause of action arose.

(7)(*a*) It is significant that registration B130 gives also the previous registrations for this spring water, and the names of the previous owners, most of whom had obviously nothing to do with channels in the big land estate of Margo Chiftlik.

(*b*) It is also significant that the earliest registration in respect of the running water covered by registration B130 is registration No. 581 dated the 14th November, 1914. No mention of channels in this registration at all.

(8). To say that such registrations as B130 and B131 for the ownership of water rights in the two springs in question, cover also the ownership of the land upon which the channels run, a matter of many hundreds if not several thousands of square yards (whether such land is covered or not by other registration) is, in our opinion, an impossible proposition.

(9) Independently of their registered title to the water of the aforesaid two springs, the respondents – plaintiffs claim by their Statement of Claim para. 2 "exclusive *ab antiquo*" and/or "exclusive prescriptive rights to the *running waters and channels*" in question. These allegations of exclusive use of the disputed channels so as to create for the plaintiffs prescriptive rights of ownership thereon, independently of the said three registrations, stand contrary to the evidence. Clearly the predecessors in title to the lands of all the parties herein, were making use of the disputed channels, two or three miles long, running next to their lands, for irrigating such lands by river water collected at the two dams in question. Nor can, we think, be reasonably suggested that their use of the channels for such irrigation, depended from the owners of the two springs described in the two registrations in question *i.e.* B130 and B131.

(10) The result is that the appeal succeeds; the injunction granted in the District Court is discharged; the judgment for £200 damages is set aside; and the action is dismissed with costs here and in the Court below.

Appeal allowed. Orders and Order as to costs as stated above.

Per curiam: We shall venture the suggestion that as matters stand according to the evidence in this case, the best way of securing fair and properly managed irrigation of the parties' lands by water from this public river (the Yialias river), would be the formation of an Irrigation Division under the appropriate Law, as attempted in the past, to cover the irrigable plots from the channels in question, whether such land belongs to the appellants, to the respondents, or to other persons.

Cases referred to:

Dormoush Paschalides v. *Kassim Abdul Rezak and Others*, 3 C.L.R.11;

Raghib Bey Hafuz Hassan v. *Gerasimo Abbot of Kykko* 3 C.L.R. 105, at p. 122;

PapaPhilippos HajiMichael and Others v. *Christodoulos Georgiades and Another*, 7 C.L.R. 1, and at pp. 3 and 4.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Stavrinides, P.D.C. & Ioannides, D.J.) dated the 13th March, 1965 (Action No. 638/58) whereby the plaintiffs were, *inter alia*, granted an injunction restraining the defendants from interfering with and/or unlawfully trespassing on certain running water and channels as claimed in the action.

St. Pavlides, for the appellants.

Chr. Mitsides with *G. Constantinides*, for the respondents.

Cur. adv. vult.

The judgment of the Court was delivered by:

VASSILIADES, P.: This is an appeal from the judgment of the District Court of Nicosia granting the respondents (plaintiffs in the action) an injunction restraining the appellants "from interfering with and/or unlawfully trespassing" on certain running water and channels as claimed in the action. Under the same judgment the appellants were, moreover, adjudged to pay £200 damages to the respondents for the alleged interference with the water and channels in question. The appeal is against the whole of the judgment.

1967
Oct 7,
Nov 18
1968
Mar 15
—
YIANNIS ASHIOTIS AND OTHERS
v
M WEINER AND OTHERS

The subject of this litigation between the parties is a dispute regarding the use of certain irrigation channels serving lands in the area known as "Margo Chiftlik" near Pyroi, Margo and Tymbou villages, all in the vicinity of the water course known as Yialias river The case turns on the issue of the ownership of the irrigation channels in question As shown on the Land Registry plans produced in evidence, and as referred to in the judgment, these channels "three or four miles long", run along the boundaries of land-plots now belonging to different persons (apparently quite a number of them), including the litigants in the present proceedings. The respondents-plaintiffs, claiming the ownership of these channels, contend that they are entitled to their exclusive possession and use, for the irrigation of their own lands or those of their tenants, and, that they are, therefore, entitled to the injunction granted by the trial Court

The appellants-defendants, on the other hand, dispute this alleged ownership of the channels, and contend that as proprietors of lands adjacent to or in the vicinity of the channels, they are entitled to irrigate such lands with river water conducted through the channels in question, same as their predecessors in the ownership of the land, have been doing in the past

Thus, the case of the respondents-plaintiffs, both at the trial Court and in the appeal, rests on their alleged ownership of the channels, which was put in issue by the defence The respondents-plaintiffs claim to have established a registered title to the channels, which is to be found, as learned counsel on their behalf contends, in the immovable property registrations under Nos B 130 and B. 131 and 4638, in the Lands Office, title-certificates for which are on the record as *exhibits 2, 4* and *3* respectively (pages 58/59, 62 and 60). They, moreover, claim to have established a good title to the channels by evidence proving "exclusive *ab antiquo* right and/or exclusive prescriptive right to irrigate their lands and enjoy the use and benefit of the running waters and channels", as alleged in para 2 of their statement of claim

It would seem that on an issue such as this, the parties should not have been in litigation for nine years now But, it appears that the size of the interests involved, and the rather unusual nature of the claim, complicated matters

Be that as it may, some of the historic background of the

dispute may help to make the position clearer

The respondents-plaintiffs (who are five persons and not six, as made to appear in the title of the action) are property owners, holding interests in lands and other immovable property of Margo estate; and are closely related to one another (P W 5 p 25, G , and p 26, A) Plaintiff (1) is one and the same person as plaintiff (4); and he sues personally and as agent of the other four plaintiffs who are his brother-in-law (plaintiff (2)), his sister (plaintiff (3)), his brother (plaintiff (5)), and his nephew (plaintiff (6)) He represents all the plaintiffs in the action; and he gave evidence in these proceedings as P W.5 For the sake of convenience I shall refer to him in this judgment as P W 5

This plaintiff (P W 5) stated in evidence that he came to Cyprus with his father 30 years ago, in 1937 (p 26 A) and purchased together with his father about 80 lots of immovable property, (p 26, B) part of Margo estate, which were registered in the name of all the plaintiffs and of their parents (father and mother) "in undivided and equal shares" (p 26, B). The father died in 1940, and the mother in 1944, and their interest in the properties in question "devolved on all the plaintiffs" (P.W 5, p. 26, B C)

To irrigate the lands so acquired (or part of them at any rate), the plaintiffs "hired" water, P W 5 said from one MacLaughlan, which they conveyed "in pipes to either Pano or Kato Demma (dams in the river-bed) as occasion required" (p 26, C) Each of these dams is served by different channels as it may be seen on the Land Registry plan, *exhibit 1*, and as described by the evidence

Lands in the area of Margo estate, known as Margo Chiftlik, (including lands now owned by the plaintiffs and lands now owned by the defendants) were mostly irrigated by water from Yialias river, collected in dams constructed provisionally for the purpose, every year (p 26 G) as well as by water from privately owned wells, chains of wells or other sources Yialias river is a public water course where winter rain waters come down to Messaoria plain from Maheras hills (P W 2, p 21 F) It is admittedly a "public river" (P W 3, p 24, G)

During the rain season in the winter months, the water in the river-bed comes down sometimes fast, and, depending

on the rainfall, occasionally plentiful. During several months of the year, however, the water running in the river-bed is (as usual for such 'rivers' in Cyprus) greatly diminished and rather scarce. It comes down the river course, fed here and there from springs and other natural sources in or near the river-bed. During the summer months the river-bed is mostly dry.

To collect the water running in the river-bed when required for the irrigation of lands in the vicinity of the river, (P.W.3, p.24,G.) temporary dams are constructed at appropriate points across the water course (again as customary in this country) which serve their purpose when there is not much water, and are carried away when the water comes down too strong for them in the rain season. These dams (known as 'Demmata' in Cyprus) are usually constructed with old tree-trunks, sizeable stones, sand-bags and such other materials.

In this case, we are concerned with two of such dams, referred to in the evidence as 'Pano' (upper) and 'Kato' (lower) Demma. They are annually constructed near water springs (P.W.5, p.26,G.). And, each dam serves different irrigation channels which were also fed in the past from privately owned sources or wells (p.26,C.). These channels run "about 3 to 4 miles" (P.W.3, p. 24, F.G.) through what were in the past the chiftlik lands; they are two to five feet deep (P.W.3, p.24, F.G.); they have been there from time immemorial, as far as the evidence in this case goes (D.W.1, p.40,H; D.W.2, p. 47, D.E.); they join or run apart as required for irrigation purposes; and their course may be best described in *exhibit 1*, the plan prepared for the purposes of this case by a Land Registry witness, where they are coloured blue. The only inference as to their original construction, which can be drawn from the evidence in the case, is that they were made by the owner of the chiftlik lands, at that time forming one big estate, for the irrigation of his property.

Margo chiftlik, apparently quite a large one, in the Messaoria plain, was owned in the past by Turks, according to the evidence (D.W.3, p. 49, C.D.) and it was acquired early in this century by a London Jewish organisation, referred to as the Jewish Colonisation Association (p.42, A; p.22, G.H.) apparently for the purpose of establishing a Jewish settlement (p.47, G.) in that area.

One of the witnesses in this case, who was married in 1914, and is now of advanced age, but his young memory at that time seems to have recorded outstanding events of that period, worked as a farm-hand at Margo chiftlik from 1911 till 1935, at first as a labourer, and later as a "waterman" (D.W.2 p. 47, A.C.D. and G.). The chiftlik then belonged to the Jewish organisation in question (p.48, B) and its lands were irrigated with water from the two dams, Pano and Kato Demma, in Yialias river, through the disputed channels (p.47, D; p.48, C.). At the site of Kato Demma the witness remembers a spring yielding at times in the past, some two inches of water, which could irrigate about one-and-a-half donums of land when there was no other water in the river course (p.47, E.). As a "waterman" he worked in the irrigation of the chiftlik lands for many years.

In the early '30s, some time before the witness left Margo estate, one Grisewood bought the whole chiftlik for £10,000, according to this witness (D.W.2, p. 48,D.). He continued working for the new proprietor same as before, for some two or three more years. According to this witness Margo chiftlik as one estate, with its extensive lands, irrigation channels, other property and such water rights as they may have existed in the early '30s, went all together to the new proprietor, Grisewood. This is confirmed by another witness, Shakkas (D.W.1., p.39,H.) who worked on the estate for over twenty years, at first as an apprentice boy of about 14 years of age, and later as an agricultural machinery mechanic and foreman (P.W.8, p.36, F; P.W.5, p.31, C) between the early '30s and 1957 when he left the chiftlik.

Be that as it may, Grisewood appears to have sold considerable part of the chiftlik-lands to two new comers, referred to in the evidence as Branisky and Tulipman (P.W.5, p.29, B; D.W.1. p.40, A.). According to P.W.5 (the plaintiff) Grisewood was not a Jew; Branisky was, (p. 29, A.). Grisewood kept the lands to the south of the main Nicosia-Larnaca road; Branisky and Tulipman got those to the north of the road (P.W.5, p.29, A); which are the lands later acquired by the Weiners, the respondent-plaintiffs (p.29, B.); part of which the Weiners subsequently sold to one Mois Haramatti, the appellant-defendants' predecessor in title. These lands to the north of Nicosia-Larnaca road, were irrigated by the disputed channels which existed at that time in much the same condition as they are now found (p. 29, C.)

capable of irrigating, when there is sufficient water, the same lands as in the past

When the Weiners (respondents-plaintiffs) came to Cyprus in 1937 (P.W.5, p.26,A.) they bought all the lands owned by Branisky and Tulipman (P.W.5, p.29,B.). Later, owing to shortage of water, according to P.W.5 (p.29, F.) they began selling lands. They sold to Mois (or Moshe) Haramatti part of the lands to the north of Nicosia-Larnaca road, which he later sold to the appellants-defendants (p. 29, F.); and they (the Weiners) sold other land to Tymbou villagers, at different localities, about 1,100 donums, according to witness Shakkas (D.W.1, p. 40,F.) for £22,000.

The sale to Haramatti, according to this witness, was in 1951/52 (p. 44, B.). Haramatti sold his lands, about 900 donums, to the appellant-defendants in the summer of 1957 for £33,000 (p.51, A; *exhibit 15*) borrowed from the Co-Operative Central Bank. After this sale witness Shakkas stopped working at Margo Chiftlik and went to live at his village, Tymbou, (D.W.1, p.44, C.).

I now come to the irrigation aspect of the case. It is well established by uncontradicted evidence, that the irrigable lands of Margo chiftlik were mostly irrigated in the past, from time immemorial (D.W.2; D.W.3) with water from Yialias public river (P.W.3, p.24, G.H.), collected at the two dams in question, Pano and Kato Demmata, and conducted to such lands by the disputed channels. These, according to witness Kimonis, (called by the respondent-plaintiffs as a Land Registry expert) run through the chiftlik lands "for about 3-4 miles"; and they are four to five feet deep in some parts, and about two feet deep in others (P.W.3, p. 24, F.G.). Dug out in the land, these irrigation-channels are, one might say, of a permanent nature, as they are now in much the same condition, and run the same course, as they have been doing from time immemorial in the past (P.W.5, p.29, C; D.W.2, p.47, D.E.; D.W.3).

It is equally well established, we think, by the evidence that these irrigation channels were made by the owners of the chiftlik when it was all one large estate, belonging to the same owner; and they were kept up clear and otherwise maintained for the irrigation of such lands, from time immemorial. They are the channels marked on the Land Registry plans produced in this case as *exhibit 1*, *exhibit 5*, and *exhibit 7*

(P.W.1, when recalled, p.23, B.C.) "The channels in *exhibit 5* —this Land Registry witness said—follow exactly the same course as those shown in *exhibit 1* and 1(A)."

The same witness produced *exhibit 7* showing one of the plots now belonging to the appellant-defendants as plot 163 (in the past plot 23 on the *exhibits*, evid. p. 23, B.), which was in the past registration 1774 covering several smaller plots, including plot 23 (evid. p. 23, F.) and which is separated from the neighbouring land still belonging to the respondent-plaintiffs, by the disputed channel (p. 22, G.). The channels thus constitute, according to the witness, the boundary of the respective plots; and is shown as such in the certificates of registration.

This tends to indicate that the present registrations for the land on either side of the channel, now belonging to different owners, extend as far as the channel; and do not include the channel itself. As, however, neither side in this case bases any claim for the ownership of the channel upon their respective registration for the adjacent land, we do not have to decide such a matter in the present action. The respondent-plaintiffs claim exclusive ownership of the channels in question, by virtue of certain specific registrations for the ownership of water; and not of their registrations for the ownership of the land adjacent to the channel.

This brings me to the registration upon which the respondent-plaintiffs' action rests. They are stated in the indorsement on the writ; and again in paragraph 1 of the statement of claim; they are registrations B.130 and B.131 of Margo village; and registration 4638 of Potamia village. B.130 is for water at Kato Demma; B.131, for water at Pano Demma; and 4638 for running water in a chain of wells.

Water as the subject of such registrations, constitutes immovable property within the definition of that expression in section 2 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224; and its ownership is governed by the provisions of the statute (section 3(1)). The relevant part of the definition reads:—

"Immovable property includes—

. . . . . .

"(d) springs, wells, water and water rights whether held together with, or independently of, any land;

"(e) privileges, liberties, easements and any other rights and advantages whatsoever appertaining or reported to appertain to any land.....

"(f) an undivided share in any property herein before set out."

Taking first the property in registration 4638, produced by the Land Registry witness Papathomas (P.W.1) as *exhibit 2*, we have it that the property covered by this registration was acquired by P.W.5 (plaintiff 1) in September, 1954, from Magdalene McLaughlan for £600. In one of the Land Registry files (application 645/45 L.R.O. Nicosia) produced for the respondent-plaintiffs, it appears that this property was originally registered on the application of Colonel Harman Grisewood of Nicosia, who had sunk under permit No. 329 of the 22nd October, 1938, the chain of wells in question, on land registered in the name of his two sons, and later transferred (in 1940) to his daughter Mrs. Magdalene McLaughlan, in whose name he (Colonel Grisewood) now applied to have the chain of wells in question, duly registered. That original registration, effected in 1946, makes no mention or reference whatever to the disputed channels (P.W.1, p.19, C.D.). The registration is for "running water and wells" as shown on *exhibit 2*. The channels may have been owned, at the time, by the same proprietor, and may have been used accordingly; but the ownership of the two properties (running water and wells on the one hand, and the old channels on the other) remained separate. At the material time, for the purposes of this action, there was no "running water", in fact there was no water at all in this chain of wells, which appear to have run dry for quite some time before the action (P.W.3, p. 25, A.). We do not think that respondent-plaintiffs' claim in this action for the ownership of the channels in dispute, can possibly be sustained by virtue of this registration (No. 4638; *exhibit 2*).

The other two registrations, B.130 for Kato Demma, and B. 131 for Pano Demma, are before the Court as *exhibits 4* and *3* respectively, produced for the respondent-plaintiffs by the same Land Registry witness, Papathomas. (P.W.1, p. 19, E.; and p.19, G.).

The former (B.130 for Kato Demma) gives the property which is the subject of the registration as—

"Running water known as Kato Demma. Starts from

the springs in the river of Yialia near plot 112 of XXX1/35 and then conducted by open special channels to the fields of Margo Chiftlik for irrigation. The turns being on every 19 days and nights".

This registration is, obviously, for water "held..... independently of any land" (section 2(d)); and is in the name of ten different persons, showing their respective interest or share in the water in the form of hours. It is stated in the title that regarding the rights of ten out of the eleven owners, the registration was effected under the general registration, and in the case of the other owner by amalgamation of his title. Several of the owners, as far as the evidence goes, have nothing whatever to do with the claim in this action; and are only connected with the disputed channels, if at all, by the description of the property given as above in the registration. There is a change in this registration effected in August 1953, by exchange of title and inheritance concerning some of the previous owners; this, however, is immaterial for the purposes of the present action.

It is the case of the respondent-plaintiffs that this registration covers also the ownership of the disputed channels "because they start from the respective water sites", one of their witnesses said (P.W.1, p. 19, A.). Mr. Constantinides argued strenuously on their behalf, that the registration covers also the channels because it mentions them. This was also the evidence of witness Groutas (P.W.9, p. 37, F.G.; p. 38, A.B.).

The other registration, B.131, for Pano Demma, *(exhibit 3)* gives the property which is the subject of the registration as—

"Running water (two wheel-wells water) known as 'Drakondia' or 'Pano Demma' spring water, having its source in the river of Yialia near plot 159 and 125 of XXX1/34 in the river of Yialia and conducted by special channels to the lands of Margo".

According to the Land Registry witness who produced the title (P.W.1, p. 19, E.F.), the earliest registration in respect of this property is No. 574 dated 19.2.1892, the subject of which as given therein, was "water running through the spring of Pyroi river".

The trial Court considered the evidence in support of respondent-plaintiffs' claim in the action as of two kinds: *(a)*

the certificates of registration, and *(b)* evidence of exclusive use of the channels by plaintiffs and their predecessors in title from time immemorial.

As regards the former, the trial Court relied on the evidence of the Land Registry witnesses; and on the number of hours and minutes for which each of the registered owners is entitled to take the water at Kato Demma under registration B.130. As these total 456 hours in the 19 days and nights which makes the circle of turns for taking the water, "it follows—the trial Court say in their judgment (p.55, B.)—that continuous use of these channels is covered by the registration of the water rights and that therefore the channels are referred to in the aforesaid certificate as subjects of ownership. And further the identical reference of the channels in *exhibit 3* can only be similarly construed."

As regards the evidence of user, the District Court say (p. 56, A.) that "on the whole, on the point whether the plaintiffs and their predecessors in title and also their co-owners, had the exclusive use of the disputed channels or not, we prefer the evidence adduced by the plaintiffs to that adduced by the defendants".

This assessment of the evidence in the judgment of the trial Court, was strongly attacked in the appeal, the main ground of which, on the factual aspect of the case, is that the judgment is against the weight of evidence.

It is, we think, hardly necessary to say that such a general view of the evidence cannot be considered as a satisfactory finding of the material facts in the case. As it has already been pointed out in this judgment, most of the material facts are established by evidence from both sides; or, by evidence which has not been contested.

There can be no doubt, we think, that the irrigation channels in question, have existed from time immemorial; and that following the same course, have been kept up in much the same condition all along as at present. They were obviously dug out originally in the lands of the large estate known as Margo chiftlik, by its owner; for the purposes of the irrigation of the owner's lands by water from the public river of Yialias. From time immemorial, as far as the evidence can show, such river-water was collected in the two dams in question, reconstructed every year in the appropriate

season, at those two particular spots in the river-bed, to serve the channels in question. Each dam was so constructed annually, near the site of a spring, the water from which flowed into the channels together with the river water, when such water came down the river course. We shall deal later in this judgment with the water from these springs as distinguished from the river water.

It is not alleged in the statement of claim that the disputed channels were made, or were kept up, cleared and maintained, during all these years for the water of those two springs. Any such allegation or suggestion would be clearly untenable on the facts as established by the evidence. To say that irrigation channels running "three to four" miles long and two to five feet deep, with the corresponding natural width and pathways near the channel, through these lands in the Messaoria plain, were originally made as shown on the plans before the Court, and were kept up in, practically, their present condition from time immemorial for the use of the water flowing from the two springs in question, regardless and independently of the use of water from the river, would be utterly untenable; and inconsistent with the evidence in the case.

The springs are now known as upper and lower dam (Pano and Kato Demma) respectively; and are undoubtedly connected with the river and its water. The channels now exist for the river water. Without it, they would, most probably, have never existed, excepting for a small fraction of their length and size, sufficient to serve the springs. And they would have ceased to exist, excepting for such a small fraction, long before action. In any case at the material time in this action and for quite some time before it, there was no water in the springs referred to in the statement of claim, which, according to the evidence, had run dry for considerable time before the cause of action arose.

The case for the respondent-plaintiffs as put in their statement of claim, is that they are the owners of the disputed channels by virtue of their registrations for the water described therein, without any reference to the river water. Independently of their registered title to the water of the two springs in question, the respondent-plaintiffs moreover allege in para. 2 of their statement of claim "exclusive *ab antiquo*" and/or "exclusive prescriptive rights to the running waters and channels" in question, again without any reference to the river water.

These allegations of exclusive use of the disputed channels so as to create for the plaintiffs prescriptive rights of ownership thereon, independently of the said three registrations, stand contrary to the evidence. To suggest that Tulipman and Branisky, the predecessors in title to the lands of all the parties herein, were not making use of the disputed channels running next to their lands, for irrigating such lands by river water collected at the two dams in question, would be contrary to the evidence, and against all reason. Nor can, we think, be reasonably suggested that their use of the channels for such irrigation, depended from the owners of the springs described in the two registrations in question. The same would apply with equal force to the successors of Tulipman and Branisky, viz. the respondent-plaintiffs herein: and later to their successor, Moshe Haramatti, who bought from the respondent-plaintiffs the irrigable lands now held by the appellant-defendants. The attempt to support such a claim by the evidence adduced to prove permission by the plaintiffs for the use of the channels, is clearly insufficient to establish a prescriptive title, even if such evidence could be found acceptable. The alleged *ab antiquo* and/or prescriptive title to the channels, has definitely, in our opinion, never been established.

What remains now to be considered is whether the registrations for the water at Kato Demma (B.130) and Pano Demma (B.131) confer or include rights of ownership to the channels in question, entitling the respondent-plaintiffs to the injunction granted by the District Court, and to the damages awarded on the basis of such rights.

Registration B.130 *(exhibit 4)* certifies the registration of ownership rights under the Immovable Property (Tenure, Registration and Valuation) Law, Cap.224, in respect of the property described therein. It certifies the registration of the water rights of those ten different persons (including the plaintiffs) who are named in the title; the rights specified opposite each name; which consist in the right to take the whole of the water for a certain number of hours and minutes every turn of 19 days and nights. The exhibit *(exhibit 4)* gives also the previous registrations for this water, and the names of the previous owners, most of whom had obviously nothing to do with channels in the big land estate belonging to the Jewish Colonisation Association for well over twenty years. It is interesting to note that one of such owners of

water was the Church of Pyroi village (presumably a Greek Orthodox Church) and another was David Tulipman of Jerusalem, presumably the person referred to in the evidence as one of the landowners connected with the land now belonging to the appellant-defendants.

Be that as it may, however, the registration is clearly for the "running water known as Kato Demma" from the "springs in the river of Yialia", the public river connected with this case; which (running water) is "then conducted by open special channels to the fields of Margo chiftlik for irrigation". It is in evidence from the first Land Registry witness (P.W.1, p.20, A.) that "the earliest registration in respect of this property is 581 dated 14.11.1914 which describes the property as 15 hours and 45 minutes of water every 19 days, coming from the spring of Pyroi village". No mention of channels in that registration at all.

To say that such registration for the ownership of water rights in the spring in question, covers also the ownership of the disputed channels in this case, that is to say the ownership of the land upon which the channels run, a matter of many hundreds if not several thousands of square yards (whether such land is covered by other registrations or not) is, in our opinion, an impossible proposition.

It is significant, in this connection, to note that channels are not mentioned in what is included in the term "immovable property" in section 2 of Cap. 224; while they are mentioned in section 7 which provides that the ownership of..... "rivers, streams and natural watercourses" not privately owned on the coming into operation of Cap. 224 in September, 1946, as well as their "beds or channels" shall in any case, be vested in the Crown by virtue of the statute; and shall thus be Government property. The provisions of sections 15 and 16 of the statute regarding water courses and irrigation channels, are also significant in this connection.

It is an established fact in this case, that there was no water in the springs covered by respondent-plaintiffs' two registrations in question, at the material time for this action, and for considerable time earlier. For all we know in this case, the water which was the subject of those two registrations may have been extinguished for good. The dispute between the parties arose when the appellant-defendants insisted on irrigating their lands with *river water* running in the channel

adjacent thereto, far away from the site of the springs, same as their predecessors in the ownership of those lands had been doing in the past, from time immemorial. To say that these registrations for the water rights in the two springs, in the river-bed (if such rights could be registered at all) conferred ownership-rights on the land on which the channels run, (land of considerable extent in this case) independently of the extinct water rights, which (ownership rights) are capable of separate enjoyment, sale, transfer etc., is, in our opinion an untenable proposition.

What the respondent-plaintiffs are obviously trying to do by this action, is to secure the means of appropriating river water, so valuable and important to the owners of the irrigable land of that large area. Water, the value of which is far greater than the value of the water covered by their registration B.130 at its very best.

The same of course applies to registration B.131 for "two wheel-wells of running water" of the spring at Pano Demma which was also dry at the material time, and for considerable time before action. This registration also makes reference to the "special channels" as the means of conducting the water to the lands of Margo estate. We find ourselves entirely unable to say that these words in the description of the water-rights in the registration, are capable of conferring ownership rights on the land on which the channels in question run.

Disputes over irrigation rights in this country, were the subject of extensive litigation in the past. One of the earliest reported cases is *Dormoush Paschalides* v. *Kassim Abdul Rezak and Others* (3, C.L.R. p. 11) where the lessee of a chiftlik in Paphos successfully maintained an action for injunction and damages, against some of the defendants, but failed against others, for interference with water claimed by the owners of the chiftlik, conducted to its lands by irrigation channels some 3 1/2 miles long. The case is not very helpful in dealing with the present case—apart of the effect of the statute (Cap. 224) now governing the position—as that case turned mainly on the Turkish wording of the 'Vakoufname' (dedication deed) regarding the water rights in question, and on the facts of that case, which were substantially different to the facts herein; but the discussion regarding the *ab antiquo* use of such rights is useful.

Another old case where the nature and extent of water rights under the law prevailing at that time, was discussed and considered in an elaborate judgment on appeal to the Supreme Court, is *Raghib Bey Hafuz Hassan* v. *Gerasimo, of Kykko* decided in 1895 (3, C.L.R. p.105). We shall only refer to a passage in the judgment at p. 122, regarding the use of river water for irrigation, which reads:—

> "We think the considerations to be applied to the water of rivers and streams are quite distinct from those applicable to underground waters. The right to make use of the waters of rivers and streams for the purposes of irrigation are regulated in that chapter of the Mejelle (Turkish code of civil rights) which commences at Article 1262. It is clear from Art. 1265 that anyone may make use of the waters of public rivers for the purposes of irrigation, on the condition that he does not injure other persons, e.g. by taking all the water of the river. This must mean that any person is entitled to make such reasonable use of the water for purposes of irrigation as is not inconsistent with the rights of other persons. It is subject to the limitation mentioned in Art. 1269 which, as we said in giving judgment in the case of "*HadjiLoizo HadjiStassi and others* v. *Ahmet Vehim and others* (1, C.L.R. p. 91) seems to show that the right to take this water for the purposes of irrigation is not a personal right, but one that is enjoyed only in respect of the ownership of land".

A case more in point, decided about ten years later (1905) on appeal from the District Court of Nicosia, regarding irrigation rights from this very same river, Yialia, at a point higher up the same watercourse, is *PapaPhilippo Haji Michael and Others* v. *Christodoulos Georghiades and Another* (7, C.L.R. p. 1). The defendants in that case, claimed to have *ab antiquo* rights to dam the river Yialia from 1st March to 1st November and take the water and use it for any purpose they wished, including sale of such water from their channel. It was held by the Supreme Court (reversing the judgment of the District Court), that such a "claim was one which would not be lawfully acquired by prescription".

After making reference to several articles in the 'Mejelle' regarding irrigation rights and other use of water from a public river such as Yialia was admitted to be, the Court

dealt with the acquisition of "further rights by *ab antiquo* user", and referred to Article 1675 of the 'Mejelle' and Article 124 of the Land Code, concluding at p. 3 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".

Another passage in the judgment at p.4, settles the law of Cyprus on the point about forty years prior to the enactment of the Immovable Property (Tenure, Registration and Valuation) Law, 1946, (now Cap. 224) which governs the rights of the parties in the present case. The passage gives the law as it existed when the channels in dispute were being used for the irrigation of the lands in question by water collected in these dams, Pano and Kato Demma, in the bed of Yialias river, during the long period covered by the evidence in the present case. The passage reads:—

> "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 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 Yialia and sell it or do what they like with the water, is therefore bad".

We are of the opinion that the claim of the respondents in this appeal for the injunction and damages obtained in the District Court, is equally bad under the law now governing the parties' rights. For the reasons stated earlier in this judgment, we hold that the respondent-plaintiffs have failed to establish ownership on the channels as claimed by virtue of the three registrations on which they based their claim; and failed to establish exclusive rights by prescription on the

channels or the river-water running therein, which the appellant-defendants have taken at the material time for the irrigation of their lands, as their predecessors in the ownership of such land, had been doing in the past, from time immemorial.

Before concluding this judgment, however, we shall venture the suggestion that as matters stand according to the evidence in this case, the best way of securing fair and properly managed irrigation of the parties' lands by water from this public river. would be the formation of an Irrigation Division under the appropriate law, as attempted in the past, to cover the irrigable plots from the channels in question, whether such land belongs to the appellants, to the respondents, or to other persons. This, however, is not for us to decide or regulate.

The result of the appeal is that it succeeds; and that the injunction granted in the District Court on the 13th March, 1965, be discharged; the judgment for £200 damages be set aside; and the action be dismissed with costs here and in the District Court.

Appeal allowed.
Orders and order as to costs, as stated above.